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THIRD DIVISION

[G.R. No. 145901. December 15, 2005]

EASYCALL COMMUNICATIONS PHILS., INC., *petitioner, vs.* **EDWARD KING,** *respondent.*

SYLLABUS

1. **MERCANTILE LAW; PD 902-A; SECURITIES AND EXCHANGE COMMISSION (SEC); JURISDICTION; SEC, NOT NLRC, HAS JURISDICTION OVER CASES INVOLVING REMOVAL OF CORPORATE OFFICERS; CORPORATE OFFICERS, DEFINED.—** Under Section 5 of PD 902-A, the law applicable at the time this controversy arose, the SEC, not the NLRC, had original and exclusive jurisdiction over cases involving the removal of corporate officers. Section 5(c) of PD 902-A applied to a corporate officer's dismissal for his dismissal was a corporate act and/or an intra-corporate controversy x x x. "Corporate officers" in the context of PD 902-A are those officers of a corporation who are given that character either by the Corporation Code or by the corporation's by-laws. Under Section 25 of the Corporation Code, the "corporate officers" are the president, secretary, treasurer and such other officers as may be provided for in the by-laws.

2. **ID.; ID.; ID.; ID.; ID.; ID.; BURDEN OF PROOF RESTS ON THE PARTY WHO MAKES THE ALLEGATION.—** The burden of proof is on the party who makes the allegation. Here, petitioner merely alleged that respondent was a corporate officer. However, it failed to prove that its by-laws provided for the office of "vice president for nationwide expansion." Since petitioner failed to satisfy the burden of proof that was required of it, we cannot sanction its claim that respondent was a "corporate officer" whose removal was cognizable by the SEC under PD 902-A and not by the NLRC under the Labor Code.

3. **ID.; ID.; ID.; ID.; ID.; ID.; EMPLOYEE, DISTINGUISHED FROM A "CORPORATE OFFICER"; CASE AT BAR.—** An "office" is created by the charter of the corporation and the officer is elected by the directors or stockholders. On the other hand, an employee occupies no office and generally is employed

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not by the action of the directors or stockholders but by the managing officer of the corporation who also determines the compensation to be paid to such employee. In this case, respondent was appointed vice president for nationwide expansion by Malonzo, petitioner's general manager, not by the board of directors of petitioner. It was also Malonzo who determined the compensation package of respondent. Thus, respondent was *an employee, not a "corporate officer."* The CA was therefore correct in ruling that jurisdiction over the case was properly with the NLRC, not the SEC.

4. **LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS; TERMINATION OF EMPLOYMENT; ILLEGAL DISMISSAL; LOSS OF TRUST AND CONFIDENCE MUST BE BASED ON A WILLFUL BREACH AND FOUNDED ON CLEARLY ESTABLISHED FACTS; CASE AT BAR.**— To be a valid ground for an employee's dismissal, loss of trust and confidence must be based on a *willful* breach and *founded* on clearly established facts. A breach is willful if it is done intentionally, knowingly and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently x x x. The grounds cited by petitioner, *i.e.,* respondent's alleged poor sales performance and the allegedly excessive time he spent in the field, were not sufficient to support a claim of loss of confidence as a ground for dismissal. Furthermore, the alleged loss of confidence was not founded on clearly established facts.

5. **ID.; ID.; ID.; ID.; ESSENTIAL ELEMENTS OF DUE PROCESS REQUIRES NOTICE AND HEARING; VIOLATED IN CASE AT BAR.**— The twin requirements of notice and hearing constitute the essential elements of due process. The law requires the employer to furnish the employee sought to be dismissed with two written notices before termination of employment can be legally effected: (1) a written notice apprising the employee of the particular acts or omissions for which his dismissal is sought in order to afford him an opportunity to be heard and to defend himself with the assistance of counsel, if he desires, and (2) a subsequent notice informing the employee of the employer's decision to dismiss him. This procedure is mandatory and its absence taints the dismissal with illegality. In this case, respondent was served with one notice only — the notice of his termination. The series of dialogues between petitioner's

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management and respondent was not enough as it failed to show that the latter was apprised of the cause of his dismissal. These dialogues or consultations could not validly substitute for the actual observance of notice and hearing.

APPEARANCES OF COUNSEL

Anover Sanchez Arteche & Associates for petitioner.
Romero Valdecantos and Valencia Law Office for respondent.

