



REPUBLIC OF THE PHILIPPINES
SENATE ELECTORAL TRIBUNAL
COA-NCR Bldg., Batasan Road, Quezon City

FRANCIS N. TOLENTINO,
Protestant,

SET Case No. 001-16

-versus-

LEILA M. DE LIMA,
Protestee.

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RESOLUTION NO. 16 - 118

Resolved herein are several Motions filed by Protestant Francis N. Tolentino, all relating to the presentation of his evidence, to wit:

1. ***Motion for Partial Reconsideration [of Resolution No. 16-104 dated 8 March 2018] dated 20 March 2018***

Ruling on Protestant Tolentino's Urgent Motion to Admit Additional Evidence dated 19 February 2018, the Tribunal, in Resolution No. 16-104 dated 08 March 2018, disallowed the presentation of certain witnesses and documents. In his *Motion for Partial Reconsideration*, he prayed that he be allowed to present the following:

- a. Mr. Felix Muga II. - Protestant alleged that he did not present Mr. Muga on 27 February 2018 because he would like to present his evidence, both the previously allowed and the additional evidence, in an organized manner that would most strategically allow him to prove his legal theory.
- b. Certificates of Canvass and Statement of Votes of the Protested Precincts. - Protestant maintained that during the hearing wherein the Certificates of Canvass and Statements of Votes were presented, the Commission on Elections (COMELEC) failed to submit the Certificates of Canvass and Statement of Votes from the Province of Bulacan. It

was Protestant's position that it would be most prudent to wait for the completion of the presentation of said documents prior to authenticating the same.

- c. COMELEC personnel who explained to the Tribunal why ballots with non-matching ballot ID numbers were accepted by certain VCMs. - Protestant claimed that the explanation of the COMELEC on the issue appears to be lacking especially considering that the same puts into question the security of the ballots. It is, therefore, important that the matter be examined beyond a few pages of explanation, particularly since the said issue impacts how the elections were conducted.
- d. COMELEC officer/representative who conducted the investigation on finding 2013 ballots in 2016 ballot boxes. - Protestant also claimed that the explanation given appears to be lacking. As the matter puts into question the integrity of the elections in certain areas, it is important that the matter be examined further.
- e. SA Martini B. Cruz, Chief of the National Bureau of Investigation (NBI) Cybercrime Division and Ferdinand P. De Leon, Director of the Information Technology Department (ITD) of the COMELEC. - Protestant averred that the unusual shutdown of computer servers at the Memory Configuration Room of the COMELEC Warehouse in Sta. Rosa, Laguna puts into question the integrity of the elections in certain areas. Thus, it is important that it be examined further without necessarily delving into the criminal aspects.

After a thorough review of the records of the case, the Tribunal grants a partial reconsideration of Resolution No. 16-104 dated 08 March 2018 with respect to the presentation of Mr. Felix Muga II.

While it may be true that Mr. Muga was scheduled to testify on 27 February 2018 and no Judicial Affidavit was submitted five (5) days prior thereto as required by Rule 66 of the 2013 SET Rules, the Hearing Commissioner overlooked the fact that in an *Urgent Motion to Reset Hearings* dated 19 February 2018, Protestant

requested that the presentation of Mr. Muga be moved any day between 05 to 09 March 2018. In view of this timely filed *Motion*, strict application of Rule 66 was misplaced.

With respect to the Certificates of Canvass and Statements of Votes, the transcript of stenographic notes (TSN) shows that on 19 February 2018, counsel for Protestant presented Mr. Vergil Soriano from the Election Records and Statistics Department of the Commission on Elections (COMELEC-ERSD). Pursuant to the subpoena *duces tecum* and *ad testificandum* issued to Atty. Jose M. Tolentino, Jr., Executive Director of the COMELEC, Mr. Soriano brought with him copies of the Provincial Certificates of Canvass (PCOC), Municipal Certificates of Canvass (MCOC), Statement of Votes by Municipality (SOVM) and Statement of Votes by Precincts (SOVP) for the protested pilot areas.

