SECOND DIVISION

G.R. No. 258269 – JOSE ANTONIO PAULO I. REYES, Petitioner, **v. SAMSUNG ELECTRONIC PHILS. CORP., KEVIN LEE, MINSU CHU, and SILVER FUNGO,** Respondents.

Promulgated:
APR 15 2024

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DISSENTING OPINION

KHO, JR., *J.*:

I respectfully dissent.

I

In probationary employment, the law specifically requires the employer to communicate to the probationary employee the *reasonable standards* that the latter must meet to attain regularization.[1] These standards must be communicated to the probationary employee at the *commencement of the probationary employment period.*[2] The employer's failure to communicate these standards to the probationary employee at the commencement of the period renders the employment regular.[3]

Moreover, I respectfully submit that the constitutional guarantee of security of tenure is faithfully adhered to when a probationary employee, as part of the guarantee of due process, is given an *opportunity to be heard* on his alleged failure to qualify for regularization.

It is with these principles in mind that I respectfully depart from the majority conclusion that petitioner Jose Antonio Paulo I. Reyes (Reyes) was validly dismissed by respondent Samsung Electronic Philippines Corp. (SEPCO). To my mind, the Court of Appeals (CA) was *not correct* in finding *no grave abuse of discretion* on the part of the National Labor Relations Commission (NLRC) when it ruled that Reyes's dismissal is valid. The Court

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1 *Moral v. Momentum Properties Management Corporation*, 848 Phil. 621, 635–636 (2019) [Per J. Carpio, Second Division], *citing Abbott Laboratories, Philippines v. Alcaraz*, 714 Phil. 510, 533 (2013) [Per J. Perlas-Bernabe, *En Banc*].

2 *See Moral v. Momentum Properties Management Corporation*, 848 Phil. 621, 635–636 (2019) [Per J. Carpio, Second Division].

3 *See Abbott Laboratories, Philippines v. Alcaraz*, 714 Phil. 510, 533 (2013) [Per J. Perlas-Bernabe, *En Banc*].

should instead grant Reyes's Petition, hold that his employment is *regular* and was *illegally terminated*, and accordingly, award him reinstatement with full backwages, as prayed for.

II

A brief restatement of the facts is in order.

On March 27, 2017, after being offered the position of Wireless Local Area Network (WLAN) Head/National Sales Manager, Reyes commenced employment with SEPCO. Both parties agreed that he would be subject to a six-month probationary period.[4] His Probationary Contract of Employment[5] states that on the *fifth month,* he would be evaluated as to his fitness for regularization.[6]

On August 23, 2017, SEPCO sent Reyes a letter[7] terminating his employment. SEPCO claimed that, based on the Performance Evaluation Form for Probationary Employees,[8] Reyes scored a 4.08 or a "Needs Improvement" rating,[9] with the lowest possible grade being a 5.0.

What transpired between March 27, 2017 and August 23, 2017 that led to his dismissal is disputed by the parties. Reyes claimed that SEPCO never informed him of the standards for regularization and that he had never seen the Performance Evaluation Form for Probationary Employees before he received it on the day of his dismissal. Reyes further claimed that when he asked SEPCO management what specific standards he should meet for regularization, he was told to perform his job based on his own assessment, considering his more than 20 years of experience in the field.[10]

On the other hand, SEPCO claims that Minsu Chu (Chu), its Senior Business Director, informed Reyes of the regularization standards when the latter started employment. SEPCO also claimed that these standards were relayed to Reyes from time to time. On the third month of the probationary period, Chu gave Reyes feedback on his performance and advised him to improve his communication skills and familiarize himself with SEPCO's processes. On June 26, 2017, Chu had another discussion with Reyes, where he instructed the latter to learn and understand the basic concepts involved in SEPCO sales and to be professional and earn his colleagues' respect. Reyes's failure to improve his performance led to his termination from SEPCO.[11]

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4 *Rollo*, p. 151.
5 *Id.* at 202–205.
6 *Id.* at 202–203.
7 *Id.* at 206.
8 *Id.* at 208.
9 *Id.*
10 *Id.* at 153, 182.
11 *Id.* at 155–156.

