

Republic of the Philippines
ENERGY REGULATORY COMMISSION
San Miguel Avenue, Pasig City



CRESCENCIANO M. PITOGO,
Complainant,

- versus -

ERC CASE NO. 2016-025 CC

VISAYAN ELECTRIC
COMPANY (VECO),
Respondent.

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DOCKETED
Date: **MAY 31 2017**
By: W

ORDER

Before this Commission for resolution is the "*Motion to Dismiss*" filed on August 1, 2016 by Visayan Electric Company (VECO) praying that the "*Affidavit-Complaint*"¹ filed by complainant Cresenciano M. Pitogo be dismissed for failure to state a cause of action.

In relation thereto, the parties made the following submissions: 1) the "*Opposition to Motion to Dismiss*" filed by complainant on August 3, 2016; 2) the "*Reply (To Complainant's Opposition to Respondent's Motion to Dismiss)*" filed by VECO on August 23, 2016; 3) the "*Rejoinder (To Reply to Opposition to Dismiss)*" filed by the complainant on August 26, 2016; and 4) the "*Manifestation*" filed by VECO on August 26, 2016.

In its motion, VECO alleged, among others, the following:

1. An examination of the said complaint revealed that it failed to state all the elements for a cause of action;
2. First, nowhere in the complaint is there any allegation of any personal and legal right that could be a basis for the filing of suit against VECO. There is no law which arose or created a right in favor of complainant;
3. The complaint only stated that complainant is the President and Chief Operation Officer of LSD Construction Corporation (LSDCC) and that one of LSDCC's lines of business was a yearly line construction and maintenance contract with VECO since year 2000. This contract, however, expired on February 1, 2012 and was not

¹ Filed by the complainant on April 8, 2016

renewed by VECO. The termination of the contract, therefore, resulted to the severance of whatever relationship VECO had with LSDCC, its President, Directors, employees, agents and clients by reason of or arising from any contractual relationship with the latter;

4. The complaint does not involve any breach or violation of a contract that can give rise to a cause of action in favor of complainant;
5. Second, with regard to the existence of a correlative obligation as one of the elements of a cause of action, the following arguments prove that there is none:
 - a. Complainant alleged that Good Shepherd Engineering Technology (GSET) has operated in a classification not authorized by its license which falls under Trade category and Trade specialty classification. He alleged that GSET does not have Philippine Construction Accreditation Board (PCAB) classification for "electrical works" and this supposedly resulted to the death of its employee Mr. Gabriel Ornopia;
 - b. This allegation is irrelevant and immaterial to VECO. Complainant has no privity with and is not privy to GSET or its employment contracts. Thus, to use this unfortunate incident of an employee (who was not related to the complainant) to create a correlative legal obligation of VECO in his favor is unconscionable and should not be countenanced;
 - c. Complainant's reliance on the Notice of Board Action (NBOA) issued by PCAB against GSET is misplaced and improper. The NBOA does not constitute the final resolution of PCAB on the matter. In fact, the NBOA states that an investigation shall first be conducted. Complainant has not shown and cannot show that such investigation has already been concluded and there is already a final resolution to that PCAB case to date;
6. Third, assuming for the sake of argument that a legal right of the complainant exists, with regard to the third element (i.e., act or omission in violation of a legal right), VECO did not act or fail to act which would constitute a cause of action of complainant against it;
7. Complainant alleged that VECO violated the Philippine Distribution Code (PDC), particularly Section 3.6 on Safety

for distribution Utilities and Suppliers: Section 3.6.1 Adoption of the Philippine Electrical code (PEC) and Occupational Safety and Health Standards (OSHS), when VECO hired PCAB licensed "Trade" contractors without Occupational Safety and Health Standards (OSHS) making the operation of VECO inferior;

