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REGION XIII (CARAGA REGION)
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DILG RO XHI
FILE

DILG-13 OPINION NO. 001-2014
 February 19, 2014

HON. EDGAR T. LAO
 Punong Barangay
 JP Rizal
 4th St., Guingona Subd.,
 Butuan City

DILG - REGION XIII
RELEASED
 DATE: MAR 06 2014
 TIME: 8:12
 BY: BR

Dear Punong Barangay Lao:

This refers to your query on how long will the Barangay Council wait for someone to replace Hon. Ruth Mongaya Alanano, Sangguniang Barangay member, who has not performed her duties as an elected barangay official due to illness, who is the right authority to appoint her replacement and is it correct for her husband to demand that he replaces her in the position.

First and foremost, for succession/replacement to take place, there must first be a vacancy, whether temporary or permanent.

DILG Opinion No. 151 Series of 2002 dated September 25, 2002 discussed the proper course of action to take as regards a Sangguniang Panlalawigan member who suffered from a serious stroke rendering him incapacitated for a period of seven (7) months then. It opined that at best, the absence of the sanggunian member may just be considered a temporary absence brought about by a temporary incapacity. This situation is keenly similar to the instant case.

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Given her condition, Hon. Ruth Mongaya Alanano may avail of leave privileges.

The last paragraph of Section 81 of the Local Government Code as basis for Rule XVI Section 5 of the Omnibus Rules Implementing Book V of Executive Order 292 provides:

"Elective local officials are entitled to the same leave privileges as those enjoyed by appointive local officials, including the cumulation and commutation thereof."

In this case of sick leave, Rule XVI Sections 53 and 54 of the Omnibus Rules Implementing Book V of Executive Order 292 are informative, *to wit*:

Section 53. Application for sick leave. - All applications for sick leave of absence for one full day or more shall be made on the prescribed form and shall be filled immediately upon employee's return from such leave. Notice of absence, however, should be sent to the immediate supervisor and/or to the agency head. Application for sick leave in excess of five (5) successive days shall be accompanied by a proper medical certificate.

Sick leave may be applied for in advance in cases where the official or employee will undergo medical examination or operation or advised to rest in view of ill health duly supported by a medical certificate.

In ordinary application for sick leave already taken not exceeding five days, the head of department or agency concerned may duly determine whether or not granting of sick leave is proper under the circumstances. In case of doubt, a medical certificate may be required. (Amended by CSC MC No. 41, s.1998)

Section 54. Approval of sick leave. - Sick leave shall be granted only on account of sickness or disability on the part of the employee concerned or of any member of his immediate family.

Approval of sick leave, whether with or without pay, is mandatory provided proof of sickness or disability is attached to the application in accordance with the requirements prescribed under the preceding section. Unreasonable delay in the approval thereof or non-approval without justifiable reason shall be a ground for appropriate sanction against the official concerned. (Amended by CSC MC No. 41, s.1998 and 14, s. 1999). (Emphasis supplied)

Based on Section 47 (a) of the Local Government Code, leaves of absence of local elective officials shall be approved as follows:

XXX

(4) *leaves of absence of a punong barangay shall be approved by the city or municipal mayor; provided, that leave of absence of sangguniang barangay members shall be approved by the punong barangay.* (Emphasis supplied)

Sections 64 Rule XVI of the Omnibus Rules Implementing Book V of Executive Order 292 on the status of the position of an official or employee on vacation or sick leave states that:

While the incumbent is on vacation or sick leave with or without pay, his position is not vacant. xxx

In which case, no succession or replacement may arise.