Reyes then filed a Complaint for illegal dismissal against SEPCO, seeking actual reinstatement, backwages, monetized leave credits, moral and exemplary damages, and attorney's fees.[12]

The Labor Arbiter and the NLRC ruled that Reyes's dismissal is legal, which the CA affirmed.[13] On whether the standards for regularization were communicated to Reyes at the time of his engagement, the NLRC held that since Reyes did not specifically deny the statements of Chu that Reyes was informed of the standards at the time of engagement, then he is presumed to have admitted Chu's assertion.[14] At any rate, the NLRC faulted Reyes for not inquiring from his employer what the standards for regularization were and found it highly unusual for someone occupying a higher management role not to inquire about his targets or quotas for regularization.[15] Finally, it held that the reasons cited by SEPCO for dismissing Reyes, such as his lack of ability to lead and inspire, or to use sound judgment and discretion, and his shallow knowledge of SEPCO's business operations, are deemed embedded or inherent in managerial positions.[16]

On appeal by *certiorari* before the Court, the *ponencia* affirms the legality of Reyes's dismissal. Preliminarily, it finds the issue of whether Reyes was made aware of the standards for regularization at the time of his engagement to be factual, which is generally not reviewable in appeals by *certiorari.* Considering that the labor tribunals and the CA were uniform in their findings of fact, the *ponencia*, thus, sees no reason to overturn them.[17]

The *ponencia* rules that the CA did not err in finding no grave abuse of discretion on the part of the NLRC. It holds that Reyes had been informed of the regularization standards he must meet, as proven by the "totality of the circumstances"[18] shown in the offer letter, the probationary contract of employment, Reyes's admission that he knew his employment would initially be probationary, as well as the credibility of his assertions. Likewise, the *ponencia* maintains that the "adequate discharge of one's duties and responsibilities serves as an inherent and implied standard for regularization,"[19] citing the Court's decision in *Abbott Laboratories v. Alcaraz.*[20] The *ponencia* further quotes from *Abbott Laboratories* that "if the probationary employee had been fully apprised by [their] employer of [their] duties and responsibilities, then basic knowledge and common sense dictate that [they] must adequately perform the same, else [they] fail to pass the

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12 *Ponencia*, p. 2.
13 *Rollo*, p. 102.
14 *Id.* at 161–162.
15 *Id.* at 162–165.
16 *Id.* at 168–171.
17 *Ponencia*, pp. 6–7.
18 *Id.* at 9.
19 *Id.* at 10.
20 714 Phil. 510 (2013) [Per J. Perlas-Bernabe, *En Banc*].

probationary trial and may therefore be subject to termination."[21] Moreover, the *ponencia* echoes the NLRC's pronouncement that the qualitative standards that Reyes did not meet, "even if not written in clear, bold language,"[22] are deemed embedded in the position.

Finally, considering that Reyes's termination was grounded on his failure to qualify for regularization, the *ponencia* rejects his claim that he should have received two notices before his dismissal.[23] Citing *Abbott Laboratories*, the *ponencia* holds that where the ground to terminate is the failure to meet the standards for regularization, the two-notice rule shall not apply.[24]

III

Contrary to the majority, I submit that —

First, in determining whether the CA was correct in finding no grave abuse of discretion on the part of the NLRC, the Court may entertain questions of fact to determine whether the NLRC committed grave abuse of discretion in its appreciation of factual issues;

Second, the NLRC gravely abused its discretion in ruling that Reyes was informed of the standards he must meet for regularization since the evidence clearly does not support this conclusion; and

Third, a single notice of termination of a probationary employee in cases of failure to qualify for regularization runs afoul of the security of tenure guaranteed by the Constitution to all employees, regardless of whether they are regular or probationary.