8. While complainant is correct that under the franchise of VECO in Republic Act No. 9339 (R.A. 9339), "all its electric facilities, lines and systems for electric services owned, maintained, operated or managed by VECO shall be operated and maintained at all times in a superior manner", there is no requirement that VECO should not hire PCAB-licensed contractors with only "Trade" classification. Nonetheless, what constitutes "a superior manner" should be gauged in light of the existing rules and regulations of the Commission;
9. In its Order in ERC Case No. 2012-063 CC, the Commission expressly held that the obligation to hire electrical contractors accredited with PCAB is not among the requirements of the Commission. The dismissal of the case was affirmed by the Court of Appeals;
10. The PDC provides a mechanism through the Distribution Management Committee that will relieve the Commission from the tedious task of monitoring day-to-day operations of the distribution system. Hence, the Commission merely adopted the rules and regulations implemented by the Professional Regulation Commission (PRC) and the Department of Labor and Employment (DOLE), respectively;
11. Any violation related to the said rules and regulations should be resolved first by the implementing agencies themselves. That is, any alleged violation should be investigated first by either PRC or the DOLE, as the case may be – not by the Commission;
12. The allegation of complainant that VECO hired the services of PCAB "Trade" licensed contractors without "Occupational Safety and Health Standards" such as that of GSET is a sweeping statement that is purely baseless;
13. VECO was never remiss with its duty when it comes to safety, health and environmental regulations as it expressly stated in the Service Provider Agreement between VECO and GSET;

14. Contrary to the claim of complainant, nowhere in the Order of the Regional Director of DOLE is it stated that service contracts of VECO with its contractors are without Occupational Safety and Health Standards. To reiterate, the DOLE found not the absence of Occupational Safety and Health Standards itself but that the service contract does not contain a program implementation of the Occupational Safety and Health Standards;
15. Thus, nowhere does the complaint aver the existence of all the essential elements of a cause of action against VECO. For this the complaint must be dismissed for failure to state a cause of action;
16. The allegation of complainant that an investigation by the Department of Trade and Industry (DTI) has commenced against GSET as regards the death of its employee is immaterial and irrelevant in this case. VECO is not a party to the DTI case. Even if it is a party, DTI had already taken cognizance of the case. Filing this case while another case is pending with the DTI is forum-shopping, which is another ground to dismiss the instant complaint;
17. It is not the first time complainant filed a case against VECO – and all of such cases filed were or are dismissible for failure to state a cause of action;
18. While the complaint alleged the violation by VECO of its franchise under R.A. 9339 and R.A. 9136 in relation to the PDC, the arguments revert to the basic premise used by the complainant on the PCAB requirement which has already been passed upon and resolved by the Commission and the Court of Appeals in their respective Decisions;
19. Clearly, this case is merely rehash or reiteration of the same arguments and must suffer the same fate as ERC Case no. 2012-063 CC and G.R. CEB SP No. 08604 – for failure to state a cause of action, it must also be dismissed;
20. The proclivity of complainant to clog the dockets of quasi-judicial agencies does not end with this Commission. Without privity of contract with or relation to Mr. Gabriel Ornopia, complainant caused the DOLE to conduct an occupational safety and health investigation at GSET in the case docketed as R007-I-JA-2015-04-0097-G/O (DOLE Case);

21. In the DOLE case, VECO was absolved of any liability for lack of employment relationship with the deceased Mr. Ornopia; and
22. Not only has the so-called cause of action been passed upon by the Commission in ERC Case No. 2012-063 CC and found to be absent, but also forms his foundation for blatant act of recycling cases in the hope of finally obtaining a favorable decision.

In the said complaint, complainant averred, among others, that VECO engaged the services of GSET which was accredited and classified by PCAB as "Trade" or "Trade Specialty Classification". Rosch Enterprises (ROSCH) and Jodan Electrical Services (JODAN) were also engaged by VECO without PCAB accreditation. He alleged that these contractors are not specializing in electrical works but were engaged by VECO to perform as such in violation of its legislative franchise under R.A. No. 9339. Also, the engagement of the aforementioned contractors by VECO has rendered the quality of its service inferior in violation of R.A. No. 9136 in relation to the provisions of PDC, particularly Sections 3.6.1 and 3.6.2² thereof, which require that distribution utilities should adopt a high degree of technical specifications and performance standards set forth by the PEC.

