LEGAL TRENDS AND ISSUES AFFECTING CATHOLIC EDUCATIONAL INSTITUTIONS: "THE SCHOOL, THE TEACHER AND THE STUDENT".

CEAP National Assembly
Cebu Waterfront Hotel, Lahug City
23 September 2010, 2:00-4:00 p.m.

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A. THE SCHOOL AND THE CHILD

1. GENERAL CONCEPTS AND STATUTORY BASIS

1.1 **Matrix of relationship between School, Faculty and Students in the context of institutional academic freedom**

Institutional academic freedom is the freedom of the School to determine for itself on academic grounds **who may teach, what may be taught, how it shall be taught, and <u>who may be admitted to study</u>.** *(Garcia vs. The Faculty Admission Committee, Loyola School of Theology, 68 SCRA 277, citing Justice Frankfurter's concurring opinion in Sweezy v. New Hampshire, 354 US 234, 263 [1957])*.

1.2 **Who may be admitted to the study – also refers to our relationship with the student.**

"Whoever receives one such child in My Name, receives Me."
Matthew 18:5

Other than the parent, the school and the teacher would be the single most important factor in determining the child's achievement.

"Certainly, it is the teacher who passionately dedicates herself or himself to the selfless sacrifice of educating the young that spells the real difference in the development of this nation. Because it is <u>the promise of a good education</u> for all that makes it possible for any child to transcend the barriers of race, social class, or background and achieve their God-given potential."

Eric Mallonga, Manila Times "Double Take" weekly column, 21 July 2008. http://www.manilatimes.net/national/2008/july/21/yehey/opinion/20080721opi7.html

1.3 The State's Role

As *parens patriae* (e.g., father of his country; parent or guardian of his country), the State has the authority to provide and ensure that persons, particularly its citizens, enjoy their fundamental rights as human beings.

In respect of the chil, the best interest of the said child shall be the paramount consideration in all actions concerning them. As such, the State shall provide special protection to children from all forms of abuse, neglect, cruelty, exploitation and discrimination. (Sec. 2, Rep. Act No. 7610, Special Protection of Children Act against Abuse, 1992).

2. LAWS TO PROTECT THE INTEREST OF THE CHILD:

2.1 Republic Act No. 7610. "An Act for the Special Protection of Children Against Abuse, Exploitation and Discrimination Act, provides special protection to children from all forms of abuse, neglect, cruelty exploitation and discrimination and other conditions, prejudicial their development; provide sanctions for their commission and carry out a program for prevention and deterrence of and crisis intervention in situations of child abuse, exploitation and discrimination."

Salient features:

- The State shall intervene on behalf of the child when:
  (a) the parent, guardian, **teacher** or person having care or custody of the child **fails or is unable to protect the child against abuse, exploitation and discrimination; or**
  (b) **when such acts against the child are committed by** the said parent, guardian, **teacher** or person having care and custody of the same.
- Punishable acts:
  (1) Child Prostitution and other sexual abuse;
  (2) Child trafficking;
  (3) Obscene publications and indecent shows;
  (4) Other acts of abuses; and
  (5) Circumstances which threaten or endanger the survival and normal development of children.
- Section 27. *Who May File a Complaint.* - Complaints on cases of unlawful acts committed against the children as enumerated herein may be filed by the following:
  (a) Offended party;
  (b) Parents or guardians;
  (c) Ascendant or collateral relative within the third degree of consanguinity;
  (d) Officer, social worker or representative of a licensed child-caring institution;
  (e) Officer or social worker of the Department of Social Welfare and Development;
  (f) Barangay chairman; or
  (g) At least three (3) concerned responsible citizens where the violation occurred
- Section 28. *Protective Custody of the Child.* - The offended party shall be immediately placed under the protective custody of the Department of Social Welfare and Development pursuant to Executive Order No. 56, series of 1986. In the regular performance of this function, the officer of the Department of Social Welfare and Development shall be free from any administrative, civil or criminal

liability. Custody proceedings shall be in accordance with the provisions of Presidential Decree No. 603.

- Section 29. *Confidentiality.* - At the instance of the offended party, his name may be withheld from the public until the court acquires jurisdiction over the case. It shall be unlawful for any editor, publisher, and reporter or columnist in case of printed materials, announcer or producer in case of television and radio broadcasting, producer and director of the film in case of the movie industry, to cause undue and sensationalized publicity of any case of violation of this Act which results in the moral degradation and suffering of the offended party.
- Section 30. *Special Court Proceedings.* - Cases involving violations of this Act shall be heard in the chambers of the judge of the Regional Trial Court duly designated as Juvenile and Domestic Court.

2.2 Republic Act No. 9262. "Anti-Violence Against Women and Children." –

Salient features:

- **Violence against women and their children"** refers to any act or a series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harrasment or arbitrary deprivation of liberty. **It includes, but is not limited to, the following acts:**

"Physical Violence"
"Sexual violence"
"Psychological Violence"
"Economic Abuse"

- **"Psychological violence"** - acts or omissions causing or likely to cause mental or emotional suffering of the victim such as but not limited to intimidation, harassment, stalking, damage to property, public ridicule or humiliation, repeated verbal abuse and mental infidelity. It includes causing or allowing the victim to witness the physical, sexual or psychological abuse of a member of the family to which the victim belongs, or to witness pornography in any form or to witness abusive injury to pets or to unlawful or unwanted deprivation of the right to custody and/or visitation of common children.
- **"Economic abuse"** - refers to acts that make or attempt to make a woman (or child) financially dependent which includes, but is not limited to the following:
  - withdrawal of financial support or preventing the victim from engaging in any legitimate profession, occupation, business or activity;
  - deprivation or threat of deprivation of financial resources and the right to the use and enjoyment of the conjugal, community or property owned in common;

- destroying household property;
- solely/controlling the victims' own money or properties

- SEC. 8. **Protection Orders**.- A protection order is an order issued under this act for the purpose of preventing further acts of violence against a woman or her child specified. Purpose: to safeguard victim from further harm, minimizing any disruption in the victim's daily life, and facilitating the opportunity and ability of the victim to independently regain control over her life. The provisions of the protection order shall be enforced by law enforcement agencies. The protection orders that may be issued under this Act are the Barangay Protection Order (BPO), Temporary Protection Order (TPO) and Permanent Protection Order (PPO), for the following acts -
  - Prohibition of the respondent from threatening to commit or committing, personally or through another, any of the acts mentioned in Section 5 of this Act;
  - Prohibition of the respondent from harassing, annoying, telephoning, contacting or otherwise communicating with the petitioner, directly or indirectly;
  - Removal and exclusion of the respondent from the residence of the petitioner, regardless of ownership of the residence;
  - Directing the respondent to stay away from petitioner child from the residence, school, place of employment, or any specified place frequented by the petitioner/child
  - Directing respondent to allow petitioner/child to sue automobile and other essential personal effects,
  - Granting a temporary or permanent custody of a child/children to the petitioner;
  - Directing the respondent to provide support to the woman and/or her child if entitled to legal support.
- Sec. 25. ***Public Crime***. – Violence against women and their children shall be considered a public offense which may be prosecuted upon the filing of a complaint by any citizen having personal knowledge of the circumstances involving the commission of the crime
- SEC 34. ***Persons Intervening Exempt from Liability***. – In every case of violence against women and their children as herein defined, any person, private individual or police authority or barangay official who, acting in accordance with law, responds or intervenes without using violence or restraint greater than necessary to ensure the safety of the victim, shall not be liable for any criminal, civil or administrative liability resulting therefrom.