IV

I respectfully submit that whether SEPCO communicated the standards for regularization to Reyes at the time of his engagement is a question of fact that is reviewable by the Court *despite the uniform factual findings of the Labor Arbiter, NLRC, and the CA.*

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21 *Ponencia*, p. 10. *See also* 714 Phil. 510, 557 (2013) [Per J. Perlas-Bernabe, *En Banc*].
22 *Ponencia*, p. 11.
23 *Id.* at 12.
24 *Id.*

In *Montoya v. Transmed*,[25] which the *ponencia* also cites in ruling that questions of fact are not reviewable in this case, the Court explained the distinct mode of review it undertakes in petitions for review on *certiorari* of labor cases, to wit:

> In a Rule 45 review, we consider the **correctness of the assailed CA decision,** in contrast with the review for jurisdictional error that we undertake under Rule 65. Furthermore, Rule 45 limits us to the review of **questions of law** raised against the assailed CA decision. In ruling for legal correctness, we have to view the CA decision in the same context that the petition for *certiorari* it ruled upon was presented to it; **we have to examine the CA decision from the prism of whether it correctly determined the presence or absence of grave abuse of discretion in the NLRC decision before it, not on the basis of whether the NLRC decision on the merits of the case was correct.** In other words, we have to be keenly aware that the CA undertook a Rule 65 review, not a review on appeal, of the NLRC decision challenged before it. This is the approach that should be basic in a Rule 45 review of a CA ruling in a labor case. **In question form, the question to ask is: Did the CA correctly determine whether the NLRC committed grave abuse of discretion in ruling on the case?**[26] (Emphasis in the original)

In *Montoya*, the Court noted therein that the core issue—whether the employee's tuberculosis is work-related—is a question of fact that the Court "cannot touch under Rule 45, *except in the course of determining whether the CA correctly ruled in determining whether or not the NLRC committed grave abuse of discretion in considering and appreciating this factual issue.*"[27] Ultimately, the Court held that the CA correctly ruled that the NLRC committed no grave abuse of discretion; hence there was no need to resolve the central question of fact. Nevertheless, *Montoya* instructively held that in examining the legal correctness of a CA decision in a labor case, the Court may entertain questions of fact to determine whether the NLRC gravely abused its discretion in its appreciation of factual issues.[28]

Relevantly, the NLRC gravely abuses its discretion when its findings and conclusions are not supported by substantial evidence, which refer to that amount of relevant evidence that a reasonable mind might accept as adequate to justify a conclusion.[29] Thus, to determine the legal correctness of a CA decision in a Rule 65 petition assailing a decision of the NLRC, the Court may review the NLRC's factual findings to see if they are supported by substantial evidence.

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25 613 Phil. 696 (2009) [Per J. Brion, Second Division].

26 *Id.* at 706–707.

27 *Id.* at 708 (Emphasis in the original).

28 *Id.* at 707.

29 *Jolo's Kiddie Carts v. Caballa*, 821 Phil. 1101, 1109 (2017) [Per J. Perlas-Bernabe, Second Division], *citing University of Santo Tomas (UST) v. Samahang Manggagawa ng UST*, 809 Phil. 212, 220 (2017) [Per J. Perlas-Bernabe, First Division].

Applied to this case, despite the uniform factual findings of the labor tribunals and the CA that Reyes was informed of the standards for regularization, or that certain standards are "deemed embedded or inherent in" the position taken by Reyes, the Court may undertake its own review of facts to determine the legal correctness of the CA's Decision.

V

The evidentiary framework in illegal dismissal cases proceeds in this manner: *first*, the burden is on the employee to prove by substantial evidence that they were dismissed from employment; *second*, the burden is on the employer to prove that the dismissal was procedurally and substantively valid.[30] In termination of probationary employment based on failure to qualify for regularization, the employer must prove the following: (1) there are reasonable standards set by the employer for regularization; (2) these reasonable standards were communicated by the employer to the employee; (3) the employer communicated these reasonable standards to the employee at the time of the latter's engagement; (4) the probationary employee failed to meet the regularization standards set by the employer; and (5) the employer notified the probationary employee of their failure to qualify for regularization.

That Reyes was dismissed from his employment is not disputed by the parties. Thus, the burden is on SEPCO to prove the procedural and substantive legality of Reyes's dismissal.