Complainant further averred that GSET, ROSCH, and JODAN are contractors of VECO without the appropriate Occupational Safety and Health Standards (OSHS)³. Notwithstanding, VECO had continued to engage their services to perform electrical maintenance

² "Measurement of Performance for Personnel Safety

Rule 1056 of the OSHS specifies the rules for the measurement of performance for personnel safety that applies to Distributors and Suppliers. The pertinent of this rule are reproduced as follows:

- (a) Exposure to work injuries shall be measured by the total number of hours of employment of all employees in each establishment or reporting unit.
- (b) Employee-hours of exposure for calculating work injury rates are intended to be the actual hours worked. When actual hours are not available, estimated hours may be used.
- (c) The Disabling Injury/illness Frequency Rate shall be based upon the total number of deaths, permanent total, permanent partial, and temporary total disabilities, which occur during the period covered by the rate. The rate relates those injuries/illnesses to the employee-hours worked during the period and expresses the number of such injuries in terms of a million man-hour units.
- (d) The Disabling Injury/illness Severity Rate shall be based on the total of all scheduled charges for all deaths, permanent total, and permanent partial disabilities, plus the total actual days of the disabilities of all temporary total disabilities, which occur during the period covered by the rate. The rate relates these days to the total employee-hours worked during the period and expresses the loss in terms of million man-hour units."

³ Set by the Bureau of Working Condition of the Department of Labor and Employment (DOLE)

works on its distribution system which resulted to the death of several personnel⁴ employed by GSET, ROSCH, and JODAN.

ISSUE

A perusal of VECO's "*Motion to Dismiss*" and the "*Affidavit-Complain*" reveals that the issues which this Commission is called to resolve is whether or not the complaint failed to state a cause of action against VECO.

DISCUSSION

Section 2, Rule 2 of the 1997 Rules of Civil Procedure defines a cause of action as an act or omission by which a person violates the right of another.

In the case of the *Philippine Charter Insurance Corporation versus Central Colleges of the Philippines*,⁵ it was settled that a cause of action has the following elements:

- 1) A right in favor of the plaintiff by whatever means and under whatever law it arises or is created;
- 2) An obligation on the part of the named defendant to respect or not to violate such right; and
- 3) An act or omission on the part of such defendant violative of the right of the plaintiff or constituting a breach of the obligation of the defendant to the plaintiff.

It bears stressing that it is only when the last element occurs that a cause of action is completed and arises. Accordingly, the cause of action does not accrue until the party obligated refuses, expressly or impliedly, to comply with its duty.⁶ If the allegations of the complaint do not aver the concurrence of these elements, the complaint becomes vulnerable to a motion to dismiss on the ground of failure to state a cause of action. Evidently, it is not the lack or absence of a cause of action that is a ground for the dismissal of the complaint but the fact that the complaint states no cause of action.

⁴ Mr. Gabriel Dula Ornopia, an employee of GSET died of electrocution while on duty on April 12, 2015. Mr. Joe Iran, an employee of ROSH died of electrocution while on duty on February 28, 2013. Undetermined number of JODAN employees who perished by accidents due to electrocution (Paragraph 25 of complainant's "Affidavit-Complaint")

⁵ G.R. Nos. 180631-33, July 2, 2014

⁶ Ibid.

Failure to state a cause of action may be raised at the earliest stage of an action through a motion to dismiss, but lack of a cause of action may be raised at any time after the questions of fact have been resolved on the basis of the stipulations, admissions, or evidence presented.⁷

Applying all the aforesaid elements of a cause of action, the Commission finds the arguments of VECO meritorious. Complainant failed to state the facts sufficient to constitute a cause of action against VECO which would warrant the prosecution of this case.