2.3 Custody battles between parents –

Prescinding from its special parental authority, the School may implement rules and regulations to ensure the academic and emotional welfare of the child within the school premises, such as:

(a) that the School be informed of whom among the parents have legal custody of the child;
(b) should the separation be merely de facto (no court case as yet), then the estranged parents will have to determine who should have custody and the right to fetch the child from school upon dismissal of class;

(c) the School may impose a restriction on visitation of the child by the parents during class hours without prior arrangement;
(d) other ancilliary services; and such other matters relative to the foregoing

Records or grades may be released to parents or guardians without prior approval of student, if student is a minor. Note as regards separated parents -

- Civil code: father has primary parental authority
- Family code: joint parental authority exercised by both mother and father

3. RIGHT TO GRADUATE AND WHERE STUDENT FAILS TO PAY TUITION FEES/OTHER CHARGES

3.1 GENERAL PRINCIPLE: A student has a right to enroll when he meets standards set by school, and his enrollment shall continue for as long a period as he is expected to complete his course in the school**.**

EXCEPTIONS WHEN A STUDENT MAY BE REFUSED RE-ADMISSION: (Sec. 79 of the proposed Manual of Regulations for Private Higher Education [MORPHE]). A student forfeits his right to continue his studies in the following instances -

- Failure to meet financial obligations
- Student fails to comply with academic requirements
- Student found guilty of behavioral infractions
- Closure of the program or closure of the school itself
- Health reasons

3.2 NON-PAYMENT OF TUITION AND OTHER SCHOOL FEES

Per Atty. Ulan Sarmiento's book, in order to validly drop student on account of non-payment of tuition and other fees, the following should be present:

- continuous failure to pay on the part of student
- student must not have been permitted to stay in school up to last month without settling financial obligation
- formal written demand for payment of fees
- despite demand and lapse of time provided in letter, still fails to pay

3.3 NO-EXAM NO PERMIT POLICY

Par. 119, Manual of Information for Private Schools, 6th ed 1960 – "This Office disapproves the practice of excluding from the final examinations students who have been permitted to remain in school up to the last month of the school year or term without having settled their financial obligations. When a student fails to meet his financial obligations, the school should drop him from the rolls**.** But when he is allowed to remain in school until the end of the term, he should not be deprived of the examinations. **The school may, however, withhold from the student his final grades in such examinations until he has completely settled his tuition and other accounts with the school; provided**

that the grades of such a student are duly recorded and submitted with the rest of the students on the prescribed forms.

Sec.99 of the 2008 Manual of Regulations for Private Higher Education (MORPHE). *Denial of Final Examinations; withholding of grades, and refusal to re-enroll*. -- No higher education institution shall deny final examinations to a student who has outstanding financial or property obligations, including unpaid tuition and other school fees corresponding to the school term. However, the institution may withhold the final grades or may refuse re-enrollment of such student. PROVIDED THAT, in case of withholding of final grades, the final grades are duly recorded and submitted together with the final grades of the rest of the students in prescribed form.

3.4 CASES ON NON-PAYMENT TUITION FEES:

Khristine Rea M. Regino vs. Pangasinan Colleges of Science and Technology, et. al., supra**. -** where a student was required to pay for tickets on a fund raising campaign "Rave Party and Dance Revolution", intended for construction of tennis and volleyball courts. As part of its reciprocal obligations under the enrolment contract, the school informs the students of the itemized fees they are expected to pay. Consequently, it cannot, after the enrolment of a student, vary the terms of the contract. It cannot require fees other than those it specified upon enrolment.

CONTRA: Crystal vs. Cebu International School, 356 SCRA 296 [04 April 2001] **–** The School imposed the payment of a "land purchase deposit" in the amount of P50,000.00 per student to be used for the "purchase of a piece of land and for the construction of new buildings and other facilities xx to which the School would transfer to and occupy after the expiration of its lease contract over the present site. Said amount was refundable after the student graduated or left the school.

The Supreme Court held that the imposition of the P50,000.00 deposit was valid, inasmuch as the imposition of the fee was made *only after prior consultation and approval by the parents***.**

3.5 CASE: May a school discipline a student for a misconduct committed outside school premises and beyond school hours?

(Angeles vs. Sison, 112 SCRA 26)

In this case, a professor of the Far Eastern University was assaulted by his students during a birthday celebration of a fellow teacher at the Oak Barrel Restaurant in Quiapo, after school hours. Upon complaint filed by the professor, FEU conducted an investigation and the student argued that it was outside school premises.

The Supreme Court held that "the school retains its powers to compel its students in-campus or off-campus to a norm of conduct compatible with their standing as members of the academic community. xxx. The determinative factor here is not the location, but the effect of the incident upon the morals and efficiency of the school, and whether it is adverse

to the school's good order and welfare, and advancement of its students.

The instances when the school might be called upon to exercise its power of discipline over its students for acts committed outside the school and beyond school hours are the following:

(a) in cases of violations of school policies or regulations occurring in connection with a school sponsored activity off-campus; or
(b) in cases where the misconduct of the student involves his status as a student, or affects the good name or reputation of the school

3.6 FRATERNITY RUMBLES:

DE LA SALLE UNIVERSITY VS. COURT OF APPEALS, G.R. No. 127980; 19 December 2007. -- Fraternity rumble resulting in charge and counter-charge of DLSU students belonging to DLSU and College of St. Benilde; Tau Gamma Phi and Domino Lux Fraternity. James Yap and three others hurt**.**

DLSU and CSB jointly expelled the Tau Gamma students, who thereafter petitioned the RTC to allow them to continue their schooling. RTC issued an Order in favor of the students, to which DLSU/CSB refused to follow.

SUPREME COURT RULING: Academic freedom upheld.

"It cannot be gainsaid that the School has an interest in teaching the student discipline – a necessary, if not indispensable, value in any field of learning. Private respondents Bungubung, Reverente and Valdes do not deserve to claim a venerable institution as their own, for they may foreseeably cast a malevolent influence on the students currently enrolled, as well as others who come after them. It must be borne in mind that universities are established, not merely to develop the intellect and skills of studentry, but to inclucate lofty values, ideals and attitudes; nay, the development or flowering of the total man."

Note: While the guilt of private respondents Bungubung, Reverente and Valdes was proved by DLSU/CSB by substantial evidence, e.g., that they had actually inflicted physical injuries upon the victims-students, the penalty of EXPLUSION was considered as DISPROPORTIONATE to their misdeed. Each of the two mauling incidents lasted only for a few seconds, and the victims did not suffer serious injury. ONLY FOR EXCLUSION.