According to the NLRC, SEPCO sufficiently discharged this burden. It considered the following facts and pieces of evidence in making this ruling: (1) the statement of Chu, which Reyes allegedly did not specifically deny nor refute, that the "targets and expectations were relayed to [Reyes] at the start of his employment"[31] and at various times during the probationary period; (2) that SEPCO set both qualitative and quantitative targets and expectations; (3) Reyes was aware that his regularization will be assessed based on these targets and expectations; and (4) Chu and Information Technology and Mobile Team Department Acting Head Rhinn Paul Piczon met with Reyes on June 26 and 27, 2017 to give him feedback about his performance thus far.[32]

The NLRC also observed that prior to his employment, Reyes met with SEPCO's President about the job opportunity. The NLRC found it hard to believe that Reyes did not ask about his duties, responsibilities, as well as the targets and expectations that come with the position. It was highly inconceivable, according to the NLRC, that someone who was satisfied with

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30 *Remoticado v. Typical Construction Trading Corp.*, 830 Phil. 508, 515 (2018) [Per J. Leonen, Third Division], *citing Doctor v. NII Enterprises*, 821 Phil. 251, 265 (2017) [Per J. Leonardo-De Castro, First Division].

31 *Rollo*, p. 161.

32 *Id.*

his former job, as Reyes allegedly was, would take on a new position without "asking questions and having full information and knowledge of [SEPCO's] offer and expectations."[33]

Reyes also signed the Probationary Contract of Employment, Section 3 of which states that he must "meet or exceed the performance standards of [SEPCO] during the probationary employment period, such performance standards to be known and thoroughly explained to the employee at the commencement of the period and shall be evaluated on his/her 5th month to determine his/her qualification to become a regular employee of [SEPCO]."[34] This means, to the NLRC, that there were certain performance standards that Reyes must meet. If, as Reyes claims, no standards were communicated to him, the NLRC faulted him for not asking SEPCO what these standards were.[35]

The NLRC also held that the performance standards need not be in written form. As long as the standards are communicated to the probationary employee, whether in verbal or written form, the requirement is already met.[36]

Finally, the NLRC differentiated SEPCO's *quantitative* standards, which are in the form of sales targets, from the latter's *qualitative* standards, which are Reyes's ability to lead and inspire his team, his use of sound judgment and make quality decisions, and to act in a professional manner. The latter, the NLRC held, are deemed embedded or inherent in the managerial position that Reyes took on. Satisfactory performance of the employee, the NRLC ruled, is and should be one of the basic standards of regularization.[37]

VI

To my mind, the NLRC's failure to properly appreciate the evidence presented by both parties led it to the gravely erroneous conclusion that SEPCO ably proved that its dismissal of Reyes was valid. This is grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the NLRC that the CA should have corrected.

In the foregoing discussion, the NLRC identified two types of performance standards in this case: *quantitative* standards, i.e., sales targets and expectations, and *qualitative* standards, i.e., ability to lead and inspire, act in a professional manner, and use sound judgment in making decisions. The quantitative standards were allegedly communicated to Reyes at the start of his engagement. At any rate, the NLRC held that the fault was with Reyes for

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33 *Id.*
34 *Id.* at 163. *See also id.* at 232–232.
35 *Id.* at 163–164.
36 *Id.* at 165–166.
37 *Id.* at 168–170.

failing to ask what the standards were when they were not communicated to him. Meanwhile, the qualitative standards, being "embedded or inherent in" the position, are expected to be met in a satisfactory or adequate manner and need not be spelled out in "clear, bold language."

Notably, both quantitative and qualitative standards are spelled out in SEPCO's Performance Evaluation Form for Probationary Employees.[38] This evaluation form was shown to Reyes *only on the date of his dismissal*.[39] This evaluation form is divided into two sections, Job Performance and Competencies. The quantitative standards are in the Job Performance section, while the qualitative standards are in the Competencies section. This evaluation form also shows Reyes's *numerical grade* on both quantitative and qualitative standards, showing that he scored 67.12% out of 100, leading to a final rating of 4, from a range of 1 to 5, 5 being the lowest.

Indisputably, SEPCO's quantitative and qualitative standards for regularization are set out in this performance evaluation form. A standard in this case refers to "[a] criterion for *measuring acceptability, quality, or accuracy.*"[40] SEPCO's evaluation form fulfills this definition as it not only sets out the expected targets and behavior that probationary employees must meet and perform, but it also provides a means of *measuring* the adequacy or acceptability of a probationary employee's performance through its rating system.

