Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

MA. MERCEDES L. BARBA,
Petitioner,

- versus -

LICEO DE CAGAYAN UNIVERSITY,
Respondent.

G.R. No. 193857

Present:

SERENO, *C.J.*,
Chairperson,
LEONARDO-DE CASTRO,
BERSAMIN,
VILLARAMA, JR., and
PEREZ,* *JJ.*

Promulgated:

NOV 2 8 2012

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DECISION

VILLARAMA, JR., *J.*:

Before the Court is a petition for review on certiorari assailing the March 29, 2010 Amended Decision[1] and September 14, 2010 Resolution[2] of the Court of Appeals (CA) in CA-G.R. SP No. 02508-MIN. The CA had reconsidered its earlier Decision[3] dated October 22, 2009 and set aside the September 25, 2007 and June 30, 2008 Resolutions[4] of the National Labor Relations Commission (NLRC) as well as the September 29, 2006 Decision[5] of the Labor Arbiter. The CA held that the Labor Arbiter and NLRC had no jurisdiction over the illegal dismissal case filed by petitioner against

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* Designated additional member per Special Order No. 1356 dated November 13, 2012.

1 *Rollo*, pp. 77-94. Penned by Associate Justice Leoncia R. Dimagiba with Associate Justices Rodrigo F. Lim, Jr. and Danton Q. Bueser concurring.

2 Id. at 166-172. Penned by Associate Justice Leoncia R. Dimagiba with Associate Justices Rodrigo F. Lim, Jr. and Ramon Paul L. Hernando concurring.

3 Id. at 54-76. Penned by Associate Justice Ruben C. Ayson with Associate Justices Rodrigo F. Lim, Jr. and Leoncia Real-Dimagiba concurring.

4 Id. at 42-48, 50-52.

5 Id. at 34-41.

respondent because petitioner's position as Dean of the College of Physical Therapy of respondent is a corporate office.

The facts follow.

Petitioner Dr. Ma. Mercedes L. Barba was the Dean of the College of Physical Therapy of respondent Liceo de Cagayan University, Inc., a private educational institution with school campus located at Carmen, Cagayan de Oro City.

Petitioner started working for respondent on July 8, 1993 as medical officer/school physician for a period of one school year or until March 31, 1994. In July 1994, she was chosen by respondent to be the recipient of a scholarship grant to pursue a three-year residency training in Rehabilitation Medicine at the Veterans Memorial Medical Center (VMMC). The Scholarship Contract[6] provides:

> 5. That the SCHOLAR after the duration of her study and training shall serve the SCHOOL in whatever position the SCHOOL desires related to the SCHOLAR's studies for a period of not less than ten (10) years;

After completing her residency training with VMMC in June 1997, petitioner returned to continue working for respondent. She was appointed as Acting Dean of the College of Physical Therapy and at the same time designated as Doctor-In-Charge of the Rehabilitation Clinic of the Rodolfo N. Pelaez Hall, City Memorial Hospital.

On June 19, 2002, petitioner's appointment as Doctor-In-Charge of the Rehabilitation Clinic was renewed and she was appointed as Dean of the College of Physical Therapy by respondent's President, Dr. Jose Ma. R. Golez. The appointment letter[7] reads:

> x x x x
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> Dear Dr. Barba:

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6 Annex "A," records, Vol. I, pp. 20-21.
7 Annex "E", CA *rollo*, p. 31.

> You are hereby re-appointed Dean of the College of Physical Therapy and Doctor-In-Charge of the Rehabilitation Clinic at Rodolfo N. Pelaez Hall, City Memorial Hospital and other rehabilitation clinics under the management of Liceo de Cagayan University for a period of three years effective July 1, 2002 unless sooner revoked for valid cause or causes.
>
> Your position is one of trust and confidence and the appointment is subject to the pertinent provisions of the University Administrative Personnel and Faculty Manuals, and Labor Code.
>
> x x x x

Petitioner accepted her appointment and assumed the position of Dean of the College of Physical Therapy. In the school year 2003 to 2004, the College of Physical Therapy suffered a dramatic decline in the number of enrollees from a total of 1,121 students in the school year 1995 to 1996 to only 29 students in the first semester of school year 2003 to 2004. This worsened in the next year or in school year 2004 to 2005 where a total of only 20 students enrolled.[8]

Due to the low number of enrollees, respondent decided to freeze the operation of the College of Physical Therapy indefinitely. Respondent's President Dr. Rafaelita Pelaez-Golez wrote petitioner a letter[9] dated March 16, 2005 informing her that her services as dean of the said college will end at the close of the school year. Thereafter, the College of Physical Therapy ceased operations on March 31, 2005, and petitioner went on leave without pay starting on April 9, 2005. Subsequently, respondent's Executive Vice President, Dr. Mariano M. Lerin, through Dr. Glory S. Magdale, respondent's Vice President for Academic Affairs, sent petitioner a letter[10] dated April 27, 2005 instructing petitioner to return to work on June 1, 2005 and report to Ma. Chona Palomares, the Acting Dean of the College of Nursing, to receive her teaching load and assignment as a full-time faculty member in that department for the school year 2005-2006.

