THE BARGAINING UNIT AND THE CONFIDENTIAL EMPLOYEE

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I

In the area of labor relations, collective bargaining is one aspect and activity which has undergone significant development. From a statutory[1] concept, it has metamorphosed into a constitutional[2] one.

"To bargain collectively", the Supreme Court stated in *Bradman Company v. C.I.R.*[3], "is for the employer and labor, [acting through their respective representatives], to meet and confer promptly and expeditously and in good faith, for the purpose of negotiating an agreement with respect to wages, hours and/or other terms and conditions of employment and of executing a written contract incorporating such agreement if requested by either party, or for the purpose of adjusting any grievance or questions under such agreement xxxx."

Before this mutual obligation can be performed, the employer and labor need to resolve two crucial issues, the first of which is the determination of the bargaining unit. **Variously**, the term *bargaining* unit has been defined to be "the legal collectivity of workers for purposes of labor relations,"[4] or "a particular group of employees with a similar community of interest appropriate for bargaining."[5]

Since both private employer and laborer are charged with knowledge of relevant facts obtaining in their sector of the commercial and industrial communities, they are, barring a conflict of opinion, the parties who are reasonably expected to

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[1]C.A. 213 and R.A. 875

[2]The 1973 Constitution provides that "The State shall assure the rights of workers to self-organization, *collective bargaining*, security of tenure, and just and humane conditions of work." (see Section 9, Article II)

[3]L-24134-35, July 21, 1977, 73 O.G. No. 42, 9764, 9769. The Supreme Court has, in this case, restated Art. 253 of the Labor Code; Elizalde Rope Factory Inc. v. C.I.R., L-16419, May 30, 1963, 8 SCRA 67, 71; Angat River Irrigation System v. Angat River Workers' Union, L-10943, December 28, 1957, 102 Phil. 790, 798; of Pampanga Bus. Co., Inc. v. Pambusco Employees' Union, Inc., No. 46739, September 23, 1939, 68 Phil. 541, 542.

[4]Perfecto Fernandez, "Labor Relations Law" (Quezon City; Tala Publishing Corp., 1977), p. 24.

[5]Black's Law Dictionary, 1977, 5th ed.

determine the scope of the collective bargaining unit. Admittedly, however, the determination of the scope is an issue uneasy for the parties to conclusively resolve, not because of diversity in their opinions, but because of difference in their objectives, immediate or intermediate.

Since R.A. 875, otherwise known as the Industrial Peace Act, merely provided "appropriateness" as the sole positive guideline in the determination of the bargaining unit, the Supreme Court, in *Democratic Labor Association v. Cebu Stevedoring*[6] declared (1) will of the employees; (2) affinity and unity of employees' interest; (3) prior collective bargaining history, and (4) employment status, such as temporary, seasonal and probationary employees, as some of the criteria to be considered in the determination of the unit. In *LVN Pictures, Inc. v. Phil. Musicians Guild*[7], the Court also stated that "circumstances under which the services of employees are engaged and rendered" was another criterion. Under the broad criterion of affinity and unity of employees' interest are such factors as "substantial similarity of work and duties, or similarity of compensation and working conditions[8]", locations of work[9], and skills and responsibilities of the employees.

These criteria still serve as fundamental or functional bases in the determination of the scope of each bargaining unit, although now "the policy thrust of the Code", according to one writer[10], "is geared towards larger bargaining units to preclude the diffusion of the bargaining power of the employees and minimize the difficulty of employers who, with the existence of several bargaining units, usually spend considerable time negotiating with the different units."

The second crucial issue to resolve in the collective bargaining process is the determination of the exclusive bargaining representative. Such representative is, under the Labor Code, "any labor organization designated or selected by the majority of the employees in an appropriate collective bargaining unit[11]." The Code also recognizes as a representative "any officer or agent of such organization whether or not employed by the employer[12]."

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[6]G.R. L-10321, February 28, 1958, 103 Phil. 1103.

7L-12582 & L-12598, January 28, 1961, 110 Phil. 725, 1 SCRA 132, 136.

[8]Democratic Labor case, *supra;* LVN Pictures Inc. case, *supra*

[9]cf Phil. Labor Alliance Council v. Califronia Employees Labor Union, L-42155, May 31, 9176, 73 O.G. No. 4, 613; 71 SCRA 214.

[10]Benildo Hernandez, "Collective Bargaining Under Present Laws", (published in "Problem Areas Under the Labor Code": Proceedings of the Fourteenth Annual Institute on Labor Relations Law – 1977; ed. by Macrina Ilustre; Quezon City; U.P. Law Center), p. 9

[11]Art. 256, Labor Code

[12]Art. 212(h), Labor Code

In *U.E. Automotive Employees and Workers Union – Trade Union of the Phils. and Allied Services v. Noriel*[13], the Supreme Court stated tha a labor union organizes itself to serve as an instrumentality to conclude bargaining agreements.