B. THE SCHOOL AND ITS PERSONNEL
WHO WILL TEACH/WHO WILL BE HIRED, AND THE EXERCISE OF MANAGEMENT PREROGATIVES

1. Preliminary: Management prerogatives

The employer is allowed to control the variables in business operations, to enhance the chances of making a profit – otherwise termed as "the elbow room in the quest for profits".[1] In its quest for profits, management may exercise its management prerogatives --- which include the whole sphere of working conditions, such as hiring, work assignments, working methods, time, place and manner of work, tools to be used, processes to be followed, supervision and discipline of workers, and termination.[2]

1.1 ELEMENTS: Valid exercise of management prerogatives

The free will of the management to conduct its own affairs to achieve its purpose cannot be denied, PROVIDED THAT THE SAME IS EXERCISED:

- **IN GOOD FAITH (BONA-FIDE IN CHARACTER**),
- FOR THE **ADVANCEMENT OF THE EMPLOYER'S INTEREST**; AND
- **NOT TO CIRCUMVENT THE RIGHTS OF THE EMPLOYEES**. (Capitol Medical Center vs. Meriz; San Miguel Brewery and Union Carbide cases).

2. Non-compete clauses in employment contract; prohibition against teaching in another school.

Non-compete agreements are increasingly being used by employers to protect themselves by prohibiting or limiting their employees and/or former employees from working for a competitor, or from misappropriating or divulging trade secrets or other proprietary data, or unfairly solicit former customers to their own benefit, to the prejudice of the employer.

While it is true that said non-compete and similar clauses may restrict an employee's constitutional right to seek gainful employment (akin to a property right), both Philippine and American courts also recognize the need to protect the employer's interests in trade secrets[3] and customer contacts. This must be so, because the former employee – in whom the employer had invested time, training and other resources -- could potentially cause significant business losses to the employer if he/she is allowed to work with a competitor or set up his/her own business upon resignation or termination from the employer's business.

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[1] Chu vs. NLRC, 232 SCRA 764

[2] San Miguel Brewery vs. Ople, 170 SCRA 25; Caltex Refinery vs. NLRC, 246 SCRA 271.

[3] Trade secret has been defined as "information, including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, or process which is used in one's business and which gives one opportunity to obtain advantage over competitors who do not know or use it." (Black's Law Dictionary, De Luxe 5th ed., 1979, citing Rimes vs. Club Corp of America, Tex. Civ. App., 542 S.W.2d 909, 913);

Thus, the validity of prior restraints upon trade or employment was upheld in the cases of Ollendorf vs. Abrahamson[4] and Red Line Transportation Co. vs. Bachrach Motor Co.[5], **where the same is not contrary to public welfare, and the restraint is reasonably necessary to afford a fair and reasonable protection to the contracting parties**. Hence, the Supreme Court stated:

> *"We adopt the modern rule that the validity of restraints upon trade or employment is to be determined by the instrinsic reasonableness of the restriction in each case, rather than by any fixed rule, and that such restrictions may be upheld when not contrary to the public welfare and not greater than is necessary to afford a fair and reasonable protection to the party in whose favor it is imposed." (Ollendorf vs. Abrahamson, ibid.)*
>
> *"The test of validity is whether, under the particular circumstances ofmthe case and considering the nature of the particular contract involved, the restraint is not only reasonably necessary for the protection of the contracting parties but will not affect the public interest or service." (Red Line Transportation, ibid.)*

The following non-compete clauses were generally considered as valid and falling within the test of reasonableness, to wit: (a) those which provide limitations on employment to a specific trade or business similar or competitive to the former employer's business within a specific timeframe after employment; (b) those which provide a limit to the geographical scope of practice, viz., no similar business within 3 miles from any franchise of the former employer; (c) those that prohibit the former employee from soliciting customers with whom the employer has an on-going relationship or which the former employee had dealt with directly [this is akin to conflict-of-interest]; and (d) restrictions on taking or using the employer's trade secrets, among others.

Dator vs. UST, Rev. Tamerlane Lana, And Rev. Rodel Aligan, 31 Aug. 2006

Upon discovery of employment with the Ombudsman, UST converted Dator's full time faculty status into one of part-time. Dator filed a case, alleging that deloading is in bad faith and in contravention of his security of tenure rights and of CBA provisions.

Supreme Court decision: Faculty Code explicity states that all faculty members must submit each semester a statement of number of teaching hours per week to be rendered in other institutions and/or daily hours of work outside the university. The rationale is unmistakably to maintain UST's quality of education and to ensure that government service is not jeopardized. Hence, there is facutal basis for deloading.

[4] 38 Phil. 585 [1918]
[5] 67 Phil. 77

New case on violation of exclusive teaching policy: MORENO VS. SAN SEBASTIAN COLLEGE-RECOLETOS, MANILA, 550 SCRA 415 [28 MARCH 2008] –

Faculty admitted having failed to secure prior permission before teaching in other schools, in violation of faculty manual. Defense: need to augment income due to financial difficulty note: 1st time offender; voluntary admission of guilt; faculty manual penalty is dismissal.

Supreme Court however ruled that such misconduct FALLS BELOW the required level of gravity that would warrant dismissal as a penalty. Moreover, willful disobedience of employer's lawful order as a just cause for termination must comply with the element that the willfulness is characterized by a "wrongful and perverse attitude." The School failed to prove that the faculty member indeed harbored perverse or corrupt motivations in violating the aforesaid school policy. Note that the faculty member: (a) admitted the guilty; and (b) had explained in detail her role as sole breadwinner and the grave financial conditions of her family necessitating her engagement in illicit teaching activities in other schools to augment her income.

3. CONTRACTING OUT OF SERVICES.
(Contracts With Security/Janitorial Agencies;
valid independent contractor vs. labor-only contractor)

General rule: Management may contact out services in the exercise of its management prerogatives.

Doctrinal case: Asian Alcohol Corporation vs. NLRC, 305 SCRA 416, at 435-436 [1999], cf. Serrano vs. NLRC, G.R. No. 117040 [27 Jan 2000]). – The Supreme Court has held in a number of cases that an employer's good faith in implementing a redundancy program is NOT necessarily destroyed by the availment of the services of an independent contractor, to replace the services of the terminated employees. **The reduction of employees in a company made necessary by the introduction of the services of an independent contractor is justified when the latter is undertaken in order to effectuate more economic and efficient methods of production**. Burden of proof is thus on the complaining employees to show proof that the management acted in a malicious or arbitrary manner in engaging the services of an independent contractor to do a specific activity. Absent such proof, the Supreme Court has no basis to interfere with the bona fide decision of management to effect a more economic and efficient methods of production.

MERALCO vs. Quisumbing, 22 Feb 2000 -- The added requirement of consultation imposed by the Secretary of Labor in cases of contracting out for six months or more was rejected by the Supreme Court.

> "Suffice it to say that the employer is allowed to contract out services for six months or more. However, a line must be drawn between management prerogatives regarding business operations per se, and those which affect the rights of the employees. In treating the latter, the employer should see to it

that its employees are at least properly informed of its decision or modes of action in order to attain harmonious labor-mgmt relationship.

Management cannot be denied the faculty of promoting efficiency and attaining economy by a study of what units are essential for its operations. It has the ultimate determination whether services should be performed by its personnel or contracted out to outside agencies.

While there should be mutual consultation, eventually deference is to be paid to what management decides. Contracting out of services is an exercise of business judgment or management prerogative; Absent proof that management acted maliciously or arbitrarily, the Court will not interfere in the exercise of such judgment by the employer."

