

EN BANC

G.R. No. 212022 – PHILIPPINE INSTITUTE FOR DEVELOPMENT STUDIES, *petitioner, versus* COMMISSION ON AUDIT, *respondent*.

Promulgated:

August 20, 2019

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SEPARATE CONCURRING OPINION
(With Qualification)*

CAGUIOA, J.:

I concur in the result.

This opinion is submitted to register my position that diverges with certain pronouncements made by the *ponencia* regarding the doctrine of qualified political agency, particularly on the powers of the Executive Secretary (ES) and the Senior Deputy Executive Secretary (SDES).

The *ponencia* grants the petition and reverses the Commission on Audit (COA) Decision No. 2014-047, which affirmed the Notice of Disallowance (ND) No. 11-001-(06-10)¹ issued against the procurement of group healthcare maintenance by the Philippine Institute for Development Studies (PIDS) in the aggregate amount of ₱1,647,235.06.² The COA disallowed the amount for violating COA Resolution No. 2005-001 prohibiting the procurement of healthcare insurance from private agencies.³ In granting the petition, the *ponencia* holds that PIDS can establish its own Health Maintenance Program (HMP) and is exempted from the provisions of Administrative Order No. (A.O.) 402 by virtue of the approval given by ES Eduardo R. Ermita (ES Ermita) through a July 23, 2007 letter by authority of the President.⁴

Respectfully, I am of the opinion that the doctrine of qualified political agency [*i.e.*, whether the approval of the Office of the President (OP) is given by the ES or SDES] is not the issue ultimately determinative of the resolution of this case.

To recall, A.O. 402 authorized government agencies and government-owned and -controlled corporations to establish an annual medical check-up program. Pursuant to this authorization, the Department of Health (DOH), the

* This caption was used by Chief Justice Enrique Fernando in *Tañada v. Tuvera*, 220 Phil. 422 (1985).

¹ *Ponencia*, p. 26.

² *Id.* at 2.

³ *Id.* at 6.

⁴ See *id.* at 12, 24.

Department of Budget and Management (DBM), and Philippine Health Insurance Corporation (PHIC) issued Joint Circular No. 01-98 which, among others, enumerated the examinations to be included in the Annual Medical Check-Up Program. PIDS sought to establish an HMP in the form of a Free Annual Medical Check-Up through its membership in a private Health Maintenance Organization (HMO), in lieu of the Annual Medical Check-Up provided under A.O. 402. **The DOH, PHIC, and DBM interposed no objection.** Thus, the OP, through SDES Ramon B. Cardenas (SDES Cardenas), approved PIDS's HMP in lieu of that provided in A.O. 402, subject to the usual accounting and auditing rules and regulations. Subsequently, PIDS entered into a Health Care Agreement (Agreement) with PhilamCare Health System, Inc. (PhilamCare).⁵

COA disallowed the amounts representing the annual membership fees of PIDS employees covered by the Agreement for violating COA Resolution No. 2005-001, which prohibits the procurement of healthcare insurance from private agencies. This matter reached the Court and was docketed as G.R. No. 200838 entitled *Philippine Institute for Development Studies v. Pulido Tan* (2015 PIDS case).⁶

Pending resolution of the disallowance, PIDS wrote the OP requesting authority to continue the implementation of its HMP. The OP referred the letter to the DOH, DBM, and PHIC. The DOH and DBM recommended its continuation, but the PHIC opined that it was not within its authority to make such recommendation. **Moreover, the PHIC informed PIDS that it has not yet included the annual medical check-up in the benefit packages being developed by PHIC.** Due to the favorable recommendations of the DOH and DBM, the OP, through ES Ermita, granted PIDS's request to continue the implementation of its HMP with the same condition that it is subject to the usual accounting and auditing rules and regulations. Thus, PIDS continued to implement its HMP and entered into healthcare agreements with different insurance companies. These became the subject of the disallowance in the instant case.⁷

Meanwhile, the Court affirmed the disallowance in the 2015 PIDS case. The Court also made a pronouncement that the “[SDES] had no power or authority to declare an agency to be exempt from an administrative order or a presidential issuance and, thus, had no basis for approving the procurement of a private health care package.”⁸

In granting the instant petition, the *ponencia* discussed the Court's ruling in the 2015 PIDS case, which was promulgated during the pendency of this case. The Court ruled therein that the agreement between PIDS and PhilamCare was properly disallowed by the COA for being an irregular

⁵ Id. at 2-4.

⁶ See id. at 4-5.

⁷ Id. at 5-7.