D E C I S I O N

CORONA, *J.*:

This petition for review on *certiorari* under Rule 45 of the Rules of Court assails the February 10, 2000 decision[1] and November 8, 2000 resolution of the Court of Appeals (CA) in CA-G.R. SP No. 53510. The assailed decision nullified the November 27, 1998 decision and April 29, 1999 resolution of the National Labor Relations Commission (NLRC) and entered a new one declaring that the respondent Edward King was illegally dismissed and awarding him backwages, separation pay and attorney's fees.

Petitioner Easycall Communications Phils., Inc. was a domestic corporation primarily engaged in the business of message handling. On May 20, 1992, petitioner, through its general manager, Roberto B. Malonzo, hired the services of respondent as assistant to the general manager. He was given the responsibility of ensuring that the expansion plans outside Metro Manila and Metro Cebu were achieved at the soonest possible time.

In an August 14, 1992 memorandum, Mr. R.T. Casas, respondent's immediate superior, recommended his promotion to assistant vice president for nationwide expansion. On

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[1] Penned by Associate Justice Elvi John S. Asuncion and concurred in by Associate Justices Buenaventura J. Guerrero and Hilarion L. Aquino of the Eighth Division of the Court of Appeals.

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December 22, 1992, respondent was appointed to the even higher position of vice president for nationwide expansion. Respondent's promotion was based on his performance during the six months preceding his appointment. As vice president for nationwide expansion, he became responsible for the sales and rentals of pager units in petitioner's expansion areas. He was also in charge of coordinating with the dealers in these areas.

Sometime in March 1993, Malonzo reviewed the sales performance of respondent. He also scrutinized the status of petitioner's Nationwide Expansion Program (NEP) which was under respondent's responsibility. He found that respondent's actual sales for the period October 1992–March 1993 was 78% of his sales commitment and 70% of his sales target.

Malonzo also checked the frequency and duration of the provincial sales development visits made by respondent for the same period to expansion areas under his jurisdiction. He discovered that the latter spent around 40% of the total number of working days for that period in the field.

The management then confronted respondent regarding his sales performance and provincial sales development visits. A series of dialogues between petitioner's management and respondent ensued.

On April 16, 1993, Rockwell Gohu, petitioner's deputy general manager, talked to respondent to discuss his sales performance. In the course of the conversation, Gohu informed respondent that Malonzo wanted his resignation. This prompted respondent to write a memorandum to Malonzo. In his memorandum, he inquired whether Malonzo really wanted him to resign. He emphasized that his work performance had yet to be evaluated. He also stated that, based on the approved budget for fiscal year ending in June 1993, he was within the budget and targets set forth by petitioner. He further declared that he had no intention of resigning from his position.

On April 19, 1993, respondent received a notice of termination signed by Malonzo. The notice informed him of the termination

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of his employment with petitioner effective April 30, 1993. In particular, the relevant portion of the notice read:

> This is to inform you that management is *no longer confident* that you are the right manager for the position you are occupying. Our series of discussions on the various aspects of your functions with you did not convince us that it is to the best interest of Easy Call to retain your services. xxx[2] (Italics supplied)

Aggrieved, the respondent filed a complaint for illegal dismissal with the NLRC. It was docketed as NLRC Case No. 00-04-02913-93.

In his June 24, 1997 decision, the labor arbiter found that the termination of respondent's employment on the ground of loss of confidence was valid. Consequently, the labor arbiter dismissed the complaint for lack of merit.

On appeal, the NLRC affirmed the decision of the labor arbiter in its November 27, 1998 decision, with the modification that petitioner was ordered to indemnify respondent in the amount of ₱10,000 for violating respondent's right to due process. Respondent filed a partial motion for reconsideration praying that the NLRC reverse its ruling insofar as it declared that he was validly dismissed for cause. The NLRC, however, denied the motion for lack of merit in an April 29, 1999 resolution. The NLRC also dismissed the complaint for lack of jurisdiction.

Respondent filed a petition for *certiorari* with the CA. The CA granted the petition and ruled that the NLRC erred in holding that it lacked jurisdiction over the case. The CA also ruled that the dismissal of respondent was illegal for having been done without cause and in violation of his right to due process.

Petitioner moved for a reconsideration of the CA decision but the motion was denied in the CA's November 8, 2000 resolution. Hence, this petition.

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[2] CA Decision, *Rollo*, p. 27.