The reasonableness of these standards is not at issue between the parties, and it appears that a close perusal of the performance evaluation form yields no criterion that is unreasonable or impossible to meet. Thus, SEPCO's standards meet the reasonableness requirement.

However, contrary to the *ponencia,* I respectfully submit that SEPCO failed to communicate these standards to Reyes *at the time of his engagement* as required by law. I disagree that Chu's Affidavit[41] proves that SEPCO informed Reyes of the standards set out in its performance evaluation form when he started his employment. I also disagree that Reyes admitted the allegations in Chu's Affidavit. Finally, I disagree that based on the "totality of circumstances" of this case, SEPCO informed Reyes of the reasonable standards for regularization at the time of his engagement.

Chu stated in his Affidavit that "[t]he *targets and expectations were relayed to [Reyes] at the start of his employment* and from time to time (i.e. at Weekly Leadership Team, Supply Chain Management (SCM) and consensus meeting) during his probationary period."[42] Chu also referred to the

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38 *Id.* at 208–210.
39 *Id.* at 42.
40 BLACK'S LAW DICTIONARY 1694 (Revised 11th ed., 2019).
41 *Rollo,* pp. 236–238
42 *Id.* at 236, par. 5 of the Affidavit (Emphasis supplied).

performance evaluation form—but short of saying that SEPCO provided a copy of the performance evaluation form to or informed Reyes that he would be assessed on the basis of the said evaluation form, Chu only stated that Reyes was "aware that his qualification for regular employment will be assessed based on his achievement of these targets and expectations."[43]

The law requires communication of the standards *at the time of engagement*, and not reiteration of the reasonable standards "from time-to-time," so my focus is on Chu's assertion that Reyes was informed of the standards "at the start of his employment." That statement, which the records show is the *only evidence* that SEPCO allegedly communicated its standards to Reyes, miserably falls short of substantial evidence. Contrary to the NLRC, I do not find this to be a "detailed" [44] narrative. Instead, Chu failed to give details as to *how* the standards were communicated to Reyes, and *who* communicated these standards to Reyes as Chu only stated in a general way, that the "targets and expectations were relayed to [Reyes]."[45]

Curiously, Chu also referred to the performance evaluation form, which contains the standards by which Reyes's performance was measured, but did not state whether Reyes was given a copy of the form. Instead, Chu only stated that Reyes "was aware" that his qualification will be assessed based on the standards. I highlight the significance of the performance evaluation form because it contains *all the standards set by SEPCO for regularization.* However, this was not communicated or shown to Reyes at the start of his engagement. In fact, as he repeated said throughout the case, he did not see the said form until the day of his dismissal.

Relatedly, I do not agree that Reyes admitted Chu's allegations, especially regarding the issue of communication of regularization standards. All throughout his *verified* submissions before the labor tribunals,[46] the CA,[47] and this Court,[48] Reyes maintained that he was never informed of the standards he must meet to qualify for regularization. He even stated in his Position Paper that after signing the contract, he asked Chu what standards he should meet to become regular. Chu answered, "do what you think is right."[49] His denial is specific, detailed, and consistent. In fact, it was Chu who failed to specifically dispute that he told Reyes to perform his duties by his own assessment or by doing what he thinks is right.

Pertinent to this issue, I find it disturbing that the NLRC, instead of taking SEPCO to task for its evidentiary burden, essentially blamed Reyes for failing to ask SEPCO for its standards. It is a grave subversion of the legal

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43 *Id.*
44 *Id.* at 162.
45 *Id.* at 236.
46 *Id.* at 153.
47 *Id.* at 92.
48 *Id.* at 40.
49 *Id.* at 153.

requirement placed squarely on the employer to communicate the standards to the probationary employee. I emphasize that the law places no duty on the employee to inquire about the standards from the employer. Even more significantly, Reyes maintained that, even though he was not duty-bound to do so, he asked Chu what standards he should meet to be regularized. Tellingly, this was not disputed by SEPCO.

Finally, the "totality of circumstances" cited by the NLRC and the *ponencia* does not show that the standards were communicated to Reyes at the time of his engagement. Nowhere can be found in the offer letter, employment contract, or any other document presented to him the standards for regularization. As stated earlier, SEPCO's only evidence of communication is Chu's bare assertion, which I find that Reyes disputed.