⁸ *PIDS v. Pulido Tan*, G.R. No. 200838, April 21, 2015 (Unsigned Resolution).



expenditure because contrary to PIDS's argument, the approval for exemption issued by the OP, through then SDES Cardenas, did not exempt it from the provisions of A.O. 402. In particular, the SDES had no authority to declare an agency as exempt from an administrative order or a presidential issuance and, thus, had no basis for approving the procurement of a private healthcare package.⁹

In this regard, the *ponencia* stated that unlike the 2015 PIDS case where it was **only the SDES** who granted PIDS's exemption from the coverage of A.O. 402, the signatory of the letter allowing PIDS to continue the implementation of its HMP is **ES Ermita himself**.¹⁰ The *ponencia* then went on to discuss the doctrine of qualified political agency and ruled that ES Ermita, being the President's alter ego, had the authority to grant PIDS authority to continue the implementation of its Annual Medical Check-Up Program through enrollment with HMOs, in lieu of those provided under A.O. 402. Thus, PIDS's exemption remained valid until disapproved or reprobated by the President.¹¹

My disagreement with the *ponencia's ratio* focusing on the doctrine of qualified political agency is that it appears to make an unqualified distinction between the powers of the SDES and the ES to act by authority of the President.

A review of the records reveals that nowhere in the pleadings was the validity of the ES's authority in approving PIDS's request to continue its HMP ever put in issue. Coupled with the fact that the Court's statement in the 2015 PIDS case that the "SDES had no power or authority to declare an agency to be exempt from an administrative order or a presidential issuance and, thus, had no basis for approving the procurement of a private health care package"¹² may not necessarily be accurate, this approach may have far-reaching and unintended consequences for the operations of the OP.

I agree fully with the *ponencia* that the power of the ES is found in the Administrative Code of 1987¹³ (Administrative Code), particularly, Section 27, Sub-Chapter B, Chapter 9, Book III of the Administrative Code:

SEC. 27. *Functions of the Executive Secretary.* – The Executive Secretary shall, subject to the control and supervision of the President, carry out the functions assigned by law to the Executive Office and shall perform such other duties as may be delegated to him. He shall:

(1) Directly assist the President in the management of the affairs pertaining to the Government of the Republic of the Philippines;

⁹ *Ponencia*, pp. 11-12.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 24.

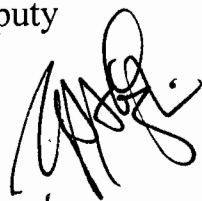
¹² *PIDS v. Pulido Tan*, supra note 8.

¹³ *Ponencia*, p. 14.



- (2) Implement presidential directives, orders and decisions;
- (3) Decide, for and in behalf of the President, matters not requiring personal presidential attention;
- (4) Exercise supervision and control over the various units in the Office of the President Proper including their internal administrative requirements;
- (5) Exercise supervision, in behalf of the President, over the various agencies under the Office of the President;
- (6) Appoint officials and employees of the Office of the President whose appointments are not vested in the President;
- (7) Provide overall coordination in the operation of the Executive Office;
- (8) Determine and assign matters to the appropriate units in the Office of the President;
- (9) Have administrative responsibility for matters in the Office of the President coming from the various departments and agencies of the government;
- (10) Exercise primary authority to sign papers "By authority of the President", attest executive orders and other presidential issuances unless attestation is specifically delegated to other officials by him or by the President;
- (11) Determine, with the President's approval, the appropriate assignment of offices and agencies not placed by law under any specific executive department;
- (12) Provide consultative, research, fact-finding and advisory service to the President;
- (13) Assist the President in the performance of functions pertaining to legislation;
- (14) Assist the President in the administration of special projects;
- (15) Take charge of matters pertaining to protocol in State and ceremonial functions;
- (16) Provide secretarial and clerical services for the President, the Cabinet, the Council of State, and other advisory bodies to the President;
- (17) Promulgate such rules and regulations necessary to carry out the objectives, policies and functions of the Office of the President Proper;
- (18) Perform such other functions as the President may direct.
(Underscoring supplied)

This listing of the duties and responsibilities of the ES is clarified or streamlined through presidential issuances. In turn, these Memorandum Orders delineate or specify the functions of the ES, the SDES, and Deputy



Executive Secretary (DES),¹⁴ and at times, even specify the designated duties and responsibilities not merely of the functional positions, but of the specific persons occupying the same.¹⁵