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Petitioner now raises the following errors:

I.

THE HONORABLE COURT OF APPEALS COMMITTED GRAVE ABUSE OF DISCRETION WHEN IT SUBSTITUTED ITS OWN FINDINGS TO THAT OF THE NLRC IN VIOLATION OF THE RULE THAT REGULAR COURTS SHOULD ACCORD GREAT RESPECT TO FINDINGS OF ADMINISTRATIVE AGENCIES CONSIDERING THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE SIMILAR FINDINGS OF BOTH THE LABOR ARBITER AND THE COMMISSIONERS OF NLRC.

II.

FURTHERMORE, GLARING IS THE FACT THAT THE HONORABLE COURT OF APPEALS SIMPLY DISREGARDED THE SUBSTANTIAL EVIDENCE ON RECORD WHICH INDISPUTABLY SHOWED THAT RESPONDENT WAS TOTALLY REMISS IN HIS DUTIES AS VICE PRESIDENT FOR NATIONWIDE EXPANSION.

III.

THE HONORABLE COURT OF APPEALS GRAVELY ERRED WHEN IT FAILED TO CONSIDER THAT BEING A CORPORATE OFFICER, THE NLRC HAS NO JURISDICTION OVER THE SUBJECT UNDER PD 902-A.[3]

We shall rule first on the issue of jurisdiction as it is decisive. If the NLRC had no jurisdiction, then it would be unnecessary to consider the validity of respondent's dismissal.

Petitioner argues that since respondent was a "corporate officer," the NLRC had no jurisdiction over the subject matter under PD 902-A. In support of its contention, petitioner invokes *Paguio v. NLRC*[4] where we held that the removal of a corporate officer, whether elected or appointed, is an intra-corporate controversy over which the NLRC has no jurisdiction. The

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[3] *Rollo*, p. 10.

[4] 323 Phil. 203 (1996).

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petitioner also cites our ruling in *de Rossi v. NLRC*[5] to the effect that the SEC, not the NLRC, has original and exclusive jurisdiction over cases involving the removal of corporate officers.

Under Section 5 of PD 902-A, the law applicable at the time this controversy arose,[6] the SEC, not the NLRC, had original and exclusive jurisdiction over cases involving the removal of corporate officers. Section 5(c) of PD 902-A applied to a corporate officer's dismissal for his dismissal was a corporate act and/or an intra-corporate controversy.[7]

However, it had to be first established that the person removed or dismissed was a corporate officer before the removal or dismissal could properly fall within the jurisdiction of the SEC and not the NLRC. Here, aside from its bare allegation, petitioner failed to show that respondent was in fact a corporate officer.

"Corporate officers" in the context of PD 902-A are those officers of a corporation who are given that character either by the Corporation Code or by the corporation's by-laws.[8] Under Section 25 of the Corporation Code, the "corporate officers" are the president, secretary, treasurer and such other officers as may be provided for in the by-laws.

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[5] 373 Phil. 17 (1999).

[6] Section 5 of PD 902 has been amended by the enactment of RA 8799, otherwise known as the Securities Regulations Code, in 2000. In particular, Section 5.2 of RA 8799 provides:

"The [SEC]'s jurisdiction over all cases enumerated under Section 5 of Presidential Decree No. 902-A is hereby transferred to the Courts of general jurisdiction or the appropriate Regional Trial Court: Provided that the Supreme Court in the exercise of its authority may designate the Regional Trial Court branches that shall exercise jurisdiction over these cases. The [SEC] shall retain jurisdiction over pending cases involving intra-corporate disputes submitted for final resolution which should be resolved within one (1) year from the enactment of this Code. The [SEC] shall retain jurisdiction over pending suspension of payments/rehabilitation cases filed as of 30 June 2000 until finally disposed."

[7] *Velarde v. Lopez, Inc.*, G.R. No. 153886, 14 January 2004, 419 SCRA 422; *Ongkingco v. NLRC*, 337 Phil. 299 (1997).

[8] *Gurrea v. Lezama*, 103 Phil. 553 (1958).

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A careful look at *de Rossi* (as well as the line of cases involving the removal of corporate officers where we held that it was the SEC and not the NLRC which had jurisdiction[9] will show that the person whose removal was the subject of the controversy was a corporate officer whose position was provided for in the by-laws. *That is not by any means the case here.*

The burden of proof is on the party who makes the allegation.[10] Here, petitioner merely alleged that respondent was a corporate officer. However, it failed to prove that its by-laws provided for the office of "vice president for nationwide expansion." Since petitioner failed to satisfy the burden of proof that was required of it, we cannot sanction its claim that respondent was a "corporate officer" whose removal was cognizable by the SEC under PD 902-A and not by the NLRC under the Labor Code.