During the hearing, counsel for Protestant realized that the election documents pertaining to the Province of Bulacan were not among those presented to him by Mr. Soriano. The latter made the commitment to submit the PCOC of Bulacan in the afternoon. True to his word, a copy of the Bulacan PCOC was submitted to the Hearing Commissioner in the afternoon of 19 February 2018.

After the testimony of Mr. Soriano, Protestant's counsel failed to move that the presented documents be marked as exhibits. Neither did he make any reservation that the same be marked after the lacking documents would have been submitted.¹ Instead, counsel for Protestant moved for the provisional markings of the PCOC, MCOC, SOVM and SOVP only on 28 February 2018.

The failure to identify, authenticate and mark said exhibits during the hearing proper on 19 February 2018 was a procedural blunder committed by Protestant's counsel which he is trying to rectify by requesting the recall of the witness. In fact, counsel for Protestee interposed a continuing objection to the provisional marking of the said documents because these were not marked simultaneously with their presentation.

¹ TSN, 19 February 2018 Hearing, pp. 46-49.

Thus, there is no valid justification to present anew the Certificates of Canvass and Statements of Votes. The Tribunal is not inclined to allow Protestant's counsel to take advantage of its liberality to hide his inadequacies and unpreparedness. Besides, this will add again to the delay in the reception of evidence. Nonetheless, the Tribunal, without necessarily ruling on the admissibility, allows the provisionally marked exhibits to remain as part of the records of the case, and adopts their pre-assigned exhibit numbers.

Considering, however, that the submission of the Bulacan PCOC was not accompanied by the corresponding MCOC, SOVM and SOVP, and that the MCOC for the Municipality of Pantao Ragat, Lanao del Norte was found missing during the conduct of provisional marking, COMELEC has to submit the certified true copies of said documents to the Tribunal. The Hearing Commissioner shall adopt the exhibit numbers that were reserved for these missing documents during the conduct of provisional marking on 28 February 2018.

As regards the alleged non-matching of ballot ID, the Commission on Elections has already explained² to the satisfaction of the Tribunal³ that the Ballot IDs for the Municipality of San Jose de Buan, Western Samar were inadvertently copied as the Ballot IDs of San Jorge, Western Samar when it submitted to the Tribunal the list of Ballot IDs of the contested municipalities. The Tribunal finds no cogent reason to require further testimony on the matter.

On the alleged finding of 2013 ballots in 2016 ballot boxes, nothing in the records shows that 2013 ballots were found inside 2016 ballot boxes. There were, however, ballot boxes for the 2013 elections that were erroneously turned over to the SET Collection Teams. This being so, the Tribunal likewise finds no cogent reason to require further testimony on the matter.

On the unusual shutdown of servers at the Memory Configuration Room wherein the testimonies of SA Martini B. Cruz of the NBI Cybercrime Division and Ferdinand P. De Leon of COMELEC-ITD are allegedly needed, the Tribunal does not agree with the proposition of Protestant that the matter should be examined

² COMELEC Compliance dated 22 December 2017.

³ Resolution No. 16-110 dated 27 April 2018.

further. Such act will obviously contravene Resolution No. 16-34 dated 06 February 2017, wherein the Tribunal acknowledged the exclusive jurisdiction of the COMELEC in the supervision and control over the Automated Election System (AES) under Republic Act No. 8436.

2. *Motion [for Additional Time to find address of Mr. Ferdinand P. de Leon and/or find a suitable replacement to testify], dated 20 March 2018*

Although the presentation of Mr. Ferdinand P. de Leon, then Director IV of the COMELEC-ITD as Protestant's witness to the shutdown of the Memory Configuration Room aforementioned is not allowed, he, nonetheless, is one of the seven (7) witnesses being identified by Protestant to prove that the 2016 elections was sham and marred with irregularities as stated in the Amended Preliminary Conference Order.⁴ His testimony would have been presented on 26 March 2018.