In reply, petitioner informed Dr. Lerin that she had not committed to teach in the College of Nursing and that as far as she can recall, her

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8 Records, Vol. I, p. 39.
9 Annex "B," id. at 23.
10 Annex "E," id. at 61.

employment is not dependent on any teaching load. She then requested for the processing of her separation benefits in view of the closure of the College of Physical Therapy.[11] She did not report to Palomares on June 1, 2005.

On June 8, 2005, petitioner followed up her request for separation pay and other benefits but Dr. Lerin insisted that she report to Palomares; otherwise, sanctions will be imposed on her. Thus, petitioner through counsel wrote Dr. Golez directly, asking for her separation pay and other benefits.

On June 21, 2005, Dr. Magdale wrote petitioner a letter[12] directing her to report for work and to teach her assigned subjects on or before June 23, 2005. Otherwise, she will be dismissed from employment on the ground of abandonment. Petitioner, through counsel, replied that teaching in the College of Nursing is in no way related to her scholarship and training in the field of rehabilitation medicine. Petitioner added that coercing her to become a faculty member from her position as College Dean is a great demotion which amounts to constructive dismissal.[13]

Dr. Magdale sent another letter[14] to petitioner on June 24, 2005 ordering her to report for work as she was still bound by the Scholarship Contract to serve respondent for two more years. But petitioner did not do so. Hence, on June 28, 2005, Dr. Magdale sent petitioner a notice terminating her services on the ground of abandonment.

Meanwhile, on June 22, 2005, prior to the termination of her services, petitioner filed a complaint before the Labor Arbiter for illegal dismissal, payment of separation pay and retirement benefits against respondent, Dr. Magdale and Dr. Golez. She alleged that her transfer to the College of

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11 Id. at 25.
12 Annex “I,” id. at 65.
13 Id. at 66.
14 Annex “L,” id. at 68.

Nursing as a faculty member is a demotion amounting to constructive dismissal.

Respondent claimed that petitioner was not terminated and that it was only petitioner's appointment as College Dean in the College of Physical Therapy that expired as a necessary consequence of the eventual closure of the said college. Respondent further averred that petitioner's transfer as full-time professor in the College of Nursing does not amount to constructive dismissal since the transfer was without loss of seniority rights and without diminution of pay. Also, respondent added that pursuant to the Scholarship Contract, petitioner was still duty bound to serve respondent until 2007 in whatever position related to her studies the school desires.

Labor Arbiter's Ruling

In a Decision[15] dated September 29, 2006, the Labor Arbiter found that respondent did not constructively dismiss petitioner; therefore, she was not entitled to separation pay. The Labor Arbiter held that petitioner's assignment as full-time professor in the College of Nursing was not a demotion tantamount to constructive dismissal. The dispositive portion of the Labor Arbiter's decision reads:

> WHEREFORE, in view of the foregoing, judgment is hereby rendered dismissing the complaint for illegal dismissal for utter lack of merit, but ordering the respondent Liceo de Cagayan University to reinstate complainant to an equivalent position without loss of seniority rights, but without back wages.
>
> However, if reinstatement is no longer feasible or if there is no equivalent position to which complainant may be reinstated, respondent may opt to pay complainant her separation pay equivalent to one-half (1/2) month pay for every year of service or in the sum of P195,000.00, subject to deduction for advances or accountabilities which complainant may have had.
>
> Other claims are ordered dismissed for lack of merit.
>
> SO ORDERED.[16]

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15 Supra note 5.
16 Id. at 41.

NLRC's Ruling

Petitioner appealed the above decision to the NLRC. On September 25, 2007, the NLRC issued a Resolution[17] reversing the Labor Arbiter's decision and holding that petitioner was constructively dismissed. The NLRC held that petitioner was demoted when she was assigned as a professor in the College of Nursing because there are functions and obligations and certain allowances and benefits given to a College Dean but not to an ordinary professor. The NLRC ruled:

> WHEREFORE, in view of the foregoing, the assailed decision is hereby MODIFIED in that complainant is hereby considered as constructively dismissed and thus entitled to backwages and separation pay of one (1) month salary for every year of service, plus attorney's fees, which shall be computed at the execution stage before the Arbitration Branch of origin.
>
> SO ORDERED.[18]

The NLRC denied respondent's motion for reconsideration in a Resolution[19] dated June 30, 2008.