3.1 General Rule: Employees of an independent contractor are not your employees.

3.2 Elements: Article 106, Labor Code; Impl Rules and Reg, S8R8B3. See also: DOLE Dept. Order No. 18-02 series of 2002.

- There is a job-contracting permissible by law where the contractor/agency carries on an INDEPENDENT business and undertakes the contract work on his ACCOUNT, under his own RESPONSIBILITY, using his own MANNER AND METHODS, FREE from the control of the principal in all matters connected with the performance of work excepting the results thereof.

- He has his own CAPITAL in the form of TOOLS, EQUIPMENT, MACHINERY, WORK PREMISES, and that the agreement between the contractor and principal assures the former's employees of ALL RIGHTS AND BENEFITS under the law.

3.3 Effect:

- **If labor only contracting**: illegal. The employer is deemed the DIRECT employer and is made liable to the employees of the contractor for a more comprehensive purpose. The labor-only contractor is deemed merely an agent.

- **If job-contracting**: legal. The employer is considered an INDIRECT EMPLOYER, and is made liable to the employees of the contractor for a more limited purposes, viz.: payment of unpaid wages and other monetary claims.

4. **HIRING OF PROBATIONARY FACULTY EMPLOYEES**.

Probationary employees are those who are hired generally for regular positions but are placed on a probationary status for a period of 6 months (as a general rule). May become regular once he has qualified as such in accordance with reasonable standards made known to him at the time of hiring. They are considered regular if they are allowed to work beyond the probationary period.

4.1 DEFINITION OF PROBN. EMPLOYMENT - exists where the employee: (Memory Aid: ETR)

E 1. Upon his **ENGAGEMENT**;

T 2. Is made to undergo a **TRIAL PERIOD** during which the employer determines his fitness to qualify for regular employment;

R 3. Based on **REASONABLE STANDARDS** made known to him at the time of his engagement.

4.2 RATIONALE BEHIND PROBN. EMPLOYMENT

To afford the employer an opportunity to observe the fitness of the probationary employee at work, and to ascertain whether he will become an efficient and proper employee (International Catholic Migration vs. NLRC, 169 SCRA 606)

Justification for right of employer to fix a probationary period of employment: Proceeds from the valid exercise of management prerogatives, viz., the right to choose who will be hired. (Intl. Catholic Migration, ibid.)

4.3 AS TO LENGTH OF TIME:

General Rule: Period of probationary employment is generally six (6) months

Exceptions to General Rule:

- Learnership/apprenticeship period (Century Canning vs. CA, 530 SCRA 501 [Aug. 2007]).
- Three years in case of teachers (Fr. Pedro Escudero vs. Office of President, 172 SCRA 783; Biboso vs. Victorias Milling, 76 SCRA 250)
- When parties agree to a longer term by virtue of company policy or when the same is required by the nature of the work (Ver Buiser vs. GTE Yellow Pages Directories, 131 SCRA 151)
- Extension of the probationary period by agreement of the parties (Mariwasa vs. Leogardo, 169 SCRA 465)

4.4. SECURITY OF TENURE OF PROBATIONARY EMPLOYEE IS LIMITED TO THE PERIOD OF PROBATION. –

Woodbridge School vs. Pe Benito, 570 SCRA 164 (2008) – A probationary employees enjoy security of tenure in the sense that during their probationary employment, they cannot be dismissed except for cause or when he fails to qualify as a regular employee in accordance with reasonable standards made known to him or her at the time of engagement. The probationary employee's security of tenure is limited to the period of probation.

NOTE:

1. Completion of probationary period does not automatically qualify a teacher to become a permanent employee of the University. -- **Lacuesta v. Ateneo De Manila University, et al., 477 SCRA 217 [2005].**

   "*Completing the probation period does not automatically qualify her to become a permanent employee of the university. Petitioner could only qualify to become a permanent employee upon fulfilling the reasonable standards for permanent employment as faculty member. Consistent with academic freedom and constitutional autonomy, an institution of higher learning has the prerogative to provide standards for its teachers and determine whether these standards have been met.* ***At the end of the probation period, the decision to re-hire an employee on probation, belongs to the university as the employer alone.***

   We reiterate, however, that probationary employees enjoy security of tenure, but only within the period of probation. Likewise, an employee on probation can only be dismissed for just cause or when he fails to qualify as a regular employee in accordance with the reasonable standards made known by the employer at the time of his hiring. ***Upon expiration of their contract of employment, academic personnel on probation cannot automatically claim security of tenure and compel their employers to renew their employment contracts.*** *In the instant case, petitioner, did not attain permanent status and was not illegally dismissed. As found by the NLRC, her contract merely expired."*

2. ***IMPORTANT: NEW CASE OF YOLANDA MERCADO VS. AMA COMPUTER COLLEGE PARANAQUE (G.R. 183572, 13 APRIL 2010) HAS NOW OVERTURNED THE LACUESTA VS. ATENEO CASE. EXPIRATION OF TERM AS A CAUSE FOR NON-RENEWAL OF PROBATIONARY CONTRACT IS NO LONGER ALLOWED****.*

   The fixed-term character of employment essentially refers to the period agreed upon between the employer and the employee; employment exists only for the duration of the term and ends on its own when the term expires. In a sense,

employment on probationary status also refers to a period because of the technical meaning "probation" carries in Philippine labor law – a maximum period of six months, or in the academe, a period of three years for those engaged in teaching jobs. Their similarity ends there, however, because of the overriding meaning that being "on probation" connotes, i.e., a process of testing and observing the character or abilities of a person who is new to a role or job.

To be sure, nothing is illegitimate in defining the school-teacher relationship in this manner. The school, however, cannot forget that its system of fixed-term contract is a system that operates during the probationary period and for this reason is subject to the terms of Article 281 of the Labor Code.

Unless this reconciliation is made, the requirements of this Article on probationary status would be fully negated as the school may freely choose not to renew contracts simply because their terms have expired. The inevitable effect of course is to wreck the scheme that the Constitution and the Labor Code established to balance relationships between labor and management.

Given the clear constitutional and statutory intents, we cannot but conclude that in a situation where the probationary status overlaps with a fixed-term contract not specifically used for the fixed term it offers, Article 281 should assume primacy and the fixed-period character of the contract must give way. This conclusion is immeasurably strengthened by the petitioners' and the AMACC's hardly concealed expectation that the employment on probation could lead to permanent status, and that the contracts are renewable **unless the petitioners fail to pass the school's standards**.

4.5 Is it necessary to inform the probationary employee that he has to follow company rules and regulations? No. Such requirement strains credulity. **(Philippine Daily Inquirer vs. Magtibay, 528 SCRA 355 [2007]).**

The suggestion that Magtibay ought to have been made to understand during his briefing and orientation that he is expected to obey and comply with company rules and regulations strains credulity for acceptance. The CA's observation that "nowhere can it be found in the list of Basic Responsibility and Specific Duties and Responsibilities of respondent Magtibay that he has to abide by the duties, rules and regulations that he has allegedly violated" **is a strained rationalization of an unacceptable conduct of an employee**. Common industry practice and ordinary human experience do not support the CA's posture. **All employees, be they regular or probationary, are expected to comply with company-imposed rules and regulations, else why establish them in the first place.**

Probationary employees unwilling to abide by such rules have no right to expect, much less demand, permanent employment..