Thus, the Code and jurisprudence reiterate the observation of Neil Chamberlain[14] that collective bargaining is inseparable from unionism, and that of Gil R. Carlos and Enrique Fernando that "Collective bargaining is inseparably linked with the existence of labor unions. Workers may and do organize for other purposes, but collective bargaining is the most important activity of all[15]." And because of this inseparability, the difficult and complicated issue of the scope of the bargaining unit relative to union membership nascently and renascently appears.

At this point, it is important to remember that the size of the union is not necessarily co-extensive with the size of the bargaining unit. Where a union represents two or more bargaining units within the employer unit, the union size is definitely greater than the bargaining unit sizes. Where the union's constitution and by-laws also do not restrict membership to the employer unit, like in the case of *Airline Pilots Association v. C.I.R.*16, the union, in this other instance, may assume a size greater than the bargaining unit size.

The contrary fact may altogether exist. Where there are at least two unions vying for representation rights, as in the *Democratic Labor Association* case [17], it is easy to conceive that the union sizes are smaller than the bargaining unit size. Also except where there is a closed shop, an employee may be a member of the bargaining unit without being a member of the union, thus creating another situation where the union size is smaller than the bargaining unit size. Whenever these situations exist, the Labor Code and jurisprudence nonetheless impose upon the union,

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[13]L-44350, November 25, 1976, 73 O.G. No. 13, 3611, 3616, 74 SCRA 72; see also Phil. Land-Air-Sea Labor Union v. C.I.R., 93 Phil. 747 (1953).

[14]Neil Chamberlain, "Collective Bargaining" (New York; McGraw Hill Book Co., Inc., 1951), p. 2

[15]Gil R. Carlos and Enrique M. Fernando, "Labor, Industrial and Tenancy Laws" (Manila; P.C.F. Publications, 1951), p. 20

[16]L-33705, April 15, 1977, 74 O.G. No. 6, 1054, 76 SCRA 274. In the Airline Pilots case, where the union president himself was not an employee in the unit, the Supreme Court stated that "Depending on the labor organization's constitution and by-laws, Section 2(e) of R.A. 875, which defines a 'labor organization' as 'any union or association of employees which exists, in whole or in part, for the purpose of collective bargaining or of dealing with employers concerning terms and conditions of employment' does not limit a labor organization to employees of a particular employer. The emphasis of the Industrial Peace Act is clearly on the purposes for which a union or association of employees is established rather than that membership therein should be limited only to employees of a particular employer."

which acts as the bargaining representative, the responsibility to represent *not only* its members, but all employees in the bargaining unit[18]. Corrollary to this assumption and performance of duty, the Labor Code allows the union to collect agency fee from those employees, who are non-union members[19].

II

A review, however, made by this author, of several collective bargaining agreements where the issue of the scope of the bargaining unit is laid to rest for a relative term revealed that certain rank-and-file employees, commonly designated as *confidential employees*[20] are excluded from the bargaining unit comprised of regular rank-and-file employees.

It is easy to deduce that in some instances, it is the private employer which proposes the exclusion of confidential employees from the bargaining unit. Primarily, the employer's objective may be to protect its property interests in dealing with the union, by neutralizing confidential employees in their relations with the union. The employer seeks to minimize, if not avoid, the risk of these employees divulging by design or by negligence to the union, economic and other material data, which they have casual access to, and which the union may utilize during the renegotiations of the collective agreement, or even during grievance adjustments. In pursuit of such objective, the private employer may effectively reduce union efficiency in size and skill through its regular exercise of its management prerogative[21] of delineating or designating job responsibilities or realignments and appointing or selecting the employees who are to hold such confidential jobs.

It is as equally easy to deduce that the union, in other instances, may also propose the exclusion of confidential employees from the unit because of its own objectives (or limitations). Its objectives being simpler, it may propose or acquiesce to any employee grouping so long as its existence or finances are not put to immediate or substantial jeopardy.

[18]Art. 144, Labor Code; Dairy Queen Products Co., of the Phils. v. C.I.R., L-35009, August 31, 1977, 74 O.G. No. 3, 473, 479, 78 SCRA, citing National Brewery and Allied Industries Labor Union of the Phils. v. San Miguel Brewery, Inc. 8 SCRA 805, 812.

[19]Art. 249(e), Labor Code

[20]These employees, or their positions, are specifically denominated as secretaries of senior officers/department heads, personnel adminstration staff, payroll staff & clerks, technical assistants, legal department secretary, SSS benefits clerk, industrial nurse, receptionist, telephone operator, *et. al.*

[21]In Government Service Insurance System v. GSIS Supervisors' Union, L-39575, 75 O.G. No. 47, 10377, 10382, the Supreme Court held that the right to select and appoint employees is the prerogative of the employer, the privilege of management because such right inheres in the conduct and operation of the business of the employer. Labor may not impose nor demand who is to be appointed or designated by management.