Ruling of the Court of Appeals

Respondent went to the CA on a petition for certiorari alleging that the NLRC committed grave abuse of discretion when it declared that petitioner's transfer to the College of Nursing as full-time professor but without diminution of salaries and without loss of seniority rights amounted to constructive dismissal because there was a demotion involved in the transfer and because petitioner was compelled to accept her new assignment.

Respondent also filed a Supplemental Petition[20] raising for the first time the issue of lack of jurisdiction of the Labor Arbiter and the NLRC over the case. Respondent claimed that a College Dean is a corporate officer under its by-laws and petitioner was a corporate officer of respondent since

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17 Supra note 4 at 42-48.
18 Id. at 47.
19 Id. at 50-52.
20 Id. at 179-209.

her appointment was approved by the board of directors. Respondent posited that petitioner was a corporate officer since her office was created by the by-laws and her appointment, compensation, duties and functions were approved by the board of directors. Thus, respondent maintained that the jurisdiction over the case is with the regular courts and not with the labor tribunals.

In its original Decision[21] dated October 22, 2009, the CA reversed and set aside the NLRC resolutions and reinstated the decision of the Labor Arbiter. The CA did not find merit in respondent's assertion in its Supplemental Petition that the position of petitioner as College Dean was a corporate office. Instead, the appellate court held that petitioner was respondent's employee, explaining thus:

> 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.
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> True, the By-Laws of LDCU provides that there shall be a College Director. This means a College Director is a corporate officer. However, contrary to the allegation of petitioner, the position of Dean does not appear to be the same as that of a College Director.
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> Aside from the obvious disparity in name, the By-Laws of LDCU provides for only **one** College Director. But as shown by LDCU itself, **numerous** persons have been appointed as Deans. They could not be the College Director contemplated by the By-Laws inasmuch as the By-Laws **authorize** only the appointment of **one** not many. **If it is indeed the intention of LDCU to give its many Deans the rank of College Director, then it <u>exceeded</u> the authority given to it by its By-Laws because only one College Director is authorized to be appointed**. It must amend its By-Laws. Prior to such an amendment, the office of College Dean is not a corporate office.
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> Another telling sign that a College Director is not the same as a Dean is the manner of appointment. **A College Director is directly appointed by the Board of Directors**. However, **a College Dean is appointed by the President** upon the recommendation of the Vice President for Academic Affairs and the Executive Vice President and approval of the Board of Directors. There is a clear distinction on the manner of appointment indicating that the offices are not one and the same.
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> x x x x

[21] Supra note 3.

> **This shows that it was not the intention of LDCU to make Dr. Barba a corporate officer** as it was stated in her letter of appointment that the same shall be subject to the provisions of the Labor Code. Otherwise, the appointment letter should have stated that her appointment is governed by the Corporation Code. Thus, We find the arguments in the Supplemental Petition on the matter of lack of jurisdiction of the Labor Arbiter and the NLRC to be without merit. Dr. Barba, being a College Dean, was not a corporate officer.[22] (Emphasis not ours)

The CA further found that no constructive dismissal occurred nor has petitioner abandoned her work. According to the CA, a transfer amounts to constructive dismissal when the transfer is unreasonable, unlikely, inconvenient, impossible, or prejudicial to the employee or it involves a demotion in rank or a diminution of salary and other benefits. In the case of petitioner, the CA held that she was never demoted and her transfer, being a consequence of the closure of the College of Physical Therapy, was valid.

The CA also noted that petitioner's appointment as Dean of the College of Physical Therapy was for a term of three years. Hence, when her appointment as College Dean was no longer renewed on June 1, 2005 or after her three-year term had expired, it cannot be said that there was a demotion or that she was dismissed. Her term as Dean had expired and she can no longer claim to be entitled to the benefits emanating from such office.

On the issue of alleged lack of jurisdiction, the CA observed that respondent never raised the issue of jurisdiction before the Labor Arbiter and the NLRC and respondent even actively participated in the proceedings below. Hence, respondent is estopped from questioning the jurisdiction of the labor tribunals.

Unsatisfied, both petitioner and respondent sought reconsideration of the CA decision. Petitioner prayed for the reversal of the ruling that there was no constructive dismissal. Respondent meanwhile maintained that the labor tribunals have no jurisdiction over the case, petitioner being a corporate officer.