C. BASIC PRINCIPLES IN DISCIPLINARY CASES

1. Code of Conduct vs. security of tenure Balancing of interests in disciplinary cases

1.1 Labor's interests

A worker's right to labor is recognized by the Constitution as a property right. As such, an employee cannot be deprived of his work without just cause or due process (Esmalin vs. NLRC; Cocoland vs. NLRC).

1.2 Management's interests

On the other hand, the employer is allowed, in the exercise of its management prerogatives, to promulgate rules and regulations, and to enforce/implement them for the efficient operations of the business. Moreover, the law also recognizes the right of the employer to expect from its workers not only good performance, adequate work and diligence, but also good conduct and loyalty.

1.3 Balancing of interests:

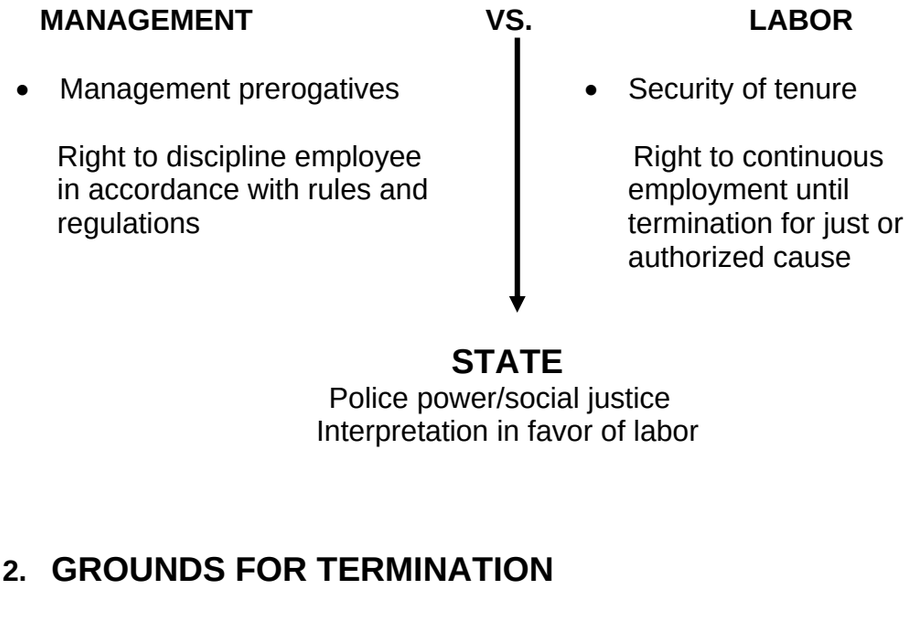
Thus, in the context of implementing the rules and regulations for the conduct of human relationships and work performance within the business, certain parameters will have to be observed:

a) Burden of proof is upon the employer to show just cause for the imposition of a penalty upon the employee. Hence, there must exist **substantial evidence** to prove just or authorized cause of termination. Proof beyond reasonable doubt not required in administrative cases.

New case: Failure of employer to submit documents which are presumed to be in its possession, inspite of an Order to do so, implies that the presentation of said documents is prejudicial to its case. (De Guzman vs. NLRC, 540 SCRA 210 [Dec. 2007]).

b) In the imposition of penalty, whether suspension or termination, the same must be commensurate to the offense committed.

c) Thus: for valid termination, there must both be **JUST CAUSE AND DUE PROCESS**. (exception: Wenphil/Serrano/Agabon ruling, see Section 4 hereunder)



2. GROUNDS FOR TERMINATION

2.1 JUST CAUSES FOR TERMINATION (Art. 282, LC)

2.1.2 Serious misconduct

- Defined as improper or wrong conduct, a transgression of a definite rule of action, a forbidden act or dereliction of duty which is willful in character and implies wrongful intent, and not mere error in judgment.

- For misconduct or improper behavior to be a just cause for dismissal, the same must be related to the performance of the employee's duties and must show that he has become unfit to continue working for the employer.

Supreme Steel Pipe Corp vs. Bardaje, 522 SCRA 155 [April 2007]. -- Although fighting within company premises may constitute serious misconduct, not every fight w/n company premises in which an employee is involved automatically warrant dismissal from service.

Punzal vs. ETSI Technologies, 518 SCRA 66 [March 2007]. – Halloween invitation sent out by employee for office trick-or-treating without clearance from higher management. Email remarks deemed just cause for misconduct. Differentiated from Samson vs. NLRC where misconduct committed was not related with employee's work as offensive remarks were verbally made during informal Christmas gathering.

Sim vs. NLRC, 534 SCRA 515 (2007); read also: Tirazona vs. CA, 548 SCRA 560 (2008); Serious misconduct; termination of managerial employee. -- Manager's stubbornness, arrogance, hostility & uncompromising stance, reading confidential letter not

intended for her (but about her). When an employee accepts promotion to a managerial position, or to a position requiring full trust and confidence, she gives up some of the rigid guarantees available to ordinary workers – infractions, which if committed by other would be overlooked or condoned / penalties mitigated, may visited with more severe disciplinary action life committed by managerial employee.

Citibank NA vs. NLRC, 544 SCRA (2008); serious misconduct; attitude problem e.g., negative attitude - When an employee, despite repeated warnings from the employer, obstinately reuses to curtail a bellicose inclination such that it erodes the morale of the co-employees, the same may be a ground for dismissal for serious misconduct. Acts destructive of co-employees' morale may be considered SERIOUS MISCONDUCT.

Bughaw Jr. Vs. Treasure Island, 550 SCRA 307 [2008]; serious misconduct; drug abuse -- The Supreme Court has taken judicial notice of scientific findings that drug abuse can damage the mental faculties of the user. It is beyond question that any employee under the influence of drugs cannot possibly continue doing his duties without posing a serious threat to the lives and property of his co-workers, and even his employer.

An employee's statements given to the police during investigation is evidence which can be considered by the employer against another employee, especially so if the latter did not appear in the scheduled admin hearing to present his side.

2.1.2 Gross insubordination

Elements: (a) employee's assailed conduct must be willful or intentional; (b) willfulness characterized by wrongful or perverse attitude; (c) the order violated must be reasonable, lawful and made known to the employee; and (d) the order must pertain to the duties which the employee has been engaged to discharge.

New case when manager contravenes VP's directive: Although a managerial employee is clothed with discretion to determine what was in the best of the company, **said managerial discretion is not without limits.** Its parameters were contained the moment the discretion was exercised, and then opposed by the immediate superior/officer for being against the policies and welfare of the company. Hence, any action in pursuit of the discretion thus opposed had ceased to be discretionary and could be considered as willful disobedience. (ePacific Global Contact Center vs. Cabansay, 538 SCRA 498 [23 Nov. 2007]).