Where the confidential employee does not question his exclusion, it is obvious that neither party to the collective agreement, at least during the life of said agreement, nor a third person, will raise the question.

But where and when the confidential employee questions his exclusion, then this query arises: Can he seek membership in the labor organization which represents the bargaining unit, with the end in view of becoming a member of the bargaining unit?

To this query, the following *dicta* of the Supreme Court apply:

> It is the employee who should decide for himself whether he should join or or not an association; and should he choose to join, he himself makes up his mind as to which association he would join[22].

> It is a notable feature of our Constitution that freedom of association is explicitly ordained; it is not merely derivative, peripheral or penumbral as is the case in the United States. More specifically, where it concerns the expanded rights of labor under the present Charter, it is categorically made an obligation of the State to assure full enjoyment of workers to self-organization and collective bargaining.xxxx The Freedom to choose which labor organization to join is an aspect of the constitutional mandate of protection to labor[23].

> There is the incontrovertible right of any individual to join an organiization of his choice. That option belongs to him. A working man is not to be denied that liberty[24].

With the confidential employee's act of seeking union membership, another query, from the employer's point of view, arises: May the employer, in its desire to protect its property rights or interests, hinder the confidential employee from exercising his right to join an organization?

In this matter, there is only need to revert to the *Victoriano case*[25], where the Supreme Court, adhering to American precedents, emphasized that "The Supreme Court of the United States has declared on several occasions that the rights in the First Amendment xxxx enjoy *a preferred position* in the Constitutional system." "The provisions of this Amendment as developed by this Court over the years may be outlined as follows: (1) freedom of religion, which consists of (a) non-establishment, and (b) free exercise; (2) freedom of expression; and finally,

[22]Victoriano v. Elizalde Rope Workers' Union, L-25246, September 12, 1974, 59 SCRA 54, 67.

[23]U.E. Automotive Employees & Workers' Union – T.U.P.A.S. v. Noriel, *supra*

[24]Phil. Labor Alliance Council v. Bureau of Labor Relations, L-41288, January 31, 1977, 73 O.G. No. 22, 4559, 4564, and cases cited thereunder.

[25]*supra*

(3) freedom of assembly, which has been expanded by definition to include freedom of association[26]."

Furthermore, the Labor Code provides that it shall be an unfair labor practice on the part of the employer "to interfere with, restrain or coerce employees in the exercises of their right to self-organization[27]."

From the union's point of view, will its act of accepting a confidential employee as member constitute a breach of the collective bargaining agreement? It is submitted that it will not be a breach, because the agreement had provided for exclusion of the confidential employees from the bargaining unit, but not prohibition to the union to accept any confidential employee into membership.

However, with the admission of the confidential employee into the union, other ramifications of consequential questions arise. Can the union now ask the employer to grant to the confidential employee those contractual benefits currently received or enjoyed by the members of the recognized bargaining unit? Can the confidential employee, soon after joining and when the need arises, elect and seek union intervention in the adjustment of his grievances in accordance with the procedure outlined in the agreement? Can the union compel the employer to immediately recognize the *enlarged* bargaining unit?

These and similar issues, it is is submitted, may be deferred until the termination of the collective bargaining agreement. When the agreement is renegotiated, the union must perforce seek the recognition from the employer that it is now the bargaining representative of the enlarged unit. Then and only then perhaps will these issues ripen to a probable polarization, considering the employer's continuing objectives on the one hand, and the union's legal responsibilities towards its members, both old and new[28], on the other hand.

Can the union, deny membership to a confidential employee on the ground that he is outside the bargaining unit? For lack of any statutory prohibition and pursuant to the policy thrust of the Labor Code, the confidential employee should be admitted. In the matter of union membership, the Code is explicit. It enumerates

[26]William F. Swindler, "Court and Constitution In The 20th Century: The Modern Interpretation" (New York; The Bobbs-Merril Co., Inc.; 1974), p. 172

[27]Art. 249(a), Labor Code.

[28]see Federacion Obrera de la Industria Tabaquera y Otros Trabajadores de Filipinas v. Noriel, L-41937, July 6, 1975, 73 O.G. No. 5, 770, 777.

security guards and other personnel employed for the protection and security of the person, properties and premises of the employer[29], and managerial employees[30] as ineligible for membership in any labor organization. The Rules add governmental employees, including employees of government-owned and/or controlled corporations[31] to the Codal exclusions. Being a rank-and-file employee and not falling under any of the aforementioned categories, a confidential employee should be admitted to membership in a union comprised of rank-and-file employees.