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[22] Id. at 64-66.

On March 29, 2010, the CA issued the assailed Amended Decision[23] setting aside its earlier ruling. This time the CA held that the position of a College Dean is a corporate office and therefore the labor tribunals had no jurisdiction over the complaint for constructive dismissal. The CA noted that petitioner's appointment as Dean of the College of Physical Therapy was approved by the respondent's board of directors thereby concluding that the position of a College Dean is a corporate office. Also, the CA held that the College Director mentioned in respondent's by-laws is the same as a College Dean and no one has ever been appointed as College Director. The CA added that in the Administrative Manual the words "college" and "department" were used in the same context in the section on the Duties and Responsibilities of the College Dean, and that there could not have been any other "head of department" being alluded to in the by-laws but the college dean.

The dispositive portion of the Amended Decision reads:

> **WHEREFORE**, in view of the foregoing, We reconsider Our Decision on October [22], 2009, and declare that the position of College Dean is a corporate office of Petitioner [Liceo de Cagayan University], thereby divesting the Labor Arbiter and the National Labor Relations Commission of jurisdiction over the instant case. Hence, the Resolutions of the Public Respondent dated September 25, 2007 and June 30, 2008 as well as that of the Regional Labor Arbiter dated 29 September 2006 are **VACATED** and **SET ASIDE** as they were rendered by tribunals that had no jurisdiction over the case.
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> **SO ORDERED**.[24]

Petitioner filed a motion for reconsideration from the above decision, but her motion was denied by the CA in its Resolution[25] dated September 14, 2010. Hence, petitioner filed the present petition.

Petitioner argues that the CA erred in ruling that she was a corporate officer and asserts that the CA's previous finding that she was respondent's employee is more in accord with law and jurisprudence. Petitioner adds that the appellate court erred when it ruled that the labor tribunals had no jurisdiction over her complaint for illegal dismissal against respondent. She

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23 Supra note 1.
24 Id. at 93.
25 Supra note 2.

faults the CA for allowing respondent to raise the issue of jurisdiction in a Supplemental Petition after respondent has actively participated in the proceedings before the labor tribunals. Petitioner also asserts that the CA erred in denying her motion for reconsideration from its Amended Decision on the ground that it is a second motion for reconsideration which is a prohibited pleading. Lastly, petitioner claims that respondent violated the rule against forum shopping when it failed to inform the CA of the pendency of the complaint for breach of contract which it filed against petitioner before the Regional Trial Court of Misamis Oriental, Branch 23.

Respondent, for its part, counters that the petition was filed out of time and petitioner's motion for reconsideration from the Amended Decision was a prohibited pleading since petitioner has already filed a motion for reconsideration from the original decision of the CA. It is respondent's posture that an Amended Decision is not really a new decision but the appellate court's own modification of its prior decision. More importantly, respondent points out that the arguments raised by petitioner do not justify a reversal of the Amended Decision of the appellate court. Respondent insists on the correctness of the Amended Decision and quotes the assailed decision in its entirety.

Issue

The decisive issue in the present petition is whether petitioner was an employee or a corporate officer of respondent university. Resolution of this issue resolves the question of whether the appellate court was correct in ruling that the Labor Arbiter and the NLRC had no jurisdiction over petitioner's complaint for constructive dismissal against respondent.

Our Ruling

We grant the petition.

Prefatorily, we first discuss the procedural matter raised by respondent that the present petition is filed out of time. Respondent claims that

petitioner's motion for reconsideration from the Amended Decision is a second motion for reconsideration which is a prohibited pleading. Respondent's assertion, however, is misplaced for it should be noted that the CA's Amended Decision totally reversed and set aside its previous ruling. Section 2, Rule 52 of the 1997 Rules of Civil Procedure, as amended, provides that no second motion for reconsideration of a judgment or final resolution by the same party shall be entertained. This contemplates a situation where a second motion for reconsideration is filed by the same party assailing the same judgment or final resolution. Here, the motion for reconsideration of petitioner was filed after the appellate court rendered an Amended Decision totally reversing and setting aside its previous ruling. Hence, petitioner is not precluded from filing another motion for reconsideration from the Amended Decision which held that the labor tribunals lacked jurisdiction over petitioner's complaint for constructive dismissal. The period to file an appeal should be reckoned not from the denial of her motion for reconsideration of the original decision, but from the date of petitioner's receipt of the notice of denial of her motion for reconsideration from the Amended Decision. And as petitioner received notice of the denial of her motion for reconsideration from the Amended Decision on September 23, 2010 and filed her petition on November 8, 2010, or within the extension period granted by the Court to file the petition, her petition was filed on time.