An early example of such Presidential issuance is Letter of Instructions No. 238 dated January 1, 1975, which provides that “[o]nly the [ES] and the [DES] shall be empowered to sign by authority of the President when implementing and disseminating Presidential directives and policies.”¹⁶

Other Memorandum Orders authorize the SDES and DES to sign official papers (or act) “[b]y authority of the President.”¹⁷ Memorandum Order (MO) No. 28 dated August 14, 1992, provides:

The Senior Deputy Executive Secretary and the Deputy Executive Secretary are hereby empowered to sign the following official papers “By authority of the President,” as follows:

- I. The Senior Deputy Executive Secretary:

x x x x

3. Transmittal and/or implementation of Presidential directives and instructions. (Underscoring supplied)

Notably, the Court had recognized the authority of the SDES and DES in the 2017 case of *Baculi v. Office of the President*,¹⁸ which the *ponencia* cites.¹⁹ Petitioner therein questioned the order of dismissal against him, claiming that it should have been issued by the President who should have personally exercised the power to remove him, not by the Acting DES for Legal Affairs. The Court dismissed this contention, ruling as follows:

x x x [I]t was of no moment to the validity and efficacy of the dismissal that only Acting Deputy Executive Secretary for Legal Affairs Gaité had signed and issued the order of dismissal. In so doing, Acting Deputy Executive Secretary Gaité neither exceeded his authority, nor usurped the power of the President. Although the powers and functions of the Chief Executive have been expressly reposed by the Constitution in one person, the President of the Philippines, it would be unnatural to expect the President to personally exercise and discharge all such powers and

¹⁴ See Letter of Instruction No. 238, January 1, 1975.

¹⁵ See Memorandum Order (MO) No. 17, DEFINING THE DUTIES AND FUNCTIONS AND DELINEATING THE RESPONSIBILITIES OF THE SENIOR OFFICIALS OF THE EXECUTIVE OFFICE UNDER THE OFFICE OF THE PRESIDENT PROPER, September 7, 1998. See also MO No. 41, DELINEATING THE FUNCTIONS AND RESPONSIBILITIES OF THE SENIOR DEPUTY EXECUTIVE SECRETARY AND THE DEPUTY EXECUTIVE SECRETARY, September 22, 1992 (SDES Dionisio C. de la Serna and DES Luis C. Liwanag II); MO No. 399, DELINEATING THE FUNCTIONS AND RESPONSIBILITIES OF THE DEPUTY EXECUTIVE SECRETARIES, September 30, 1991 (DES Dionisio C. de la Serna and DES Mariano Sarmiento III).

¹⁶ Underscoring supplied.

¹⁷ See MO No. 139, DESIGNATING THE OFFICIALS AUTHORIZED TO ACT ON CERTAIN MATTERS AND SIGN DOCUMENTS “BY AUTHORITY OF THE PRESIDENT,” June 24, 1993 and MO No. 28, PRESCRIBING THE OFFICIAL DOCUMENTS THAT MAY BE SIGNED BY THE SENIOR DEPUTY EXECUTIVE SECRETARY AND THE DEPUTY EXECUTIVE SECRETARY “BY AUTHORITY OF THE PRESIDENT,” August 14, 1992.

¹⁸ 807 Phil. 52 (2017).

¹⁹ *Ponencia*, p. 23.

functions. Somehow, the exercise and discharge of most of these powers and functions have been delegated to others, particularly to the members of the Cabinet, conformably to the doctrine of qualified political agency. **Accordingly, we have expressly recognized the extensive range of authority vested in the Executive Secretary or the Deputy Executive Secretary as an official who ordinarily acts for and in behalf of the President. As such, the decisions or orders emanating from the Office of the Executive Secretary are attributable to the Executive Secretary even if they have been signed only by any of the Deputy Executive Secretaries.**²⁰ (Emphasis and underscoring supplied)

With respect to SDES Cardenas who, in so many words, the Court ruled in the 2015 PIDS case to have had no power to act by authority of the President on his own or in default of the ES, MO No. 17 dated September 7, 1998 specifically provides his duties and functions.²¹ Among these is to “[p]erform the duties of the Executive Secretary upon express designation and delegation

²⁰ *Baculi v. Office of the President*, supra note 18, at 66-68.