Protestant, in his *Motion* dated 20 March 2018, manifested that Mr. Ferdinand P. de Leon had resigned his post as head of COMELEC-ITD. Protestant alleged that some of the information requested may only be accessed by the COMELEC-ITD head. Thus, in order to ensure that the necessary information is culled, and to guarantee access to documents in the custody of the COMELEC, Protestant requested that he be given additional time to find the address of Mr. De Leon and/or find a suitable replacement.

A considerable length of time had lapsed from the filing of the aforesaid motion. Protestant should have already determined the whereabouts and the correct address of Mr. De Leon or, in the alternative, identified a suitable replacement who can testify on the matter. No further additional time shall be granted.

3. *Urgent Motion (to issue Subpoena Ad Testificandum to Messrs. Ivan Uy and Drex Laggui) dated 23 March 2018*

In another development, counsel for Protestant, in his *Urgent Motion* dated 23 March 2018, asked the Tribunal to issue *subpoena ad testificandum* to Messrs.

⁴ Resolution No. 16-45-A dated 09 May 2017, p. 15, Item no. 4.

Ivan Uy and Drex Laggui for the hearing that was scheduled on 05 April 2018. It was alleged in the said Motion that during the hearing for the reception of evidence held on 22 March 2018, the Hearing Commissioner informed Protestant's counsel that the Acting Secretary of the Tribunal had expressed the inclination not to issue the requested subpoena *ad testificandum* on the basis that both Ivan Uy and Drex Laggui are both private individuals.

The Acting Secretary, Atty. Crisanta V. Valera, protested claiming that there was no truth to the foregoing allegation. She pointed out that pursuant to Rule 60 of the SET Rules, it was the Hearing Commissioner who was authorized by the Tribunal to issue subpoenas for the reception of evidence. She decried the statements made by Protestant's counsel during the 02 April 2018 hearing that the Acting Secretary was reversing the Tribunal by her alleged refusal to issue the subpoena to Messrs. Uy and Laggui considering that the Tribunal had earlier allowed their presentation.

The Hearing Commissioner, Atty. James G. Allanigue, admitted that it was his own decision not to issue the requested subpoena as it was his position that the Judicial Affidavit Rule should be applied. The Hearing Commissioner had, in fact, issued a written apology for any inconvenience that may have been caused by the statements he made during the conduct of the hearing.

On 06 April 2018, Protestant, *in his Manifestation and Motion*, reiterated his request for the issuance of subpoena *ad testificandum* to Messrs. Ivan Uy and Drex Laggui claiming that his attempts to convince them to testify were unjustifiably declined or ignored. Protestant maintained that the requested subpoena should be issued in lieu of the submission of judicial affidavits.

To resolve the issue, the Tribunal revisited all the motions for the issuance of subpoenas previously filed by the Protestant. Clearly, Protestant never mentioned that his witnesses unjustifiably refused to cooperate. It was only in his *Urgent Motion* dated 23 March 2018 that he did mention that his attempts to convince both Messrs. Ivan Uy and Drex Laggui to testify had been ignored.

Protestant must be reminded that the issuance of a subpoena is not a matter of right, which a party in this protest may demand at any time. It must be stressed that the 2013 SET Rules mandates, as a general rule, the use of judicial affidavits as direct testimony of witnesses.⁵ The Hearing Commissioner had a valid reason to insist on the submission of judicial affidavit, especially for Mr. Drex Laggui. Records show that Mr. Laggui was among the representatives of the Protestant during the system date change demonstration conducted by the COMELEC on 25 January 2018. Having presented himself to the Tribunal as one of the representatives of the Protestant, the Hearing Commissioner reasonably assumed that Mr. Laggui would testify without need of a subpoena.