Now on the main issue.

As a general rule, only questions of law may be allowed in a petition for review on certiorari.[26] Considering, however, that the CA reversed its earlier decision and made a complete turnaround from its previous ruling, and consequently set aside both the findings of the Labor Arbiter and the NLRC for allegedly having been issued without jurisdiction, it is necessary for the Court to reexamine the records and resolve the conflicting rulings.

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[26] *Uy v. Centro Ceramica Corporation*, G.R. No. 174631, October 19, 2011, 659 SCRA 604, 614.

After a careful review and examination of the records, we find that the CA's previous ruling that petitioner was respondent's employee and not a corporate officer is supported by the totality of the evidence and more in accord with law and prevailing jurisprudence.

Corporate officers are elected or appointed by the directors or stockholders, and are those who are given that character either by the Corporation Code or by the corporation's by-laws.[27] Section 25[28] of the Corporation Code enumerates corporate officers as the president, the secretary, the treasurer and such other officers as may be provided for in the by-laws. In *Matling Industrial and Commercial Corporation v. Coros*,[29] the phrase "such other officers as may be provided for in the by-laws" has been clarified, thus:

> Conformably with Section 25, **a position must be expressly mentioned in the By-Laws in order to be considered as a corporate office.** Thus, the creation of an office pursuant to or under a By-Law enabling provision is not enough to make a position a corporate office. *Guerrea v. Lezama*, the first ruling on the matter, held that the only officers of a corporation were those given that character either by the *Corporation Code* or by the By-Laws; **the rest of the corporate officers could be considered only as employees of subordinate officials.** Thus, it was held in *Easycall Communications Phils., Inc. v. King*:
>
> > **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** not by the action of the directors or stockholders but b**y the managing officer of the corporation who also determines the compensation to be paid to such employee.** (Emphasis supplied)

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27 *Gomez v. PNOC Development and Management Corporation (PDMC)*, G.R. No. 174044, November 27, 2009, 606 SCRA 187, 194.

28 SEC. 25. *Corporate officers, quorum.* – Immediately after their election, the directors of a corporation must formally organize by the election of a president, who shall be a director, a treasurer who may or may not be a director, a secretary who shall be a resident and citizen of the Philippines, and such other officers as may be provided for in the by[-]laws. Any two (2) or more positions may be held concurrently by the same person, except that no one shall act as president and secretary or as president and treasurer at the same time.

The directors or trustees and officers to be elected shall perform the duties enjoined on them by law and the by[-]laws of the corporation. Unless the articles of incorporation or the by[-]laws provide for a greater majority, a majority of the number of directors or trustees as fixed in the articles of incorporation shall constitute a quorum for the transaction of corporate business, and every decision of at least a majority of the directors or trustees present at a meeting at which there is a quorum shall be valid as a corporate act, except for the election of officers which shall require the vote of a majority of all the members of the board.

Directors or trustees cannot attend or vote by proxy at board meetings.

29 G.R. No. 157802, October 13, 2010, 633 SCRA 12, 26.

In declaring petitioner a corporate officer, the CA considered respondent's by-laws and gave weight to the certifications of respondent's secretary attesting to the resolutions of the board of directors appointing the various academic deans for the School Years 1991-2002 and 2002-2005, including petitioner. However, an assiduous perusal of these documents does not convince us that petitioner occupies a corporate office position in respondent university.

The relevant portions of respondent's by-laws[30] are hereby quoted as follows:

> Article III
> The Board of Directors
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> Sec. 3. The Board of Directors shall appoint a College Director, define his powers and duties, and determine his compensation; approve or disapprove recommendations for appointment or dismissal of teachers and employees submitted to it by the College Director; and exercise other powers and perform such duties as may be required of it hereafter for the proper functioning of the school.
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> x x x x
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> Article IV
> Officers
>
> Sec. 1. The officers of the corporation shall consist of a **President, a Vice President, and a Secretary-Treasurer,** who shall be chosen from the directors and by the directors themselves. They shall be elected annually at the first meeting of the directors immediately after their election, and shall hold office for one (1) year and until their successors are elected and qualified.
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> x x x x
>
> Article V
> Other Appointive Officials
>
> Sec. 1. The Liceo de Cagayan shall have a **College Director** and such heads of departments as may exist in the said college whose appointments, compensations, powers and duties shall be determined by the Board of Directors.[31] (Emphasis supplied)

On the other hand, the pertinent portions of the two board resolutions appointing the various academic deans in the university including petitioner, read as follows:

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30 *Rollo*, pp. 211-218.
31 Id. at 212-215.