Permanent vacancy may only arise in instances enumerated by Section 44 of the Local Government Code of 1991 (LGC):

"Section 44. xxx For purposes of this Chapter, a permanent vacancy arises when an elective local official fills a higher vacant office, refuses to assume office, fails to qualify, dies, is removed from office, voluntarily resigns, or is otherwise permanently incapacitated to discharge the functions of his office." (Emphasis supplied)

Given the circumstance of Hon. Ruth Mongaya Alanano, she may opt to resign voluntarily. In which case, Section 82 of the Local Government Code of 1991 is instructive:

Resignations by elective officials shall be deemed effective only upon acceptance by the following authorities:

xxx

(4) *The city or municipal mayor, in case of barangay officials.*

(b) *Copies of the resignation letters of elective local officials, together with the action taken by the aforesaid authorities, shall be furnished the Department of the Interior and Local Government.*

(c) *The resignation shall be deemed accepted if not acted upon by the authority concerned within fifteen (15) days from receipt thereof.*

(d) *Irrevocable resignations by sanggunian members shall be deemed accepted upon presentation before an open session of the sanggunian concerned and duly entered in its records: Provided, however, That this subsection does not apply to sanggunian members who are subject to recall elections or to cases where existing laws prescribed the manner of acting upon such resignations.*

However, if she insists in continuing to hold office despite inability to perform functions due to severe illness, there is no vacancy to speak of yet, and consequently the rule of suspension cannot be applied.

In such instance, DILG Legal Opinion No. 89, Series of 2011, dated November 28, 2011, is helpful in defining the above phrase saying "is otherwise permanently incapacitated to discharge the functions of his office". It opined that temporary/permanent vacancies may be further classified in two (2), i.e., vacancy due to illness / physical disability and vacancy due to legal causes. (Emphasis supplied).

However, both DILG Opinion No. 22, Series of 2010 dated March 10, 2010 and DILG Opinion No. 151, Series of 2002 dated September 25, 2001, discussed the consequence of such temporary/permanent vacancy due to the illness/physical disability of the incumbent, *viz*:

xxx the Local Government Code did not empower any agency or official of the government to declare permanent vacancy due to illness of the incumbent.

At this point, it bears to stress that due to the lack of provision in the local Government Code, the determination as to whether or not there is permanent or temporary vacancy due to illness of the incumbent would necessarily become an adjudicatory matter, meaning, such declaration should be obtained from our courts of justice in order for the said courts of justice to adjudicate and apply the law involved.

It is in this regard, that we strongly suggest that in order for this hiatus not be left without remedy as it would undoubtedly affect the operations of your barangay, you may invoke the aid of the Regional Trial Court, a court of general jurisdiction, seeking a declaration pursuant to the Rules of Court, as to whether or not your incumbent Sangguniang Barangay Member is still physically and mentally fit to discharge the functions of his office. It is only the court which can judicially declare a vacancy in the office of the Sangguniang Barangay, whether permanent or temporary."

Needless to say, Hon. Ruth Mongaya Alanano may need to be examined by a competent doctor in order to determine the severity of her illness and who may be an expert to opine as regards the declaration of the incapacity to discharge the functions of the office. At the end, the barangay council may pass a resolution requesting the City Health Officer

through the City Mayor to conduct the necessary medical and physical examinations and consequently issue a medical certificate.

If and when there is already such vacancy, Section 45 outlines the rule of succession in case of permanent vacancies in the sanggunian,

"Section 45. (a) Permanent vacancies in the sanggunian where automatic successions provided above do not apply shall be filled by appointment in the following manner:

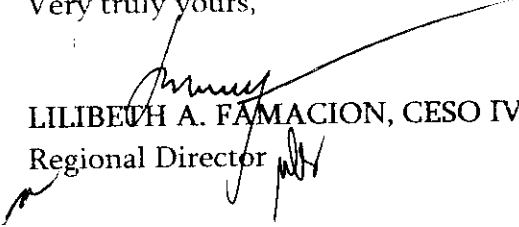
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(3) The city or municipal mayor, in the case of sangguniang barangay, upon recommendation of the sangguniang barangay concerned. xxx (Emphasis supplied)

To emphasize, as already underscored in the cited Legal Opinions, the recommendation is a collegial decision of the sangguniang barangay concerned. So that, the husband of Hon. Ruth Mongaya Alanano has no vested right to compel the sangguniang barangay that he (husband) replaces Hon. Alanano. It is the sangguniang barangay's collective choice and decision as to whoever, who may or may not be the husband of Hon. Alanano, they will recommend to the city mayor for appointment to fill the permanent vacancy.

We hope to have sufficiently addressed your concerns.

Very truly yours,


LILIBETH A. FAMACION, CESO IV
Regional Director