Assuming however that its constitution and by-laws are restrictive, can the union refuse him membership? Generally, such constitution and by-laws must provide for a situation where membership is available to employees on an equal basis especially where there is an agreement on union security, like a union shop. Otherwise, the union can be open to charge of discrimination. In *Salunga v. C.I.R.*, the Supreme Court stated

> Although, generally, a State may not compel ordinary voluntary associations to admit thereto any given individual, because membership therein may be accorded or withheld as a matter of privilege, the rule is qualified in respect of labor unions holding a monopoly in the supply of labor, either in a given locality or as regards a particular employer with which it has a closed-shop agreement. The reason is that the closed-shop and the union shop cause the admission requirements of trade unions to become affected with public interest.xxxx Consequently, it is well settled that such unions are not entitled to arbitrarily exclude qualified applicants to membership[32].

Furthermore, in view of the statutory proscription against restraining or coercing employees in the exercise of their right to self-organization[33], such denial of membership to a confidential employee may amount to an unfair labor practice on the part of the union officers, its agents or representatives.

III

Considering that there is neither a statutory restraint on the confidential employee nor a statutory grant to either the private employer or the union to delimit the confidential employee's right to collective bargaining, said right should therefore not be defeated or even delimited by the device of the confidential employee's exclusion from the bargaining unit. The author, being of the opinion

[29]Art. 245, Labor Code

[30]Art. 246, Labor Code

[31]Sec. 1, Rule II, Book V, Rules and Regulations Implementing The Labor Code.

[32]L-22456, September 27, 1967, 21 SCRA 217, 222, 223.

[33]Art. 250(a), Labor Code.

that there being no substantial distinction between an ordinary rank-and-file employee and a confidential employee and there being sufficient affinity and unity of interests between them, the confidential employee must necessarily belong to the bargaining unit where the other rank-and-file employees belong.

And considering that the "collective bargaining agreement lies at the very heart of labor-management relations[34]", the determination of the scope of the bargaining unit as the first crucial stage in the collective bargaining process is, therefore, indubitably infused with public interest[35]. In this light, the government, through the Bureau of Labor Relations, upon submission of the bargaining agreement for its certification[36], must not passively defer to an absolute determination by the employer and the union of the scope of the bargaining unit, especially where confidential employees and other employees situated like them are excluded therefrom, and must instead secure from the employer and the union the reasons for the exclusion of such employees from the unit, and must act affirmatively, upon the parties' default or unsatisfactory reasons, in enjoining the parties to include such employees into the unit. This is one means by which the State can assure the right of these employees to collective bargaining.

[34]Pambujan Sur United Mine Workers v. Samar Mining Co., Inc., L-5694, 94 Phil. 932, 937.

[35]The Civil Code, in its Art. 1700 provides in part that "The relation between capital and labor are not merely contractual. They are impressed with *public interest* that labor contracts must yield to the common good.

[36]see Art. 231, Labor Code

THE LEGAL EFFECTS OF THE LIFTING OF MARTIAL LAW ON THE POWER OF THE PRESIDENT TO LEGISLATE

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INTRODUCTION

September 21, 1972 was not an ordinary day. Neither was January 17, 1981. The former referred to the day when Martial Law was proclaimed by virtue of Proclamation No. 1081 while the latter referred to the day when it was lifted by virtue of Proclamation No. 2045.

When Martial Law was terminated by Proclamation No. 2045, several questions arose as to its possible legal implications and consequences.

One of those which legal minds and keen observers cannot help but ask is the possible legal effects of the lifting of Martial Law on the power of the incumbent President to legislate.

Prior to Proclamation No. 2045, it had been ruled by the Supreme Court that –

> As Commander-in-Chief and enforcer or administrator of Martial Law, the incumbent President of the Philippines can promulgate proclamations, orders, and decrees during the period of Martial Law essential to the security and preservation of the Republic, to the defense of the political and social liberties of the people and to the institution of reforms to prevent the resurgence of rebellion or insurrection or secession or the threat thereof as well as to meet the impact of a worldwide recession, inflation or economic crisis which presently threatens all nations including highly developed countries.[1]

Not only was the President empowered to legislate. He could also propose amendments to the Constitution. Thus, the Supreme Court had the occasion to rule that –

> Would it then be within the bounds of the Constitution and of the law for the President that constituent power of the Interim National Assembly vis-a-vis his assumption of that body's legislative functions? The answer is yes. If the President has been legitimately discharging the legislative functions of the Interim National Assembly, there is no reason why he cannot validly discharge the function of that Assembly to propose amendments to the constitution, which is but adjunct, although peculiar, to its gross legislative power.[2]

[1]Aquino v. Enrile L-40004, January 31, 1975.

[2]Sanidad v. Comelec L-44640, October 12, 1976.