²¹ In the interest of public service and in order to promote efficiency and proper coordination of work, the delineation of duties, functions and responsibilities of the senior officials in the Executive Office of the Office of the President Proper are as follows:

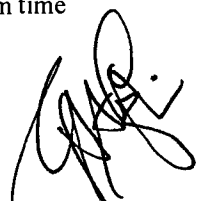
DEPUTY AND ASSISTANT EXECUTIVE SECRETARIES – The duties and functions of the Deputy Executive Secretaries and Assistant Executive Secretaries shall be based on the mandated function of the Executive Secretary as head of the Executive Office pursuant to the provisions of Sections 25, 26 and 27, Title III, Book IV of the Revised Administrative Code of 1987. Secondly, their special assignments by the President or the Executive Secretary shall be issued through an appropriate executive issuance.

DEPUTY EXECUTIVE SECRETARIES

A. HON. RAMON B. CARDENAS

Senior Deputy Executive Secretary

1. Directly assist the Executive Secretary in the performance of his functions as provided for in Section 27, Sub-Chapter B, Chapter 9, Book III of the Administrative Code of 1987.
2. Perform the duties of the Executive Secretary upon express designation and delegation during his absence or when the Secretary is unable to perform his duties owing to illness and other causes.
3. Attend with the Executive Secretary Cabinet meetings or in such other occasions where the President needs the presence of the Executive Secretary and he is unable to do so.
4. Advise and assist the Executive Secretary in the management and supervision over the various units of the Office of the President.
5. Advise and assist the Executive Secretary in the formulation and implementation of policies, plans, programs and projects, rules and regulations pertinent to the general management and administration of the Office of the President.
6. Oversee, for the Executive Secretary, the operations of the offices and agencies under or attached to the Office of the President.
7. Advise and assist the Executive Secretary on economic and related matters.
8. Coordinate the corporate planning and budgeting processes under the Office of the President.
9. Act on requests for travel authority of line agency secretaries, undersecretaries, assistant secretaries and other officials of equivalent rank.
10. Attend the cabinet cluster meetings on Agro-Industrial Development, Macro-Economy & Finance, Physical Infrastructure & Energy Support and on International Relations, and advise and assist the Executive Secretary on pertinent matters and concerns that may arise from these meetings.
11. Provide consultative research, fact finding and advisory service to the Executive Secretary in his assigned areas of responsibility.
12. Advise and assist the Executive Secretary on matters relative to legislation involving his assigned areas of responsibility.
13. Advise and assist the Executive Secretary in the preparation and implementation of presidential orders and decisions involving his assigned areas of responsibility.
14. Advise and assist Executive Secretary in the administration of the President's special projects and programs.
15. Perform such other functions as the President and/or Executive Secretary may assign from time to time. (Underscoring in the original)



during his absence or when the Secretary is unable to perform his duties owing to illness and other causes.”²²

These Presidential issuances show that no absolute or categorical rule can be made that the SDES has no power to act on his own or in default of the ES by authority of the President generally or specifically whether it be to exempt PIDS from the coverage of A.O. 402, or to approve the HMP pursuant to A.O. 402.

Therefore, I am concerned that it may be somewhat improvident for the Court to resolve the current case by distinguishing this case from the 2015 PIDS case on that account. This, especially considering that the current organizational setup of the OP still has a DES for Legal Affairs, General Administration, and Finance and Administration, with duties and responsibilities which they exercise on their own or in default of the ES by authority of the President.

To reiterate, the COA disallowed the subject amounts for violating COA Resolution No. 2005-001. Indeed, one of PIDS’s arguments was that it was authorized by the OP, upon recommendation of the DOH and DBM, to establish its own HMP in lieu of that authorized in A.O. 402. Thus, according to PIDS, it had duly complied with the requirement in Section 5²³ of Presidential Decree No. 1597 of securing approval from the OP of its HMP.²⁴ However, the COA made clear its position that the approval by the DOH, DBM, and the OP does not exempt PIDS from compliance with COA Resolution No. 2005-001.²⁵

Correlatively, x x x, the approvals by the DOH, DBM and OP will not, in any manner, render the agreements valid since, in the first place, they were not in accordance with AO No. 402. Although it complied with Section 5 of PD No. 1597 which requires presidential approval on the grant of any allowance, honoraria and other benefits to government officials and employees, such approval nonetheless was not in harmony with the provision of AO No. 402, the enabling law that gave rise to said Agreements. The Agreements should have been in conformity with AO No. 402 and not have been over and beyond what was provided thereof. x x x²⁶

Thus, the disallowance in this case was made by the COA not on the basis of the authority or the lack thereof of the SDES or the ES in

²² See also MO No. 146, July 13, 1993.