A perusal of the "*Affidavit-Complaint*" disclosed that complainant failed to establish the elements of a cause of action. First, there is no allegation in the complaint that complainant has any personal or legal right that could be the basis for filing a case against VECO. The said complaint alleged that complainant, as President and Chief Operation Officer of LSDCC, had a previous line construction and maintenance contract with VECO. Said contract, however, expired on February 1, 2012 and was not renewed by VECO. Nowhere in the complaint is there any allegation pertaining to a breach or violation of the said contract that can give rise to a cause of action against VECO.

Second, since the contract between complainant and VECO had expired and no breach or violation committed during its validity, either party has no correlative obligation with respect to their expired contract. It must be noted that the grounds relied upon by complainant are premised on the alleged defect of the license of another contractor of VECO, i.e. GSET, and the investigation of NBOA on the alleged death of GSET's employee, Mr. Ornopia. This allegation, however, is irrelevant and immaterial as the basis of complainant in filing this case against VECO. The Commission concurs with VECO that complainant has no privity with or is not privy to the contract of VECO and GSET. Similarly, complainant's reliance on the investigation of NBOA and DTI is misplaced considering that there is no evidence presented by complainant showing that such investigations of both agencies have already been concluded and that a final resolution has been rendered.

Third, complainant also alleged that VECO violated the safety standards prescribed under the PDC and its legislative franchise (R.A. 9339) when it hired contractors with PCAB licensed as "Trade Contractors" and without OSHS, making the operation of VECO inferior. Complainant also contended that VECO's contractors are not specializing in electrical maintenance works, yet they were contracted and allowed by VECO to perform electrical maintenance works on its distribution system.

⁷ Dolores Macaslang vs. Renato and Melbazamora, G.R. No. 156375, May 30, 2011

It must be emphasized that the issue concerning the PCAB accreditation requirement was already addressed upon and dealt with by this Commission in its Order dated September 9, 2013 in ERC Case No. 2012-063 CC⁸. On appeal, the ruling of the Commission in the aspect of PCAB accreditation was upheld by the Court of Appeals in CA-G.R. SP No. 08604⁹. It held that:

"As did the ERC, We also find that there is no specific provision of laws and rules cited by petitioner which mandates that distribution utilities, in this case VECO, to hire only electrical contractors accredited by the PCAB. Indeed, the ERC even held that R.A. No. 9136 and its Implementing Rules and Regulations do not require the distribution utilities to engage only the services of PCAB-accredited contractors, and, therefore, the hiring of non-PCAB accredited contractors is not among the grounds for the revocation of VECO's CPCN. Even assuming *arguendo* that VECO hired non-PCAB accredited electrical contractors, the *Amended Affidavit-Complaint* still presented no sufficient allegations upon which the ERC could grant the relief petitioner prayed for since, as previously mentioned, such circumstances is not one of the grounds for the cancellation of respondent VECO's CPCN."

Section 3.6.1 of the PDC provides that:

"3.6.1 Adoption of PEC and OSHS:

3.6.1.1 The Distributor shall develop, operate, and maintain its Distribution System in a safe manner and shall always ensure safe work environment for its employees. In this regard, the ERC adopts the Philippine Electrical Code (PEC) Part 1 and Part 2 set by the Professional Regulation Commission and **the Occupational Safety and Health Standards (OSHS) set by the Bureau of Working Conditions of the Department of Labor and Employment.**

3.6.1.2 The Philippine Electrical Code (PEC) Parts 1 and 2 shall govern the safety requirements for electrical installation, operation, and maintenance. Part 1 of the

⁸ "In the Matter of the Complaint for Revocation of Certificate of Public Convenience and Necessity (CPCN), LSC Construction Corporation (LSDCC) as Complainant versus Visayan Electric Company, Inc. (VECO) as Respondent"

⁹ "LSD Construction Corporation (LSDCC) represented by Cresenciano M. Pitogo, Petitioner versus Visayan Electric Company, Inc. (VECO), Respondent"