Be that as it may, in view of their alleged unjustifiable refusal to testify, Messrs. Uy and Laggui come within the exception to the Judicial Affidavit Rule pursuant to the provisions of A.M. 12-8-8-SC dated 12 September 2012, which may be applied suppletorily. Thus, the Tribunal grants Protestant's request for the issuance of *subpoena ad testificandum* to said witnesses.

4. Urgent Motion (for the recall to the witness stand of Director Teopisto E. Elnas, Jr. of the Election and Barangay Affairs Department of COMELEC) dated 05 April 2018

Protestant alleged that in the hearing for the presentation of evidence conducted on 02 April 2018, the Hearing Commissioner, upon motion of the counsel for Protestee de Lima, dispensed with the testimony of COMELEC Director Teopisto E. Elnas, Jr. on the basis of his purported lack of knowledge on the matter of Regional Hubs, the purpose for which he was called to testify.

Protestant further averred that based on the testimony of Director Elnas, he was the head of the COMELEC National Command Center that monitored and coordinated various requests that were referred to the National Technical Service (should be Support) Center, including matters concerning Regional Hubs.

Per transcript of stenographic notes taken during the hearing on 02 April 2018⁶, Mr. Elnas testified that as Director of Election and Barangay Affairs

⁵ Rule 65 of 2013 SET Rules.

⁶ TSN, 02 April 2018 Hearing, pp. 34- 62.

Department of COMELEC (COMELEC-EBAD), he was the head of the National Command Center (NCC) during the 2016 National and Local Elections. He explained that the NCC was in charge of the operational issues, while the National Technical Support Center (NTSC) was in charge of technical issues.

In his testimony, Director Elnas declared that NCC had nothing to do with the replacement of defective Secure Digital (SD) cards. He pointed out that technical matters, like problems with the SD cards or replacements of SD cards, were lodged with the NTSC. However, with respect to operational issues, like how the replacement SD cards would be delivered, these were endorsed to NCC. NCC's function was to coordinate with the election officers or the field officials as to the status of the reconfiguration or the deployment of replacement SD cards.

Director Elnas mentioned that as far as the coordination or communication between the NCC and field officials is concerned, these were recorded by the NCC. The records, however, pertain only to those officially endorsed by the NTSC to the NCC. As for the personal calls made by election officers directly to Director Elnas, no records were made. Director Elnas also declared that his Department, EBAD, had nothing to do with the Regional Hubs.

Protestant's Motion to recall Director Elnas may have stemmed from the testimony of Mr. Felimon Enrile, Information and Technology Officer III, Information and Technology Department of COMELEC (COMELEC-ITD) which is in contradiction with the testimony of Director Elnas. On 26 February 2018, Mr. Enrile testified that requests for replacements of SD cards were lodged with the EBAD as the head of the NTSC.⁷ It would appear, however, that Director Elnas of EBAD headed the NCC, not the NTSC.

Nevertheless, considering the testimony of Director Elnas that NCC coordinated with the election officers or the field officials as to the status of the reconfiguration or the deployment of replacement SD cards and that the coordination made, particularly those officially endorsed, were recorded by the

⁷ TSN, 26 February 2018, p. 32.

NCC, the Tribunal allows his recall to the witness stand to shed further light on the matter.

With the resolution of the foregoing incidents, the reception of evidence must resume forthwith. Atty. Lamberto B. Delleva, Supervising Legislative Officer III and Officer-in-Charge of the SET Legal Service, is hereby designated as Hearing Commissioner, and Atty. Joyce D. Paras, Supervising Legislative Officer III and Officer-in-Charge of the Canvass Board Service as Deputy Hearing Commissioner, with authority to issue subpoena to the parties' witnesses upon proper application. The parties' respective counsel are required to appear before the Hearing Commissioner on 27 June 2018 at 10:00 o'clock in the morning, Room 208 (Hearing Room) for a conference to discuss the schedule for the presentation of evidence which shall resume on 04 July 2018. No further postponement shall be allowed.