I reiterate here that the burden of proving that the standards were communicated to the probationary employee at the time of his engagement falls on the employer. Case law, however, recognizes certain exceptions to the rule on communication, such as in self-descriptive occupations, i.e. maids, cooks, drivers, and messengers.[50] the Court has also ruled that standards of basic knowledge and common sense need not be spelled out to the employee, and the rule on communication should not be used to exculpate employees who act in a manner contrary to either.[51] In these cases, the Court ruled that there was no need to explicitly communicate the reasonable standards that the employees failed to meet.[52]

These exceptions are not applicable here. Reyes's position is not self-descriptive in nature, as shown by the fact that his performance is governed not by a single task that his title reflects, but by several targets, expectations, and behaviors as provided in his performance evaluation form. Also, the standards where Reyes supposedly fell short, are also not matters of *basic knowledge and common sense.*

While the *ponencia* rules that the standards for regularization were communicated to Reyes, it also added that certain *qualitative* standards, such as the ability to lead and inspire one's team, exercise sound judgment, make quality decisions, and exhibit professional behavior, are "inherent to the duties and obligations associated with [Reyes's] position."[53] Thus, the adequate performance of these obligations is an implied standard for regularization. Citing *Abbott Laboratories*, the *ponencia* states that "if the probationary employee had been fully apprised by his employer of these duties and responsibilities, then basic knowledge and common sense dictate that he must

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50 *Moral v. Momentum Properties Management Corporation*, 848 Phil. 621, 636 (2019) [Per J. Carpio, Second Division], *citing Abbott Laboratories, Philippines v. Alcaraz,* 714 Phil. 510, 534 (2013) [Per J. Perlas-Bernabe, *En Banc*].

51 *Aberdeen Court, Inc. v. Agustin, Jr.*, 495 Phil. 706, 716–717 (2005) [Per J. Azcuna, Third Division].

52 *Robinsons Galleria v. Ranchez,* 655 Phil. 133 (2011) [Per J. Brion, Second Division], citing *Aberdeen Court, Inc. v. Agustin, Jr.*, 495 Phil. 706, 716–717 (2005) [Per J. Azcuna, Third Division].

53 *Ponencia*, p. 11.

adequately perform the same, else he fails the probationary trial and may therefore be subject to termination."[54] It appears for the *ponencia*, then, that under the "*basic knowledge and common sense*" exception, there was no need to communicate the qualitative standards to Reyes as they are inherent to his position and that he is expected to "adequately perform" the same.

I respectfully disagree.

As I stated earlier, in probationary employment, the law requires *reasonable standards*. Further, the law mandates the employer to inform a probationary employee how their performance would be *measured and assessed* for purposes of regularization. "Adequate performance" hardly fulfills that requirement. What constitutes an adequate performance *to the employer*, when left uncommunicated to the probationary employee, becomes arbitrary and subject only to the employer's will. It is a serious threat to the guarantee of security of tenure when a probationary employee is dismissed on the ground of inadequate performance when they were not even informed of what the measure of adequacy is. I hasten to add that in his performance evaluation form, Reyes was graded on five separate qualitative competencies,[55] none of which were communicated to him. While I agree that certain duties and responsibilities are part and parcel of managerial positions such that any holder of that position is expected to perform them, I do not agree that this inherent-ness exempts the employer from communicating to the probationary employee *how their performance would be measured as regards these duties.*

Thus, I find that SEPCO failed to communicate to Reyes both the quantitative and qualitative standards for regularization. This failure resulted in Reyes's employment becoming regular.

VII

Reyes claimed that as a regular employee, he is, as part of his right to due process, entitled to two notices regarding his dismissal. The *ponencia* disagreed, ruling that because he is a probationary employee who was dismissed on his failure to qualify, he is entitled to only one notice.

Given that, to my mind, Reyes is SEPCO's regular employee, I disagree with the *ponencia.* Reyes is entitled to two notices, *first*, regarding the grounds for his termination and *second*, after hearing, indicating that upon consideration of all the circumstances, grounds have been established to justify dismissal.[56]

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54 *Id.* at 10.
55 *Id.* at 210.
56 Book VI, Rule I, Section 2, Implementing Rules of the Labor Code, as amended by DOLE Department Order No. 147-15 (2015).