PEC pertains to the wiring system in premises of End-Users. Part 2 covers electrical equipment and associated work practices employed by the electric utility. Compliance with these Codes is mandatory. Hence, the Distributor and Supplier shall at all times ensure that all provisions of these safety codes are not violated." (Underscoring Supplied)

As can be gleaned from the foregoing provisions of PDC, the requirements of OSHS are in the nature of labor legislation or labor standard¹⁰ laws and the administration and enforcement of these laws squarely falls within the authority and jurisdiction of the Department of Labor and Employment (DOLE) pursuant to Article 168 and Article 171 of the Labor Code.

Based on the supporting documents submitted, it appears that the DOLE Regional Director already assumed jurisdiction of a case filed against VECO but did not impose any penalty for violation of OSHS. In the Order dated November 24, 2015 in DOLE Case No. RO07-1-JA-2015-04-0097-G/O¹¹, the DOLE Regional Director only required VECO to "include in the service agreement with all its contractors, present and future, to include the mandatory formulation and submission to DOLE the Occupational Safety and Health Program per project." Hence, there is no cogent reason for the Commission to initiate administrative proceedings or impose sanction against VECO for violation of the PDC and CPCN. A mere conclusion that the engagement of these contractors had diminished, to a lesser degree, the reliability, safety, and integrity of VECO's distribution system, thereby creating an imaginary link of direct causal connection in the death of several persons¹² is unconscionable since the allegations of the complaint were couched in general terms and were, at best, conclusion of fact.

¹⁰ Labor standards, as defined more specifically by jurisprudence, are the minimum requirements prescribed by existing laws, rules and regulations relating to wages, hours of work, cost-of-living allowance, and other monetary and welfare benefits, **including occupational, safety, and health standards**. (Page 7 Labor Standards and Welfare Volume I 2013 Edition by Atty. Cezario Alvero Azucena, Jr. citing Maternity Children's Hospital versus Secretary of Labor, G.R. No. 78909, June 30, 1989)

¹¹ "In Re: Occupational Safety and Health Investigation Conducted at Good Shepherd Engineering Technology (GSET) and/or Visayan Electric Company (VECO)". Order dated November 24, 2015 as **Annex 1** of respondent's "*Motion to Dismiss*"

¹² **Mr. Gabriel Dula Ornopia**, an employee of GSET died of electrocution while on duty on April 12, 2015. **Mr. Joe Iran**, an employee of ROSH died of electrocution while on duty on February 28, 2013. **Undetermined number of JODAN employees** who perished by accidents due to electrocution (Paragraph 26 of complainant's "*Affidavit-Complaint*")

WHEREFORE, the foregoing premises considered, the "Affidavit-Complaint" filed on April 8, 2016 by complainant Cresenciano M. Pitogo is hereby **DISMISSED** for failure to state a cause of action.

SO ORDERED.

Pasig City, March 16, 2017.

FOR AND BY AUTHORITY
OF THE COMMISSION:

Gloria Victoria C. Yap-Taruc
GLORIA VICTORIA C. YAP-TARUC
Commissioner

We Concur:

[Signature]
JOSE VICENTE B. SALAZAR
Chairman



[Signature]
JOSEFINA PATRICIA A. MAGPALE-ASIRIT
Commissioner

[Signature]
ALFREDO J. NON
Commissioner

[Signature]
GERONIMO D. STA. ANA
Commissioner

Copy Furnished:

1. **MR. CRESCENCIANO M. PITOGO**
#229 San Roque, Lamac, Consolacion, Cebu

2. **ATTYS. JOAN A. GIDUQUIO-BARON AND PIÑA LUZ P. CATARMAN**
J.P. Garcia and Associates
Counsel for Respondent VECO
Units 1501-1502, 15th Floor Ayala Life-FGU Center
Mindanao Avenue corner Biliran Road
Cebu Business Park, Cebu City
Tel. No. (032) 232-0253; (032) 232-0283