2.1.3 Gross and habitual neglect of duties

a) gross negligence: connotes want of care in the performance of one's duties, or absence of even slight care or diligence as to

amount to a reckless disregards of the safety of the person or property

b) habitual neglect: implies repeated failure to perform one's duties over a period of time

c) willful neglect of duties: imply bad faith on the part of the employee in failing to perform his job, to the detriment of the employer and the latter's business

d) Totality of infractions ruling: where the employee has been found to have repeatedly incurred several suspensions or warnings on account of violations of company rules and regulations, the law warrants their dismissal as it is akin to "habitual delinquency". It is the totality, not the compartmentalization of company infractions that the employee had consistently committed, which justified the penalty of dismissal. (Meralco vs. NLRC, 263 SCRA 531 [24 Oct 1996]).

New case: Past infractions of which an employee had been duly penalized cannot be taken collectively as a justification for the dismissed from service of the employee. (Acebedo Optical vs. NLRC, 527 SCRA 655 [July 2007]).

e) Absences: Habitual absenteeism and excessive tardiness are forms of neglect of duty on the part of the employee and constitute just and sufficient cause for termination.

New case: The best evidence of AWOL are the certified true copies of daily time records. (NS Transport Services vs. ZETA, 520 SCRA 261 [April 2007]).

Arsenio Quiambao vs. Manila Electric Company, GR No. 171023, 18 December 2009. -- Both Labor Arbiter and NLRC found that petitioner's unauthorized absences and repeated infractions of company rules on employee discipline manifest gross and habitual neglect of duty that merited the imposition of the superme penalty of dismissal from work. In addition however, the NLRC awarded separation pay to the complainant. On appeal, Court of Appeals affirmed the findings of the labor tribunals **and further concluded that petitioner's infractions are worse than inefficiency; they border on dishonesty constituting serious misconduct**. Thus, the CA Decision was elevated to the Supreme Court on petition for review on certiorari.

Supreme Court ruling:

As to first issue, the Supreme Court held that a series of irregularities when put together may constitute serious misconduct. We also held that gross neglect of duty becomes serious in character due to frequency of instances. Serious misconduct is said to be a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, willful in character, and indicative of wrongful intent and not mere error of judgment. Oddly, petitioner never advanced any valid reason to

justify his absences. Petitioner's intentional and willful violation of company rules shows his utter disregard of his work and his employer's interest. Indeed, there can be no good faith in intentionally and habitually incurring unexcusable absences."

As to second issue, petitioner Quiambao is **not entitled to separation pay**. The Supreme Court reiterated that: "(L)abor adjudicatory officials and the CA must demur the award of separation pay based on social justice when an employee's dismissal is based on xxx grounds under Art. 282 of the Labor Code that sanction dismissals of employees. They must be most judicious and circumspect in awarding separation pay or financial assistance as the constitutional policy to provide full protection to labor is not meant to be an instrument to oppress the employers. The commitment of the Court to the cause of labor should not embarrass us from sustaining the employers when they are right, as here. **In fine, we should be more cautious in awarding financial assistance to the undeserving and those who are unworthy of the liberality of the law.**

f) Abandonment of work: the deliberate and unjustified refusal of an employee to resume his employment. It is a form of neglect of duty, and hence, a just cause for termination by the employer.

For a valid finding of abandonment, two factors must be present:: (a) the failure to report for work or absence without valid or justifiable reason; and (b) a clear intention to sever the employer-employee relationship, with the second as the more determinative factor which is manifested by overt acts from which it may be deduced that employee has no more intention to work. The intent to discontinue the employment must be shown by clear proof that it was deliberate and unjustified.

Uniwide Sales Warehouse vs. NLRC, 547 SCRA 220 (2008); gross negligence; abandonment. -- Failure to return to work after notice to return to work has been served DOES NOT NECESSARILY constitute abandonment. Mistaken belief of employee that the successive memoranda sent her from March-June 1998 constituted discrimination tantamount to constructive dismissal, should not lead to a drastic conclusion that she has chosen to ABANDON work.

Asian Terminal Inc. vs. NLRC, 541 SCRA 105 (2007); gross negligence; absences - Absences incurred by an employee who is prevented from reporting to work due to illegal detention (to answer criminal charges) is excusable, especially so that criminal charge against him is not at all supported by sufficient evidence.

Hilton Heavy Equipment vs. Ananias Dy, G.R. No. 164860, 02 February 2010. -- Anianas Dy, hired as personal bodyguard of company president Lim, mauled a co-employee Echiverri within company premises, in presence of president and in defiance of the latter's order to stop the fight. Dy even threatened to kill the co-employee Echiverrie, and uttered that if given monetary consideration, he will cease working in the company. Thereafter Dy

did not report for work anymore. A month after, company summoned Dy and gave him P120,000.00 as separation pay. One month after, Dy filed illegal termination case against the company stating that he did not resign nor abandon his work. Supreme Court ruling: Just cause but no due process. Separation pay of P120,000.00, although in excess of usual P30,000.00 award for nominal damages, will suffice, and excess will be considered as a voluntary and discretionary gratuity.

2.1.4 Fraud or willful breach of trust

- Fraud: the deliberate and false representation of fact, despite knowledge of its falsehood, in order to induce another who relied upon it and benefit therefrom.

- Elements of willful breach of trust leading to loss of trust and confidence: (a) the breach must be willful and not ordinary breach [hence, done knowingly and intentionally]; (b) employee holds a position of trust and confidence; (c) must be in relation to the work performed; (d) there must exist substantial evidence, and should not be based on mere surmises, speculations and conjectures.

N.B. Findings of fact made by both Labor Arbiter, NLRC and the Court of Appeals to the effect that there was no deliberate attempt on the part of the managerial employee to defraud the employer and hence, termination is illegal, is binding upon the Supreme Court. (Pfizer and Lleander vs. Galan, G.R. No. 158460, 24 August 2007).

Abelardo Abel vs. Philex Mining Corporation, G.R. No. 178976, 31 July 2009. – The first requisite for dismissal on the ground of loss of trust and confidence is that the employee concerned must be holding a position of trust and confidence. The second requisite is that there must be an act that would justify the loss of trust and confidence. Loss of trust and confidence, to be a valid cause for dismissal, must be based on a willful breach of trust and founded on clearly established facts

There are two classes of positions of trust. The first class consists of managerial employees. They are defined as those vested with the powers or prerogatives to lay down management policies and to hire, transfer, suspend, lay-off, recall, discharge, assign or discipline employees or effectively recommend such managerial actions. The second class consists of cashiers, auditors, property custodians, etc.. They are defined as those who, in the normal and routine exercise of their functions, regularly handle significant amounts of money or property.

Respondent's evidence against petitioner fails to meet this standard. Its lone witness, Lupega, did not support his affidavit and testimony during the company investigation with any piece of evidence at all. No other employee working at respondent's mine site attested to the truth of any of his statements. Standing alone,

Lupega's account of the subsidence area anomaly could hardly be considered substantial evidence. And while there is no concrete showing of any ill motive on the part of Lupega to falsely accuse petitioner, that Lupega himself was under investigation when he implicated petitioner in the subsidence area anomaly makes his uncorroborated version suspect.

2.1.5 Commission of crime by employee against employer xxx

New case: This will also include false accusation by the employee of his immediate superior of a crime such as robbery, as such is tantamount to to serious misconduct (Torreda vs. Toshiba Info Equipment Phils. 515 SCRA 133 [Feb 2007]).