x x x x

RESOLVE, as it is hereby resolved, that pursuant to Section 3[,] Article III and Section 1[,] Article V of the Corporation's By-laws, the various academic deans for the school years 1999-2002 of the University, as recommended by the President of the Corporation, are hereby appointed, whose names are enumerated hereunder and their respective colleges and their honoraria are indicated opposite their names, all of them having a three (3) year term, to wit:

Name and College	Honorarium
Ma. Mercedes Vivares Physical Therapy	2,660.00

x x x x

RESOLVE, as it is hereby resolved, that pursuant to Section 3[,] Article III and Section 1[,] Article V of the Corporation's By-laws, the various academic deans for the school years 2002-2005 of the University, as recommended by the President of the Corporation, are hereby appointed, whose names are enumerated hereunder and their respective colleges and their honoraria are indicated opposite their names, all of them having a three (3) year term, to wit:

Name and College	Honorarium
Ma. Mercedes Vivares Physical Therapy	2,450.00

x x x x[32]

In respondent's by-laws, there are four officers specifically mentioned, namely, a president, a vice president, a secretary and a treasurer. In addition, it is provided that there shall be other appointive officials, a College Director and heads of departments whose appointments, compensations, powers and duties shall be determined by the board of directors. It is worthy to note that a College Dean is not among the corporate officers mentioned in respondent's by-laws. Petitioner, being an academic dean, also held an administrative post in the university but not a corporate office as contemplated by law. Petitioner was not directly elected nor appointed by the board of directors to any corporate office but her appointment was merely approved by the board together with the other academic deans of respondent university in accordance with the procedure prescribed in respondent's Administrative Manual.[33] The act of the board of

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[32] CA *rollo*, pp. 191-193.

[33] 4.2. Academic Deans

x x x x

directors in approving the appointment of petitioner as Dean of the College of Therapy did not make her a corporate officer of the corporation.

Moreover, the CA, in its amended decision erroneously equated the position of a College Director to that of a College Dean thereby concluding that petitioner is an officer of respondent.

It bears stressing that the appointive officials mentioned in Article V of respondent's by-laws are not corporate officers under the contemplation of the law. Though the board of directors may create appointive positions other than the positions of corporate officers, the persons occupying such positions cannot be deemed as corporate officers as contemplated by Section 25 of the Corporation Code. On this point, the SEC Opinion dated November 25, 1993 quoted in the case of *Matling Industrial and Commercial Corporation v. Coros,*[34] is instructive:

> Thus, pursuant to the above provision (Section 25 of the Corporation Code), whoever are the corporate officers enumerated in the by-laws are the exclusive Officers of the corporation and the Board has no power to create other Offices without amending first the corporate By-laws. **However, the Board may create appointive positions other than the positions of corporate Officers, but the persons occupying such positions are not considered as corporate officers within the meaning of Section 25 of the Corporation Code and are not empowered to exercise the functions of the corporate Officers,** except those functions lawfully delegated to them. Their functions and duties are to be determined by the Board of Directors/Trustees.

But even assuming that a College Director may be considered a corporate officer of respondent, a review of the records as well as the other documents submitted by the parties fails to persuade that petitioner was the "College Director" mentioned in the by-laws of respondent. Nowhere in petitioner's appointment letter was it stated that petitioner was designated as the College Director or that petitioner was to assume the functions and duties of a College Director. Neither can it be inferred in respondent's by-laws that a dean of a college is the same as a College Director of respondent.

4.2.2.1. Appointed by: The President upon the recommendation of the VPAA and EVP and upon approval of the Board of Directors for a definite term not to exceed three (3) years and subject to reappointment. (*Rollo*, p. 83).

[34] Supra note 29 at 27.

Respondent's lone surviving incorporating director Yolanda Rollo even admitted that no College Director has ever been appointed by respondent. In her affidavit, Yolanda also explained the reason for the creation of the position of a College Director, to wit:

> 4. At the time we signed the By-Laws of the Corporation, we, as directors, did envision to form only a college of law as that was the main thrust of our president, the late Atty. Rodolfo N. Pelaez. The original plan then was to have a "College Director" as the head of the college of law and below him within the college were heads of departments. The appointments, remuneration, duties and functions of the "College Director" and the heads of departments were to be approved by the Board of Directors. x x x[35]

Notably, the CA has sufficiently explained why petitioner could not be considered a College Director in its previous decision. The appellate court explained:

> True, the By-Laws of [Liceo de Cagayan University] provides that there shall be a College Director. This means a College Director is a corporate officer. However, contrary to the allegation of petitioner, the position of Dean does not appear to be the same as that of a College Director.
>
> Aside from the obvious disparity in name, the By-Laws of [Liceo de Cagayan University] provides for only **one** College Director. But as shown by [Liceo de Cagayan University] itself, **numerous** persons have been appointed as Deans. They could not be the College Director contemplated by the By-Laws inasmuch as the By-Laws **authorize** only the appointment of **one** not many. **If it is indeed the intention of [Liceo de Cagayan University] to give its many Deans the rank of College Director, then it <u>exceeded</u> the authority given to it by its By-Laws because only one College Director is authorized to be appointed.** It must amend its By-Laws. Prior to such amendment, the office of [the] College Dean is not a corporate office.
>
> Another telling sign that a College Director is not the same as a Dean is the manner of appointment. **A College Director is directly appointed by the Board of Directors.** However, **a College Dean is appointed by the President** upon the recommendation of the Vice President for Academic Affairs and the Executive Vice President and **approval** of the Board of Directors. There is a clear distinction on the manner of appointment indicating that the offices are not one and the same.[36] (Additional emphasis supplied)

Undoubtedly, petitioner is not a College Director and she is not a corporate officer but an employee of respondent. Applying the four-fold test

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35 CA *rollo*, p. 195.
36 *Rollo*, p. 65.

concerning (1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; (4) the employer's power to control the employee with respect to the means and methods by which the work is to be accomplished, it is clear that there exists an employer-employee relationship between petitioner and respondent. Records show that petitioner was appointed to her position as Dean by Dr. Golez, the university president and was paid a salary of ₱32,500 plus transportation allowance. It was evident that respondent had the power of control over petitioner as one of its deans. It was also the university president who informed petitioner that her services as Dean of the College of Physical Therapy was terminated effective March 31, 2005 and she was subsequently directed to report to the Acting Dean of the College of Nursing for assignment of teaching load.

Thus, petitioner, being an employee of respondent, her complaint for illegal/constructive dismissal against respondent was properly within the jurisdiction of the Labor Arbiter and the NLRC. Article 217 of the Labor Code provides:

> **ART. 217. Jurisdiction of Labor Arbiters and the Commission.** – (a) Except as otherwise provided under this Code, the Arbiters shall have original and exclusive jurisdiction to hear and decide xxx the following cases involving all workers, whether agricultural or non-agricultural:
>
> 1. Unfair labor practice cases;
>
> **2. Termination disputes;**
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> 3. If accompanied with a claim for reinstatement, those cases that workers may file involving wage, rates of pay, hours of work and other terms and conditions of employment;
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> 4. Claims for actual, moral, exemplary and other forms of damages arising from the employer-employee relations;
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> 5. Cases arising from any violation of Article 264 of this Code, including questions involving the legality of strikes and lockouts; and
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> 6. Except claims for Employees Compensation, Social Security, Medicare and maternity benefits, all other claims arising from employer-employee relations, including those of persons in domestic or household service, involving an amount exceeding five thousand pesos (₱5,000.00) regardless of whether accompanied with a claim for reinstatement.
>
> (b) The Commission shall have exclusive appellate jurisdiction over all cases decided by Labor Arbiters.
>
> x x x x

Moreover, we agree with the CA's earlier pronouncement that since respondent actively participated in the proceedings before the Labor Arbiter and the NLRC, it is already estopped from belatedly raising the issue of lack of jurisdiction. In this case, respondent filed position papers and other supporting documents to bolster its defense before the labor tribunals but in all these pleadings, the issue of lack of jurisdiction was never raised. It was only in its Supplemental Petition filed before the CA that respondent first brought the issue of lack of jurisdiction. We have consistently held that while jurisdiction may be assailed at any stage, a party's active participation in the proceedings will estop such party from assailing its jurisdiction. It is an undesirable practice of a party participating in the proceedings and submitting his case for decision and then accepting the judgment, only if favorable, and attacking it for lack of jurisdiction, when adverse.[37]

Under Section 6, Rule 10 of the 1997 Rules of Civil Procedure, as amended, governing supplemental pleadings, the court "may" admit supplemental pleadings, such as the supplemental petition filed by respondent before the appellate court, but the admission of these pleadings remains in the sound discretion of the court. Nevertheless, we have already found no credence in respondent's claim that petitioner is a corporate officer, consequently, the alleged lack of jurisdiction asserted by respondent in the supplemental petition is bereft of merit.

