



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 - 132

Before the Tribunal is an *Urgent Motion* dated 16 October 2017 filed by Protestee Leila M. de Lima, praying for the dismissal of the instant protest.

The Protestee posits that the acceptance by Protestant Francis N. Tolentino¹ of a *permanent appointment* as Political Adviser heading the Office of the Political Adviser under the Office of the President during the pendency of the instant protest constitutes an abandonment of the same.² In addition, the Protestee submits that such acceptance all the more bars the Protestant from sitting as a Senator because the two offices are incompatible as per Section 13, Article VI of the 1986 Constitution.³

The Protestant, on the other hand, opposes⁴ the *Urgent Motion*, saying that the acceptance of a *primarily confidential position*, as in his case, does not constitute abandonment of an electoral protest. He further asserts that his

¹ On 27 June 2017, President Rodrigo Roa Duterte appointed Protestant to the Political Adviser position.

² Paragraph 6, Protestee's *Urgent Motion*.

³ *Id.* at Paragraphs 17 and 18.

⁴ Protestant's *Opposition* dated 27 October 2017.

appointment as Presidential Adviser on Political Affairs and the exercise of his duties as such is not incompatible with his claim to the 12th seat in the Senate.⁵

*Moraleja vs. Relova*⁶ is particularly enlightening in resolving the issue. Pertinent portions may be quoted, thus:

"The acceptance by the protestee of an appointment to another position is not a ground for dismissal of the protest like the resignation of the protestee from the contested office, simply because it is of public interest that the real winner be known, neither can the acceptance of a more or less temporary employment, such as that of a technical assistant of the Vice-Governor, which is a primarily confidential position, be considered as inconsistent with protestant's determination to protect and pursue the public interest involved in the matter of who is the real choice of the electorate. x x x Of course, the case of a protestant who accepts a permanent appointment to a regular office could be different, but We are not ruling on it here." (Emphasis supplied)

The Supreme Court in *Defensor-Santiago vs. Ramos*⁷ has this to add:

"Then, too, it must be reiterated, to avoid further miscomprehension, that the Moraleja ruling even conceded that the matter of abandonment could be different if the petitioner therein had accepted a permanent appointment to a regular office during the pendency of his protest. In short, Moraleja in fact intimates abandonment of an election protest if, in the meantime, the Protestant accepts a permanent appointment to a regular office." (Emphasis supplied)

Thus, the Supreme Court laid down in *Moraleja* the principle that the acceptance of the Protestant of a "more or less temporary appointment", such as that of a highly confidential position, is not a ground for dismissal of a protest. On the other hand, a "permanent appointment to a regular office", as briefly mentioned in *Moraleja* and clarified in passing in *Santiago*, would render the protest abandoned.

⁵ Paragraphs 9 and 10, Protestant's Opposition.

⁶ G.R. No. L-30828, 22 October 1971.

⁷ P.E.T. Case No. 001, 13 February 1996

While *Moraleja* does not define what is a "more or less temporary appointment" it can be inferred that what is referred to therein is a position which is primarily confidential, the tenure of which is coterminous with that of the appointing authority or at the latter's pleasure.⁸ This, although not officially called so, makes the appointment "more or less temporary". There is security of tenure but only as a primarily confidential employee.⁹

In the words of the Supreme Court, "[t]he concept of security of tenure xxx labors under a variation for primarily confidential employees due to the basic concept of a 'primarily confidential' position. ***Serving at the confidence of the appointing authority, the primarily confidential employee's term of office expires when the appointing authority loses trust in the employee.*** When this happens, the confidential employee is not 'removed' or 'dismissed' from office; ***his term merely 'expires' and the loss of trust and confidence is the 'just cause' provided by law that results in the termination of employment.***"¹⁰ (Emphasis supplied)

Executive Order No. 344, series of 2004, creating the Office of the Political Adviser, specifically states that the head has the rank of a Cabinet Secretary.¹¹ As such, he holds his position at the pleasure of the President. The Administrative Code of 1987 classifies such position as non-career, to wit:

"Section 9. Non-Career Service. The Non-Career Service shall be characterized by (1) entrance on bases other than those of the usual tests of merit and fitness utilized for the career service; and (2) tenure which is limited to a period specified by law, or which is coterminous with that of the appointing authority or subject to his pleasure, or which is limited to the duration of a particular project for which purpose employment was made.

Included in the non-career service are:

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⁸ Civil Service v. Javier, G.R. No. 173264, 22 February 2008.

⁹ *Infra.*

¹⁰ Provincial Government of Camarines Norte vs. Gonzalez, G.R. No. 185740, 23 July 2013.

¹¹ Section 1 of Executive Order No. 344, series of 2004.

(2) **Secretaries and other officials of Cabinet rank** who hold their positions at the pleasure of the President and their personal or confidential staff;
xxx." (Emphasis supplied)

The Political Adviser position is primarily confidential in nature, similar to the position in controversy in the landmark case of *Moraleja*. A position is considered to be primarily confidential when there is a primarily close intimacy between the appointing authority and the appointee, which ensures the highest degree of trust and unfettered communication and discussion on the most confidential of matters.¹² Clearly, the Political Adviser position falls within this category.