2.1.6 Other analogous causes

- **INCOMPETENCE –**

  An allegation of incompetence should have a factual foundation and may be shown by weighing it against a standard, benchmark or criterion. (EDI Staff Builders vs.NLRC, 537 SCRA 409 [Oct 2007]).

- **IMMORALITY -**

  This has been defined as such conduct which conflicts with generally or traditionally held moral principles. It is akin to the phrase "moral turpitude", the term implying something immoral in itself, regardless of whether it is punishable by law or not.

  New case on common live-in relationships: Toledo vs. Toledo, 544 SCRA 27 [06 February 2008] – The Court has previously defined immoral conduct as that conduct which is "willful, flagrant or shameless, and which shows a moral indifference to he opinion of the good and respectable members of the community. In disbarment cases however, this Court has ruled that the mere fact of sexual relations between two unmarried adults is not sufficient to warrant administrative sanction for such illicit behavior. Whether a lawyer's sexual congress with a woman not his wife or without benefit of marriage should be characterized as "grossly immoral conduct" will depend on the surrounding circumstances. The Supreme Court further ruled that intimacy between a man and a woman who are not married, where both suffer from no impediment to marry, voluntarily carried on and devoid of any deceit on the part of the respondent, is neither so corrupt as to constitute a criminal act nor so unprincipled as to warrant disbarment or disciplinary against a member of the Bar. **As such, the Court cannot conclude that this act of cohabiting with a woman and betting children by her without benefit of marriage falls within the category of "grossly immoral conduct**".

- **ANTI-SEXUAL HARASSMENT LAW (Section 3, R.A. 7877)**

  Work, education or training related sexual harassment is committed by an employer, employee, manager, supervisor, agent of the employer, teacher, instructor, professor, coach, trainor or any other person who, having authority, influence or moral ascendancy over another in a work or training or education environment, demands, request or otherwise requires any sexual favor from the other, regardless of whether the demand, request or requirement for submission is accepted by the object of the Act.

  Ada's equation: SEX + POWER = SEXUAL HARASSMENT

- **SOLO PARENT'S WELFARE ACT OF 2000**

  The Solo Parents Welfare Act was enacted in 07 November 2000, in pursuance of the Constitutional policy to "promote the family as the foundation of the/ nation, strengthen its solidarity and ensure its total development."

  A perusal of the explanatory notes prepared by the sponsors[6] of said law reveals that *the ultimate goal of the passage of the act was the protection of the children's rights*, in cognizance of the fact that a solo parent who is deprived of a source of livelihood would be more economically vulnerable and less able to support the child. A "solo parent" has been defined by the Act to include *"any unmarried mother or father who has preferred to keep and rear her/his child/children instead of having others care for them or give them up to a welfare institution".*

  Toward this end, the Act makes provisions for the creation of a comprehensive package of social development and welfare services intended to support the solo parent, such as: (a) training on livelihood skill and job placement; (b) counseling services, (c) educational benefits; (d) housing benefits; and (e) medical assistance, among others.

  Of particular note regarding provisions affecting employment policies however, are the following: (a) seven (7) working days leave privilege for every year for every solo parent; (b) flexible work schedule; and **(c) prohibition against discrimination of solo parent employee with respect to the terms and conditions of employment on account of his/her status.**

[6] Senators Flavier, Sergio Osmena III and Teresita Aquino-Oreta.

3. AUTHORIZED CAUSES FOR TERMINATION (Art. 283-284, LC) Memory aid: DIRe^{2}C

3.1 ***D*isease (**separation pay of 1/2 month pay for every year of service)

- Employee must be suffering from a disease, and continued employment is prohibited by law and/or is prejudicial to his health and/or that of his co-employees;
- Disease cannot cannot be cured within a period of six (6) months, and said fact is certified by a competent public health authority
- If curable, then employer cannot terminate but may ask employee to take a leave; immediately upon restoration of normal health, employer must reinstate employee to former position.

3.2 ***I*nstallation of labor saving devices** (sepn pay: 1 mo/yr of service)

- Example: computerization of accounting and payroll system; mechanization of assembly line, etc.
- Presumption is that the employer does not have any serious business losses, as to afford the purchase of labor-saving devices.

3.3 ***Re*dundancy** (Sepn pay: 1 mo/yr of service)

Redundancy is akin to retrenchment and is another authorized cause for the termination of employees under Article 283 of the Labor Code, **through no fault of the latter**. Under this circumstance, the employer may thus validly terminate the employee because ***he has no legal obligation to keep in his payroll more employees than are necessary for the economical operation of the business***.[7]

New case: New requirements for redundancy program. Aside from the 30-day notice to both affected employee and the DOLE, as well as the separation pay of 1 month for every year of service, the Supreme Court likewise ruled that the employer must show good faith in abolishing the redundant position; and that there must be fair and reasonable criteria in ascertaining which positions are to be declared redundant. A letter merely stating the PLAN to implement redundancy program without contents as to details thereof, is not written notice to DOLE. (Caltex vs. NLRC, 536 SCRA 175 [15 Oct 2007]).

3.4 ***Re*trenchment** (Sepn. Pay: 1/2 month pay for every year of service)

Retrenchment is the termination of employment by the employer ***through no fault of the employees***, and is usually resorted to

[7] Wiltshire File Co. Inc. vs. NLRC, G.R. No. 82249 [07 February 1991].

by the employer primarily to avoid or minimize economic or business reverses during periods of business recession, industrial depression, seasonal fluctuations, re-organization or automation of the company operations.[8] Where the employer suffers serious and actual business losses, management has the final say as to whether it will continue to risk its capital or not.[9] **However, the employer bears the burden to prove his allegation of business losses**.[10]

Elements for valid retrenchment:

Under Article 283 of the Labor Code, in conjunction with Section 2, Rule XXIII of the Implementing Rules of the Labor Code, the following elements must be strictly complied with in order that the retrenchment may be considered as valid:

a) The losses expected should be substantial and not merely ***de minimis*** in extent. --
b) The substantial losses apprehended must be reasonably imminent;
c) The retrenchment must be reasonable necessary and likely to effectively prevent the expected losses; and
d) The alleged losses, if already incurred and the expected imminent losses sought to be forestalled, must be proved by sufficient and convincing evidence.[11]

This means that retrenchment must be reasonably necessary and is likely to prevent business losses which, ***if already incurred***, must be substantial, serious, actual and real, **OR** ***if only expected*** , are reasonably imminent as perceived objectively and in good faith by the employer.

In addition, the employer should have taken other measures prior or parallel to retrenchment to forestall losses, e.g., cut other costs. Thus, the Supreme Court has ruled that the retrenchment undertaken by a company to be invalid where it was shown that the company likewise continued to dispense fat executive bonuses to its officers.