An "office" is created by the charter of the corporation and the officer is elected by the directors or stockholders.[11] On the other hand, an employee occupies no office and generally is employed not by the action of the directors or stockholders but by the managing officer of the corporation who also determines the compensation to be paid to such employee.[12]

In this case, respondent was appointed vice president for nationwide expansion by Malonzo, petitioner's general manager, not by the board of directors of petitioner. It was also Malonzo who determined the compensation package of respondent. Thus, respondent was *an employee, not a "corporate officer."* The

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[9] *Philippine School of Business Administration v. Leaño*, 212 Phil. 716 (1984); *Dy v. NLRC*, 229 Phil. 234 (1986); *Cagayan de Oro Coliseum v. Office of the Minister of Labor and Employment*, G.R. No. 71589, 17 December 1990, 192 SCRA 315; *Lozon v. NLRC*, 310 Phil. 1 (1995); *Espino v. NLRC*, 310 Phil. 60 (1995); *Tabang v. NLRC*, 334 Phil. 424 (1997); *Ongkingco v. NLRC, supra.*

[10] *Rufina Patis Factory v. Alusitain*, G.R. No. 146202, 14 July 2004; *Stolt-Nielsen Marine Services, Inc. v. NLRC*, 360 Phil. 881 (1998).

[11] *Tabang v. NLRC, supra.*

[12] *Id.*

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CA was therefore correct in ruling that jurisdiction over the case was properly with the NLRC, not the SEC.

We now proceed to the substantive issue of the validity of the dismissal of respondent.

While loss of confidence is a valid ground for dismissing an employee, it should not be simulated.[13] It must not be indiscriminately used as a shield by the employer against a claim that the dismissal of an employee was arbitrary.[14]

To be a valid ground for an employee's dismissal, loss of trust and confidence must be based on a *willful* breach and *founded* on clearly established facts.[15] A breach is willful if it is done intentionally, knowingly and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently.[16] Thus, a willful breach cannot be a breach resulting from mere carelessness.

In this case, the labor arbiter's finding, affirmed by the NLRC, was that the sales record of respondent and the time he spent in the field were "clear indications of complainant's inefficiency and/or negligence."[17] Inefficiency implies negligence, incompetence, ignorance and carelessness.[18] Negligence is the want or lack of care required by the circumstances.[19]

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[13] *Pepsi-Cola Bottling Co. v. NLRC*, G.R. No. 101900, 23 June 1992, 210 SCRA 277; *General Bank and Trust Co. v. Court of Appeals*, 220 Phil. 243 (1985).

[14] *Sulpicio Lines, Inc. v. Gulde*, 427 Phil. 805 (2002).

[15] *Asia Pacific Chartering (Phils.), Inc. v. Farolan*, 441 Phil. 776 (2002); *National Bookstore, Inc. v. Court of Appeals*, 428 Phil. 235 (2002).

[16] *Id.*

[17] *Rollo*, p. 104; Decision dated June 24, 1997 in NLRC Case No. 00-04-02913-93, p. 8.

[18] *Cuaresma v. Enriquez*, A.M. No. MTJ-91-608, 20 September 1995, 248 SCRA 454; *Suroza v. Honrado*, 196 Phil. 514 (1981).

[19] *Cruz v. Gangan*, 443 Phil. 856 (2003) citing *Valenzuela v. Court of Appeals*, 323 Phil. 374 (1996).

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The grounds cited by petitioner, *i.e.*, respondent's alleged poor sales performance and the allegedly excessive time he spent in the field, were not sufficient to support a claim of loss of confidence as a ground for dismissal.

Furthermore, the alleged loss of confidence was not founded on clearly established facts.[20] First, petitioner included the sales performance of respondent for the period covering October 1992 to December 1992 in arriving at the conclusion that his sales record was dismal. However, as the CA correctly pointed out, petitioner previously recognized that respondent's performance for that period "was not merely satisfactory" but "more than extra-ordinary that it merited his promotion not only to the position of assistant vice president, to which he was recommended by his supervisor, but to the even higher position of vice president."[21] This self-contradictory position of petitioner negates its claim of loss of confidence in repondent.