VIII

Even if I were to agree with the *ponencia* that Reyes's employment remained probationary, I find that the *one-notice rule*, which by jurisprudence is applicable to termination of probationary employment on the ground of failure to qualify, runs afoul of the constitutional guarantee of security of tenure.

The one-notice rule is an administrative creation set out in the Implementing Rules and Regulations (IRR) of the Labor Code, as amended by Department of Labor and Employment (DOLE) Department Order No. 010-97,[57] which states:

> ARTICLE III. Section 2, Rule I, Book VI of the Implementing Rules is hereby amended, to read as follows:
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> > Section 2. *Security of tenure*. (a) In cases of regular employment, the employer shall not terminate the services of an employee except for just or authorized causes as provided by law, and subject to the requirements of due process.
> >
> > (b) The foregoing shall also apply in cases of probationary employment; provided, however, that in such cases, termination of employment due to failure of the employee to qualify in accordance with the standards of the employer made known to the former at the time of engagement may also be a ground for termination of employment.
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> > . . . .
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> > "*If the termination is brought about by the completion of a contract or phase thereof, or by failure of an employee to meet the standards of the employer in the case of probationary employment, it shall be sufficient that a written notice is served the employee within a reasonable time from the effective date of termination.*" (Emphasis supplied)

After a conscientious study of relevant constitutional provisions, legal principles, and statutes, I respectfully opine that the one-notice rule runs counter to the policies enshrined in the Constitution protecting labor and *should now be abandoned* by the Court. Particularly, the two-notice rule, which is applied in case of just causes for dismissal, should equally be applied to dismissal due to failure of a probationary employee to qualify for regularization.

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57 AMENDING THE RULES IMPLEMENTING BOOKS III AND VI OF THE LABOR CODE, AS AMENDED (1997).

As pointed out, the Labor Code itself does not provide for these rules on notice of termination, delegating the authority instead to the DOLE to promulgate rules and regulations implementing the statute.[58] Thus, both the one-notice and the two-notice rules are set out in the IRR of the Labor Code.[59]

Meanwhile, the State's policy of affording *full protection to labor* is enshrined in the Constitution and the Labor Code. The Constitution declares that the State "affirms labor as a primary social economic force" and it "shall protect the rights of workers and promote their welfare."[60] Its article on social justice and human rights[61] devotes a section specific to labor, *viz.:*

> Labor
>
> SECTION 3. *The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.*
>
> It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. *They shall be entitled to security of tenure, humane conditions of work, and a living wage.* They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.
>
> The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.
>
> The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth. (Emphasis supplied)

The Labor Code also declares the State's basic policy as follows:

> Art. 3. *Declaration of Basic Policy.* — The State shall afford protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race or creed, and regulate the relations between workers and employers. *The State shall assure the rights of workers to self-organization, collective bargaining, security of tenure, and just and humane conditions of work.* (Emphasis supplied)

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58 LABOR CODE (1974), art. 5.

59 The two-notice rule is stated in Rule XXIII, Section 2 (I), as amended by DOLE Department Order No. 09-97.

60 CONST., art. II, sec. 18.

61 CONST., art. XIII.

Relevantly, jurisprudence also recognizes the right of persons vis-à-vis their chosen occupation, recognizing that "one's employment, profession, trade or calling is a property right within the protection of the constitutional guaranty of due process of law."[62]

The State likewise protects the right of workers to security of tenure. By "security of tenure" is meant the right of workers not to be dismissed "except for just cause provided by law and after due process."[63]

In *Telus International Philippines, Inc. v. de Guzman,*[64] the Court explained that security of tenure enables workers to "have a reasonable expectation that they are secured in their work and that management prerogative, although unilaterally wielded, will not harm them. Employees are guaranteed that they can only be terminated from service for a just and valid cause and when supported by substantial evidence after due process."[65] Clear from this definition are the following aspects of security of tenure: *first*, that the cause of a worker's dismissal must be just and valid; *second*, the cause for dismissal must be based on substantial evidence; and *third,* that due process must be observed.