Virgilio Anabe vs. AsiaKonstruct, G.R. No. 183233, 23 December 2009; financial statements as proof of serious business losses. -- Supreme Court ruling as to financial statement. – While NLRC may receive evidence on appeal, note that the burden of proof is upon the employer. Company inexplicably submitted financial statements TWO YEARS after the case was filed and pending, and ONLY AFTER it had received the adverse decision of the Labor Arbiter. The delay in the submission of the evidence should be clearly explained and should adequately prove the employer's allegations of the cause of termination. In this case, Asiakonstruct proferred no

[8] See: Sebuguero vs. NLRC, 248 SCRA 533 [1995].
[9] San Pedro Hospital of Digos, Inc. vs. Secretary of Labor, 263 SCRA 98 [1996].
[10] Guerrero vs. NLRC, 261 SCRA 301 [1996]
[11] San Miguel Jeepney Services vs. NLRC, 265 SCRA 35 [1996]

explanation behind the belated submission. Moreover, the financial statements covering period 1998-2000 was prepared only in 2001 – which begs the question of how the management knew at such date of the company's huge losses to justify Anabe's retrenchment in 1999. Lastly, SEC certification that no financial statements were submitted for the period 1998-2000, and 2003-2005, thereby lending credence to Anabe;s theory that the financial statements submitted on appeal may have been fabricated. Indeed, AsiaKonstruct could have easily submitted its financial statements during the pendency of the proceedings at the arbitral level.

3.5 ***C*essation or closure of employer's business** (1/2 month pay for every year of service)

New case: An employer is not prevented from exercising its prerogatives to close shop so long as it is done in good faith to advance its interests, and not for the purpose of defeating or circumventing the rights of the employees. (Angeles vs. Polytex Design, 536 SCRA 159 [Oct 2007]).

IMPORTANT NOTES ON PROCEDURE FOR AUTHORIZED CAUSE:

N.B.1: Notice requirement for ALL authorized causes, e.g., one month notice prior to the intended date of termination to the affected employee as well as to the Department of Labor.

The affected employees shall be entitled the following under Article 283 of the Labor Code, to wit:

a) one (1) month notice prior to the effective date of termination
b) one month (1) separation pay or one (1) month for every year of service for redundancy and installation of labor-saving devices OR one-half month for every year of service for retrenchment, closure and disease, (a fraction of at least six months being considered as a whole year), whichever is higher; and
c) Notice to the Department of Labor at least one (1) month prior to the intended date of termination.

What is the effect if the company fails to comply with the two notice requirement in termination for authorized causes?

The lack of written notice to the employees and to the DOLE does not, however, make the retrenchment illegal (as to entitle employees to backwages and separation pay) ***but is merely defective where imminent or actual serious business losses is proven***.[12]

Be that as it may, the Supreme Court imposes a penalty on the employer who fails to comply with the notice and procedural requirements, by sanctioning the employer with penalty in the amount

[12] Sebuguero vs. NLRC, 248 SCRA 533 [1995]; modified by AGABON VS. NLRC,

of P30,000.00 in accordance with the new ruling of Agabon vs. NLRC (G.R. No. 158693, 17 November 2004). [See discussion in Section 4.4 hereunder].

N.B.2: Why is the employee separated for AUTHORIZED causes is given separation pay? The law mandates that the employee be entitled to separation pay of one month at the very least or half month pay for every year of service, **because as the termination of employment was not due to causes of the employee's doing but because of the exercise of management prerogative (management decision)**.

N.B.3: BUT note that any employee who is terminated for JUST CAUSE is not entitled to reinstatement, separation pay, payment of backwages or damages.

4. PROCEDURE FOR TERMINATION:

General Rule:

The twin requirements of **NOTICE and HEARING** are the essential elements of **due process** in termination cases, which cannot be dispensed with without violating the constitutional right to due process

New Case:
In order to intelligently prepare the employees for their explanation and defenses, the notice should contain a detailed narration of the facts & circumstances that will serve as the basis for the charge against the employee – a general description of the change will not suffice. (King of Kings Transport vs. Mamac, 526 SCRA116 (29 Jun 2007)

ILLEGALITY OF THE ACT OF DISMISSAL - DISCHARGE WITHOUT JUST CAUSE:

Remedies under the Labor Code:

1. Reinstatement to his former position without loss of seniority rights.

2. Payment of **FULL** backwages corresponding to the period from his illegal dismissal up to actual reinstatement.

ILLEGALITY IN THE MANNER OF DISMISSAL - DISMISSAL WITHOUT DUE PROCESS: (AGABON RULING)

1. In any event, **NO REINSTATEMENT.**

2. However, as regards **penalty for non-compliance with due process** requirements, the newest Supreme Court ruling circa

November 2004 is that the employer shall be sanctioned with penalty of P30,000.00 in accordance with the Agabon vs. NLRC case, for failure to comply with the constitutional right to due process.

5. ON NOTICE AND HEARING
Dept. Order No. 10, Article V; IRR B5 R14 S1-11

5.1 **Two notices required**:

1st notice: ***Notice of appraisal***, which is a written notice served on the employee specifying the ground or grounds of termination, and giving the employee ***reasonable opportunity*** within which to explain his side

New cases: The first notice should contain a detailed narration of facts an dcircumstances that will serve as basis for the charge against the employee. A general description of the charge will not suffice. The notice should specifically mention which company rules, if any, are violated. **(King of Kings Transport vs. Mamac, 526 SCRA 116 [29 June 2007]),** and that the employer seeks dismissal for the act or omission charged against the employee; otherwise; the notice does not comply with the rules. (**Magro Placement vs. Hernandez, 526 SCRA 408 [04 July 2007])**

New case expounding on "Reasonable opportunity": This means every kind of assistance that management must accord to the employees to enable them to prepare adequately for their defense. **This should be construed as a period of FIVE (5) CALENDAR DAYS from receipt of notice to give the employees an opportunity to study the accusation against them, consult a union official or lawyer, gather data and evidence, and decide on the defenses they will raise against the complaint.** (King of Kings Transport, ibid.)

2nd notice: ***Notice of termination***, which is a written notice of termination served upon the employee, indicating that upon due consideration of all the circumstances, grounds have been established to justify his termination.

5.2 ***Hearing****:*

- a hearing or a conference during which the employee concerned, with the assistance of counsel if he so desires, is given the opportunity to respond to the charge, to present his evidence, or to rebut the evidence presented against him.

- note that a formal hearing (as in the manner of regular courts) is not required; only substantial evidence is necessary.

- There is no necessity for a formal hearing where an employee admits responsibility for the alleged misconduct. It is sufficient

that she be informed of the findings of management and the basis of its decision to dismiss her.

6. BURDEN OF PROOF RESTS UPON THE EMPLOYER

The employer must show that the dismissal of the employee is for just cause. Failure to do so means that the dismissal is not justified and the employee is entitled to reinstatement. In fact, as early as the case of Century Textile Mills vs. NLRC [G.R. No. 77859, 25 May 1988], a finding of the employee's participation in the criminal conspiracy cannot be made to rest solely on the unilateral declaration of one who is himself a confirmed "co-conspirator." The co-conspirator's confession must be corroborated by other competent and convincing evidence.

7. ON REINSTATEMENT:

- Where the former position is no longer available, the employee must be reinstated to an equivalent position.

- Where the reinstatement is no longer viable in view of the strained relations between the employer and employee, or if the employee decides not to be reinstated, the employer shall pay him separation pay in lieu of reinstatement

- Actual reinstatement vs. payroll reinstatement at the option of the employer; effect where the decision finding illegal termination was reversed on appeal

- END OF HANDOUTS series September 2010–

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THE OPPORTUNITY TO BE OF SERVICE TO YOU! – Ada Abad