²³ SECTION 5. *Allowances, Honoraria, and Other Fringe Benefits*. — Allowances, honoraria and other fringe benefits which may be granted to government employees, whether payable by their respective offices or by other agencies of government, shall be subject to the approval of the President upon recommendation of the Commissioner of the Budget. For this purpose, the Budget Commission shall review on a continuing basis and shall prepare, for the consideration and approval of the President, policies and levels of allowances and other fringe benefits applicable to government personnel, including honoraria or other forms of compensation for participation in projects which are authorized to pay additional compensation.

²⁴ *Rollo*, p. 12.

²⁵ *Id.* at 98.

²⁶ *Id.* at 34.



approving PIDS's request for the establishment or continuation of its HMP. In fact, the COA recognizes that PIDS was authorized by the President, through the letter from the ES. As stated in the COA's Comment:

Let it be stressed that the letter of Executive Secretary Eduardo R. Ermita, by authority of the President, dated July 23, 2007, approving the request of petitioner PIDS to continue the implementation of its Annual Medical Check-Up Program with private health insurance companies "is subject to the usual accounting and auditing rules and regulations." Thus, the approval by the President of PIDS' health care package with private health insurance companies carries with it the express reservation or condition that it should be subject to the usual accounting rules and regulations of the COA.²⁷ (Emphasis omitted)

It is thus clear that the COA's concern was the extent of the President's approval, *i.e.*, that it is still "subject to the usual accounting and auditing rules and regulations."

To my mind, this is the issue upon which the case turns. In other words, does the OP approval, admitted by both parties, serve to excuse PIDS from complying with COA Resolution No. 2005-001?

In this regard, I agree with the *ponencia* that the tenor of the approval given by SDES Cardenas in 2000 and by ES Ermita in 2007 tends to show that PIDS was authorized to establish its HMP *in lieu of* the PHIC health program as provided in A.O. 402. Meaning, while the authority given to PIDS by ES Ermita provides that it is still "subject to the usual accounting and auditing rules and regulations," this does not mean that the COA can use A.O. 402 in order to cite PIDS in violation of the authority granted to it — as this proves to be a circular argument.

An administrative order is an executive issuance; hence, it can be abrogated by the President as the issuing authority. When ES Ermita, by authority of the President, approved PIDS's request for authority to continue with the implementation of their HMP *in lieu of that provided in A.O. 402*, the President, in effect, carved out an exception from A.O. 402 in favor of PIDS. Thus, the COA cannot hold PIDS liable under A.O. 402 precisely because the President, through the ES, already exempted PIDS from said administrative order.

On this note, I also agree with the following statements in the *ponencia*:

"In lieu" means instead or in the place of. It signifies that petitioner's annual medical checkup program functions as a substitute or an alternative to the annual medical health program provided under Administrative Order No. 402.

²⁷ Id. at 96.



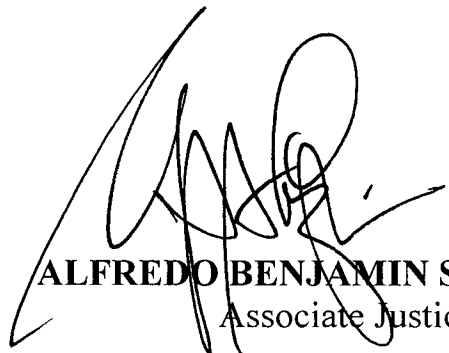
Thus, respondent erred when it upheld Notice of Disallowance No. 11-001-(06-10) reasoning that petitioner's agreements with health insurance companies should have been limited to diagnostic medical procedures, such as physical examination, chest x-ray, complete blood count, urinalysis, stool examination and ECG, as provided under Administrative Order No. 402.²⁸

Likewise, I agree with the ruling in the *ponencia* that PIDS did not violate COA Resolution No. 2005-001, to wit:

Clearly, procuring health insurance from private health insurance companies, by itself, does not constitute disbursement of public funds. What Commission on Audit Resolution No. 2005-001 forbids is the procurement of another health insurance *in addition to* the health program provided by the government through PhilHealth.

The annual medical checkup program being implemented by petitioner is **not an additional insurance**. **It is an alternative** to that provided by PhilHealth. PhilHealth, in its July 13, 2007 letter, informed petitioner that it has "not yet included the annual medical check-up benefit in the benefit packages being developed by [it]."²⁹ (Emphasis and underscoring supplied)

All things considered, I submit that the resolution of the case turned only upon this issue, making it unnecessary to rely upon qualified political agency as the *ratio decidendi* for the ultimate resolution of the case.



ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

²⁸ *Ponencia*, p. 25.

²⁹ *Id.* at 26.