Notwithstanding the Labor Code's provision on security of tenure, which defines the right "in cases of regular employment,"[66] jurisprudence has consistently and uniformly held that probationary employees similarly enjoy security of tenure.[67] In *Lopez v. Javier*,[68] the Court emphasized that the Constitution, in according the protection of security of tenure, "does not distinguish as to the kind of worker who is entitled to be protected in this right."[69]

To my mind, the employer's duty to observe due process when dismissing a probationary employee *does not end* when the employee is simply told by the employer that they failed to qualify for regularization and

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62 *Wallem Maritime Services, Inc. v. NLRC and Macatuno*, 331 Phil. 476 (1996) [Per J. Romero, Second Division], *citing Callanta v. Carnation Philippines, Inc.*, 229 Phil. 279 (1986) [Per J. Fernan, Second Division].

63 *Dumapis v. Lepanto Consolidated Mining Company,* 884 Phil. 156, 162 (2020) [Per J. Lazaro-Javier, *En Banc*].

64 867 Phil. 270 (2019) [Per J. Hernando, Second Division].

65 *Id.* at 287.

66 LABOR CODE, art. 294 [279]. *Security of Tenure.* – In cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title. An employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.

67 *See Jaso v. Metrobank & Trust Co.*, G.R. No. 235794, May 12, 2021 [Per J. Inting, Third Division]; *Abbott Laboratories v. Alcaraz,* 714 Phil. 510 (2013); *Skyway O&M v. Reinante,* 860 Phil. 668 (2019) [Per J. Inting, Third Division]; *Moral v. Momentum Properties Management Corporation,* 848 Phil. 621, 635–636 (2019) [Per J. Carpio, Second Division]; *Brazil v. STI Education Service Group*, 843 Phil. 828 (2018) [Per J. Tijam, First Division]; and *PNOC-EDC v. Buenviaje*, 788 Phil. 508 (2016) [Per J. Jardeleza, Third Division].

68 322 Phil. 70 (1996) [Per J. Romero, Second Division].

69 *Id.* at 79.

will be dismissed from their employment; rather, the employer must also *inform the employee of their failure to qualify and in them being allowed the opportunity to be heard thereon prior to termination.* In this manner, the ground of failure to qualify to the standards of regularization *is akin* to a just cause to dismiss an employee.

The similarity between these grounds is evident. In both these cases, the supposed "fault" or "failure" as it were lies with the employee, such as, in just causes: (*a*) serious misconduct or willful disobedience; (*b*) gross and habitual neglect; (*c*) fraud or willful breach of trust; (*d*) commission of a crime against the employer or an immediate member of their family; and (*e*) other analogous causes.[70] In probationary employment, the failure to meet the employer's reasonable standards is obviously attributed to the probationary employee.

In just causes, the employee is given the opportunity to be heard on the charges against them—charges that, if ultimately resolved against them results in the termination of their employment and in the deprivation of their property right. The same is true for probationary employees, who enjoy the same security of tenure as regular employees. When faced with a circumstance that could potentially deprive them of their property right, such as their alleged failure to qualify for regular employment based on standards unilaterally set by their employer, *they then should be entitled to the same right to be heard —the opportunity to explain the charges against them—as regular employees*. The right of employees to their employment, even in cases of probationary employment, is a valuable right that needs to be fully protected. As the Court said in *Lopez,* the Constitution does not distinguish between the kind of employment when it extends its protective mantle to employees. The Court must not hold otherwise.

As it stands, the rules implementing the due process requirements for dismissal of probationary employees who fail to qualify for regularization (the one-notice rule) do not reflect the constitutional guaranty of security of tenure. This is clearly prejudicial to the rights of probationary employees. It opens probationary employees to an unjust situation where, at the end of the probationary period, their performance is graded poorly, and they are perforce dismissed and deprived of their employment without even an opportunity to explain their side and be heard by the employer—*the very heart of the due process*. It is high time for the Court to declare the one-notice rule on probationary employment as unconstitutional. Requiring the same two-notice rule applicable to regular employment to probationary employment would be in keeping with constitutional and statutory policies affording protection to labor.

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70 LABOR CODE, art. 297[282].

ACCORDINGLY, I **VOTE** to **GRANT** the Petition.

ANTONIO T. KHO, JR.
Associate Justice