Moreover, the promotion of an employee negates the employer's claim that it has lost its trust and confidence in the employee.[22] Hence, petitioner's claim of loss of confidence crumbles in the light of respondent's promotion not only to assistant vice-president but to the even higher position of vice-president.

Second, the sales record of respondent for the period October 1992 – December 1992 was recognized as so exemplary that it merited his promotion. Later, however, this very same record was suddenly deemed poor and dismal to justify loss of confidence. Thus, petitioner interpreted one and the same sales record as proof of respondent's simultaneous efficiency and inefficiency. This could only mean that there was no sufficient

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[20] While the general rule is that the Court's jurisdiction in a petition for review is limited to reviewing errors of law allegedly committed by the appellate court, this rule admits of exceptions. This case falls under one of the exceptions — the findings of fact of the CA are contrary to that of the labor arbiter and the NLRC.

[21] *Rollo*, p. 30, CA decision dated February 10, 2000, p. 5.

[22] *Norkis Distributors, Inc. v. NLRC*, 316 Phil. 634 (1995).

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standard with which to measure the performance of respondent, an indication of the arbitrariness of petitioner.

Finally, during the hearing of this case before the labor arbiter, Malonzo stated that the percentage of the time spent by respondent in his sales area was actually "not below par."[23] This admission of petitioner's general manager only proves all the more the lack of sufficient standard for determining respondent's performance.

The lack of just cause in respondent's dismissal was aggravated by the absence of due process.

The twin requirements of notice and hearing constitute the essential elements of due process. The law requires the employer to furnish the employee sought to be dismissed with two written notices before termination of employment can be legally effected: (1) a written notice apprising the employee of the particular acts or omissions for which his dismissal is sought in order to afford him an opportunity to be heard and to defend himself with the assistance of counsel, if he desires, and (2) a subsequent notice informing the employee of the employer's decision to dismiss him.[24] This procedure is mandatory and its absence taints the dismissal with illegality.[25]

In this case, respondent was served with one notice only — the notice of his termination. The series of dialogues between petitioner's management and respondent was not enough as it failed to show that the latter was apprised of the cause of his dismissal.[26] These dialogues or consultations could not validly substitute for the actual observance of notice and hearing.[27]

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[23] *Rollo*, pp. 153 and 221; Comment, p. 9 and Memorandum, p. 13 both citing TSN of July 28, 1995, pp. 11-13.

[24] *San Antonio v. NLRC*, 320 Phil. 440 (1995).

[25] *Id.*

[26] *Rollo*, p. 121, Decision dated November 27, 1998 in NLRC CA No. 013552-97, p. 12.

[27] See *San Antonio v. NLRC, supra*; *Pepsi-Cola Bottling Co. v. NLRC, supra*.

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WHEREFORE, the petition is hereby *DENIED*. The February 10, 2000 decision and November 8, 2000 resolution of the Court of Appeals in CA-G.R. SP No. 53510 are *AFFIRMED*.

Costs against the petitioner.

SO ORDERED.

Panganiban (Chairman), Sandoval-Gutierrez, Carpio Morales, and *Garcia, JJ.,* concur.

THIRD DIVISION

[G.R. No. 148420. December 15, 2005]

ANDREA TAN, CLARITA LLAMAS, VICTOR ESPINA and LUISA ESPINA, *petitioners, vs.* **BAUSCH & LOMB, INC.,** *respondent.*

SYLLABUS

1. **REMEDIAL LAW; SPECIAL CIVIL ACTIONS;** ***CERTIORARI;*** **TECHNICAL RULES MAY BE RELAXED UNDER CERTAIN SPECIAL SITUATIONS; CASE AT BAR.**— Under certain special circumstances, a petition for *certiorari* may be given due course notwithstanding that no motion for reconsideration was filed in the lower court. The exception applies in this case since the order of the trial court was, as will be discussed later, a patent nullity. Likewise, the one-day delay in the filing of the petition may be excused on the basis of equity to afford respondent the chance to prove the merits of the complaint.

2. **POLITICAL LAW; CONSTITUTIONAL LAW; SUPREME COURT; POWER TO PROMULGATE RULES ON PLEADING, PRACTICE AND PROCEDURE; LIMITATIONS.**— Section 5 (5) of the 1987 Constitution empowers the Supreme