The position's temporary nature is explained clearly in the 1950 case of *De los Santos v. Mallare*¹³ where a primarily confidential position has been defined as:

"x x x. These positions [policy-determining, primarily confidential and highly technical positions], involve the highest degree of confidence, or are closely bound up with and dependent on other positions to which they are subordinate, or are **temporary in nature**. It may truly be said that the good of the service itself demands that appointments coming under this category be **terminable at the will of the officer that makes them**." (Emphasis supplied)

It is readily apparent from the above discussion that Protestee de Lima's *Urgent Motion* was premised on the misclassification of the appointment of Protestant Tolentino to the position of Presidential Adviser as a permanent one. Considering that (1) the Protestant's appointment does not require any eligibility, and (2) the tenure of the Political Adviser is coterminous with that of the appointing authority, or is at the latter's pleasure, his appointment falls squarely under what *Moraleja* called a "*more or less temporary appointment*", which does not constitute an abandonment of a pending electoral protest.

¹² Civil Service Commission v. Pililia Water District, G.R. No. 190147, 5 March 2013.

¹³ G.R. No. L-3881, 31 August 1950.

Protestee likewise incorrectly invokes *Defensor-Santiago*. The operative act of abandonment or withdrawal that the Supreme Court deemed to have rendered the pending election protest of therein Protestant Defensor-Santiago moot and academic was her election and assumption of office as Senator,¹⁴ a permanent position with a fixed term, and not an appointment to a primarily confidential position, as in the case at bar.

Protestee's claim that "[the Protestant's] assumption to the office as the Political Adviser also bars him from sitting as a Senator because they are incompatible offices" is misplaced. In invoking Section 13, Article VI of the Constitution,¹⁵ the Protestee forgets that such provision does not apply to the Protestant, who is not currently a Senator. In other words, there is no seat to forfeit as of yet.

In the same vein, the Protestee's submission that the Protestant's appointment "would render his automatic resignation as Senator even before he assumes office..."¹⁶ is also grossly incorrect. Resignation implies that one currently holds the office he is resigning from. Resignation after all is the act of an officer by which he declines his office and renounces the further use of it.¹⁷

As clearly enunciated by the Supreme Court in *Moraleja*:¹⁸

"In such instances, the plight of protestant may be viewed in the same light as that of an employee who has been illegally dismissed and who, to find means to support himself and family while he prosecutes his case for reinstatement, accepts a temporary employment elsewhere. Such employee is not deemed to have abandoned the position he seeks to recover."

¹⁴ *Supra* note 7.

¹⁵ Section 13. No Senator or Member of the House of Representatives may hold any other office or employment in the Government, or any subdivision, agency, or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries, during his term without forfeiting his seat. Neither shall he be appointed to any office which may have been created or the emoluments thereof increased during the term for which he was elected. (Cited in Paragraph 18 of the Protestee's Urgent Motion)

¹⁶ Paragraph 20 of the Protestee's Urgent Motion.

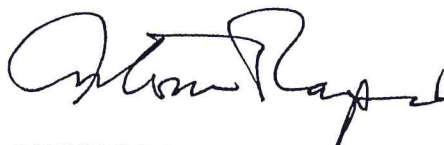
¹⁷ *Ortiz vs. Commission on Elections*, G.R. No. 78957, 28 June 1988.

¹⁸ *Supra* note 6.

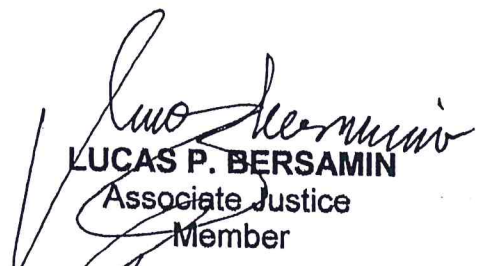
IN VIEW OF THE FOREGOING, the Tribunal Resolves to **DENY** Protestee de Lima's *Urgent Motion* for lack of merit.

SO ORDERED.

27 September 2018.



ANTONIO T. CARPIO
Senior Associate Justice
Chairperson



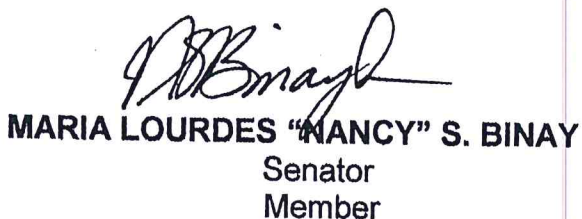
LUCAS P. BERSAMIN
Associate Justice
Member



ESTELA M. PERLAS-BERNABE
Associate Justice
Member



RICHARD J. GORDON
Senator
Member



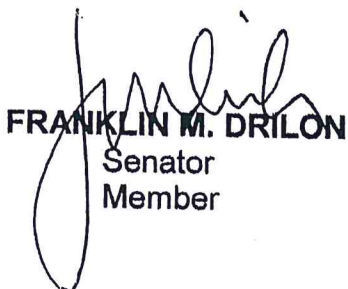
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JOEL VILLANUEVA
Senator
Member



EMMANUEL "MANNY" D. PACQUIAO
Senator
Member



FRANKLIN M. DRILON
Senator
Member

ANTONIO "SONNY" F. TRILLANES IV
Senator
Member