Counsel for Protestant is directed to submit during the conference the list of witnesses to be presented and the dates for their presentation; the list of witnesses or documents for which the issuance of subpoena is needed; the specific addresses and designations of the witnesses to be subpoenaed. No motion for the presentation of additional evidence for the Protestant shall be entertained. Protestant is further reminded that he has consumed seventeen (17) days⁸ of the thirty (30) days allotted to him for the presentation of evidence which covers both the pilot and non-pilot areas⁹.

Protestee Leila M. de Lima's *Very Urgent Motion (To Set the Case for Continuation of Proceedings)* dated 05 June 2018 is hereby NOTED.

Also NOTED is the *Motion* of Protestant Tolentino dated 06 April 2018 praying that the Tribunal take judicial notice of the Privilege Speech of Senator Vicente C. Sotto III on 06 March 2018 concerning alleged various anomalies during

⁸ February 19, 26, 27, 28, March 22, April 2, 3, 5, 10 (actual hearing days consumed); February 12, 13, 14, 15, 20, 21, 22, 23 (charged to the period allotted for the presentation of evidence pursuant to Rule 64 of the 2013 SET Rules in view of the postponement requested by Protestant).

⁹ Rule 64 2013 SET Rules.

the 09 May 2016 National and Local Elections and all subsequent investigations that may follow such Privilege Speech.


IN VIEW OF THE FOREGOING, the Executive Committee of the Tribunal Resolves to:

1. **ORDER** the resumption of the reception of evidence on **04 July 2018** with **WARNING** that no further postponement shall be allowed;
2. **DIRECT** the parties' respective counsel to appear before the Hearing Commissioner, Atty. Lamberto B. Delleva, on **27 June 2018** at 10:00 o'clock in the morning, Room 208 (Hearing Room) for a conference to discuss the schedule for the presentation of evidence;
3. **DIRECT** the counsel for Protestant to submit during the aforesaid conference the list of witnesses to be presented and the dates for their presentation; the list of witnesses or documents for which the issuance of subpoena is needed; and the specific addresses and designations of the witnesses to be subpoenaed, with **WARNING** that no motion for the presentation of additional evidence for the Protestant shall be entertained;
4. **GRANT** Protestant Tolentino's *Urgent Motion for Partial Reconsideration* dated 20 March 2018 only with respect to the presentation of Mr. Felix Muga II;
5. **DIRECT** Protestant Tolentino to submit the address of Mr. Ferdinand P. de Leon or his suitable replacement to facilitate the issuance of subpoena;
6. **DIRECT** the Hearing Commissioner to issue the necessary *Subpoena Ad Testificandum* to Messrs. Ivan Uy and Drex Laggui subject to the submission by Protestant's counsel of the schedule for their presentation;

7. **GRANT** Protestant Tolentino's *Motion* to recall Director Teopisto E. Elnas, Jr. of the Election and Barangay Affairs Department of COMELEC to the witness stand; and
8. **REQUIRE** the Commission on Elections to submit to the Tribunal certified true copies of the MCOC, SOVM and SOVP of Bocaue and Sta. Maria, Bulacan, and the MCOC of Pantao Ragat, Lanao del Norte, within ten (10) days from receipt of this Resolution.

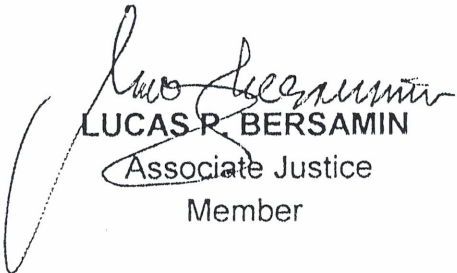
SO ORDERED.

20 June 2018.



ANTONIO T. CARPIO
Senior Associate Justice
Chairperson


TERESITA J. LEONARDO-DE CASTRO
Associate Justice
Member


LUCAS R. BERSAMIN
Associate Justice
Member