On the issue of constructive dismissal, we agree with the Labor Arbiter and the appellate court's earlier ruling that petitioner was not constructively dismissed. Petitioner's letter of appointment specifically appointed her as Dean of the College of Physical Therapy and Doctor-in-Charge of the Rehabilitation Clinic "*for a period of three years effective July 1, 2002 unless sooner revoked for valid cause or causes.*" Evidently, petitioner's appointment as College Dean was for a fixed term, subject to reappointment and revocation or termination for a valid cause. When respondent decided to close its College of Physical Therapy due to drastic

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[37] *Philippine Veterans Bank v. National Labor Relations Commission (Fourth Division)*, G.R. No. 188882, March 30, 2010, 617 SCRA 204, 211.

decrease in enrollees, petitioner's appointment as its College Dean was validly revoked and her subsequent assignment to teach in the College of Nursing was justified as it is still related to her scholarship studies in Physical Therapy.

As we observed in *Brent School, Inc. v. Zamora*,[38] also cited by the CA, it is common practice in educational institutions to have fixed-term contracts in administrative positions, thus:

> Some familiar examples may be cited of employment contracts which may be neither for seasonal work nor for specific projects, **but to which a fixed term is an essential and natural appurtenance:** overseas employment contracts, for one, to which, whatever the nature of the engagement, the concept of regular employment with all that it implies does not appear ever to have been applied, Article 280 of the Labor Code notwithstanding; **also appointments to the positions of dean, assistant dean, college secretary, principal, and other administrative offices in educational institutions, which are by practice or tradition rotated among the faculty members, and where fixed terms are a necessity without which no reasonable rotation would be possible.** x x x (Emphasis supplied)

In constructive dismissal cases, the employer has the burden of proving that its conduct and action or the transfer of an employee are for valid and legitimate grounds such as genuine business necessity.[39] Particularly, for a transfer not to be considered a constructive dismissal, the employer must be able to show that such transfer is not unreasonable, inconvenient, or prejudicial to the employee. In this case, petitioner's transfer was not unreasonable, inconvenient or prejudicial to her. On the contrary, the assignment of a teaching load in the College of Nursing was undertaken by respondent to accommodate petitioner following the closure of the College of Physical Therapy. Respondent further considered the fact that petitioner still has two years to serve the university under the Scholarship Contract.

Petitioner's subsequent transfer to another department or college is not tantamount to demotion as it was a valid transfer. There is therefore no

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38 G.R. No. 48494, February 5, 1990, 181 SCRA 702, 714.

39 See *Julie's Bakeshop v. Arnaiz*, G.R. No. 173882, February 15, 2012, 666 SCRA 101, 115.

constructive dismissal to speak of. That petitioner ceased to enjoy the compensation, privileges and benefits as College Dean was but a logical consequence of the valid revocation or termination of such fixed-term position. Indeed, it would be absurd and unjust for respondent to maintain a deanship position in a college or department that has ceased to exist. Under the circumstances, giving petitioner a teaching load in another College/Department that is related to Physical Therapy -- thus enabling her to serve and complete her remaining two years under the Scholarship Contract -- is a valid exercise of management prerogative on the part of respondent.

Lastly, as to whether respondent was guilty of forum shopping when it failed to inform the appellate court of the pendency of Civil Case No. 2009-320, a complaint for breach of contract filed by respondent against petitioner, we rule in the negative. Forum shopping exists when the elements of *litis pendentia* are present or where a final judgment in one case will amount to *res judicata* in another. *Litis pendentia* requires the concurrence of the following requisites: (1) identity of parties, or at least such parties as those representing the same interests in both actions; (2) identity of rights asserted and reliefs prayed for, the reliefs being founded on the same facts; and (3) identity with respect to the two preceding particulars in the two cases, such that any judgment that may be rendered in the pending case, regardless of which party is successful, would amount to *res judicata* in the other case.[40]

While there is identity of parties in the two cases, the causes of action and the reliefs sought are different. The issue raised in the present case is whether there was constructive dismissal committed by respondent. On the other hand, the issue in the civil case pending before the RTC is whether petitioner was guilty of breach of contract. Hence, respondent is not guilty of forum shopping.

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[40] *Yu v. Lim*, G.R. No. 182291, September 22, 2010, 631 SCRA 172, 184.

WHEREFORE, the petition for review on certiorari is **GRANTED.** The Amended Decision dated March 29, 2010 and Resolution dated September 14, 2010 of the Court of Appeals in CA-G.R. SP No. 02508-MIN are hereby **SET ASIDE**. The earlier Decision dated October 22, 2009 of the Court of Appeals in said case is **REINSTATED and UPHELD**.

No pronouncement as to costs.

SO ORDERED.

MARTIN S. VILLARAMA, JR.
Associate Justice

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice
Chairperson

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice