Republic of the Philippines
Securities and Exchange Commission
SEC Bldg., EDSA Greenhills, Mandaluyong City

BENPRES HOLDINGS CORPORATION,
Appellant,

- **versus** -

CORPORATION FINANCE DEPARTMENT,
Appellee.

SEC En Banc Case No. 07-08-138
For: *Review of CFD Letter Order dated 25 June 2008*

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DECISION

Before the Commission is the Memorandum on Appeal[1] ("Memorandum") dated 23 July 2008 filed by Appellant Benpres Holdings Corporation ("BenPres")[2] on 24 July 2008, appealing the *Letter-Order* dated 25 June 2008[3] issued by the Appellee Corporation Finance Department ("CFD") of the Commission through its Director, Justina F. Callangan, which reprimanded BenPres for violation of SRC Rule 38(6)(B)(iii) of the Amended Implementing Rules and Regulations ("IRR") of the Securities Regulation Code ("SRC")[4] and directed it to replace Washington G. Sycip ("Sycip") as its independent director.

Mr. Sycip, independent director of BenPres, was found by the CFD, based on the corporation's previous Sworn Certification,[5] to have attended only five (5) out of eleven (11) board meetings during the fiscal year from January 1 to December 31, 2007.

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[1] Received by the Commission on 24 July 2008.
[2] Now known as "Lopez Holdings Corporation," as per the Certificate of Filing of Amended Articles of Incorporation dated 23 June 2010.
[3] Annex "A," Memorandum on Appeal.
[4] R.A. 8799 (2000).
[5] Secretary's Certification dated 30 January 2008.

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Under the corporation's Amended Manual on Corporate Governance ("Manual", for brevity)[6], non-attendance in more than half of the Board meetings is a ground for temporary disqualification.

In the instant appeal, BenPres prays that Sycip be allowed to continue in office as an Independent Director of the corporation, or in the alternative, serve as regular director, and that the reprimand issued by the CFD be withdrawn and expunged from the records of the corporation.

FACTS OF THE CASE

On 30 January 2008, BenPres filed its Sworn Certification to the CFD, which states:

> "ENRIQUE I. QUIASON ... secretary of BenPres Holdings Corporation ... hereby certifies to the attendance of the Directors of the Corporation in regular and special meetings of the Board of Directors held for the fiscal year from January 1, 2007 and ending on December 31, 2007, as follows:
>
> xxx
>
> 6. Washington Z. Sycip – attended five out of eleven board meetings."[7]

Subsequently, on 23 April 2008, BenPres filed with the Commission its Preliminary Information Statement ("PIS," for brevity) as well as its Management Report for its 12 June 2008 annual stockholders' meeting.[8]

In a letter dated 29 April 2008, CFD informed BenPres that its PIS and Management Report were not in full compliance with the requirements of SRC Rule 20 and directed it to amend the same in accordance with the checklist of requirements provided by the CFD and to file its Definitive Information Statement and report not later than the date of distribution of the same to the company's holders, with clearance from

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[6] Annex "F," Memorandum on Appeal, referred to by CFD in its letter-order as filed with the Commission on 27 March 2003.
[7] *Supra*, note 5.
[8] SEC Form 20-IS submitted by BenPres dated 23 April 2008, Annex "B" of the Memorandum on Appeal.

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the Commission prior to distribution.[9] In the checklist of BenPres' PIS filed on 23 April 2008 with the CFD, the CFD made the following comment in the remarks section:

> "Based on the company's Sworn Certification filed with this Commission on January 30, 2008, ***Mr. Washington Z. Sycip has only attended five out of eleven meetings conducted last year***. Per company's Manual on Corporate Governance, this is a ground for temporary disqualification. Explain why he is still included in the list of nominees."

In response, BenPres sent a letter-explanation dated 06 May 2008, the pertinent portions of which are quoted:

> "We reproduce below the relevant provision adverted to in your letter:
>
> Any of the following shall *be a ground* for the temporary disqualification or dismissal for cause of a director:
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> ...
>
> b. *Absence or non-participation for unjustifiable reason/s for more than fifty percent (50%)* of all meetings, both regular and special, of the Board of directors during his incumbency or any twelve-(12) month period during said incumbency. This disqualification applies for purposes of the succeeding election.
>
> ...
>
> The *Board shall have the final decision to determine the qualification or disqualification of a director.*
>
> We wish to point out that absences *per se* are not what are covered in the above provision. Rather, it is absence without any justifiable reason which is contemplated. Thus, a mathematical summation of Mr. Sycip's attendance by itself does not necessarily fall thereunder."[10]

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[9] Annex "C," Memorandum on Appeal.
[10] *Ibid.*, Annex "D."

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On 21 May 2008, Ben Pres filed its Definitive Information Statement with the CFD, without removing Sycip as nominee for independent director[11], and included in the Information Statement its letter-explanation dated 06 May 2008 addressed to the CFD.[12] The Information Statement was distributed to the corporation's stockholders.

On 12 June 2008, BenPres filed its Current Report (SEC Form 17-C) with the CFD, disclosing the list of its newly elected directors, including Sycip as an independent director.[13]

On 25 June 2008, the CFD issued the assailed letter-order to BenPres[14], reprimanding the latter and directing the latter to replace Sycip, which BenPres appealed.

On 21 August 2008, an Order was issued to the CFD to file its Reply Memorandum.

The CFD filed its Reply-Memorandum dated 22 September 2008.[15]

The arguments presented by BenPres in support of its Appeal can be summarized as follows: (1) two of these absences were justified due to a change in schedule initiated by the corporation; (2) under its Manual, the Board of Directors has the final decision to determine the qualification or disqualification of a director; (3) there was lack of due process on the part of CFD by failing to notify Sycip of the disqualification.

On the other hand, the arguments posited by the CFD can be summarized as follows: (1) change in schedule of the board meetings of BenPres is not a valid excuse for Sycip's absences; (2) the disqualification of Sycip has bases in law ; and (3) there was no violation of due process because BenPres was sufficiently informed of the disqualification of Sycip and notice to Sycip himself was not necessary.

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[11] Annex "E," Memorandum on Appeal, p. 3-4.
[12] Ibid, p. 2-3.
[13] Reply-Memorandum, p.2.
[14] Annex "A," Memorandum on Appeal.
[15] Received by the Commission on 24 September 2008.

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ISSUE

After a careful reading of the pleadings and arguments put forth by the parties, the issue to be resolved is: whether or not the CFD erred in imposing sanctions on BenPres for its alleged violation of SRC Rule 38 as embodied in the Manual of the Corporation.

RULING

The Commission is vested with broad regulatory powers as part of its mandate under the SRC in order to:

> "(E)stablish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratization of wealth, promote the development of the capital market, protect investors, ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market."[16]

The Commission is tasked to monitor and regulate public and listed corporations for the benefit and protection of the public. Thus, the Code of Corporate Governance ("CCG")[17] was promulgated to actively promote corporate governance reforms and help achieve high sustained growth for the corporate sector, and the economy and in pursuance of these objectives, the corporations are directed to promulgate and adopt their own corporate governance rules and principles in accordance with the CCG.[18]

Under its by-laws, the annual stockholders' meeting of BenPres shall be held every last Wednesday of May of each year under its by-laws,[19] for the purpose of

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[16] Section 2, SRC. The rule-making authority vested in the Commission can be found in Section 5(g) of the SRC: "Prepare, approve, amend or repeal rules, regulations and orders, and issue opinions and provide guidance on and supervise compliance with such rules, regulations and orders."

[17] SEC Memorandum Circular No. 2, series of 2002, as amended by SEC Memorandum Circular No. 6, series of 2009.

[18] Part VII of the CCG.

[19] By-Laws of BenPres Holdings Corporation (now Lopez Holdings Corporation), as amended per Certificate of Filing of Amended By-Laws issued by the CRMD on 16 January 2001.

electing its Directors.[20] Based on the 2007 General Information Sheet submitted by BenPres, the annual stockholders' meeting was conducted on 14 June 2007.[21]

It appears that the CFD relied on the Sworn Certification dated 30 January 2008 of BenPres in issuing its reprimand. On its face, the Sworn Certification only refers to the attendance of the directors at regular and special meetings only for the fiscal year from January 1 to December 31, 2007.

SRC Rule 38(6)(B)(iii) of the IRR implementing Section 38[22] of the SRC provides:

> "No person enumerated under Section II (5) of the Code of Corporate Governance shall qualify as an independent director. He shall likewise be disqualified during his tenure under the following instances or causes:
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> (iii) ***Fails, without any justifiable cause, to attend at least 50% of the total number of Board meetings during his incumbency,***"

The requirement to attend Board meetings and the consequences of non-attendance or non-participation of an incumbent director can be found specifically in Section II(5) of the CCG, which provides:

> "The Board may also provide for the temporary disqualification of a director for the following reasons:
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> b. Absence or non-participation for whatever reason/s for more than fifty percent (50%) of all meetings, both

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[20] *Ibid.*, Article I, Section 1.

[21] It is to be noted, too, that subsequent General Information Sheet submissions of BenPres for 2008 and 2009 indicate that the annual meeting was moved to the second Thursday of June.

[22] "Sec. 38. Independent Directors. - Any corporation with a class of equity securities listed for trading on an Exchange or with assets in excess of Fifty million pesos (P50,000,000.00) and having two hundred (200) or more holders, at least two hundred (200) of which are holding at least one hundred (100) shares of a class of its equity securities or which has sold a class of equity securities to the public pursuant to an effective registration statement in compliance with Section 12 hereof shall have at least two (2) independent directors or such independent directors shall constitute at least twenty percent (20%) of the members of such board, whichever is the lesser. For this purpose, an 'independent director' shall mean a person other than an officer or employee of the corporation, its parent or subsidiaries, or any other individual having a relationship with the corporation, which would interfere with the exercise of independent judgment in carrying out the responsibilities of a director."

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> regular and special, of the Board of directors ***during his incumbency, or any twelve (12) month period during said incumbency***. This disqualification applies for purposes of the succeeding election."

The provision is likewise reproduced[23] in the Manual of BenPres.

The provisions on non-compliance with such attendance requirements as a ground for disqualification of an independent director in the Amended IRR, CCG and Manual of BenPres clearly refer to the non-attendance in board meetings held during the incumbency or any twelve month period during the incumbency, or tenure of the director.

Thus, it is necessary first to determine the proper period contemplated by the 'incumbency' of a director, during which, s/he may be disqualified in the succeeding election, for failure to attend or participate in at least fifty per cent (50%) of the regular and special Board meetings. The period contemplated by the rules refers to the tenure of the director that usually commences upon his or her election at the annual stockholders' meeting and usually continues until the next annual stockholders' meeting where a successor is qualified and elected.

Applying the same to the instant case, the fiscal year indicated in BenPres' Sworn Certification – i.e., from January 1 to December 31, 2007 does not appear to coincide with the tenure or period of incumbency of Sycip as a director. Since Sycip was being considered for a new term starting from 12 June 2008 to 12 June 2009, then the twelve month period that has to be examined is the twelve months prior to such election, i.e. June 2007 – June 2008, and not from January to December, 2007.

Thus, the CFD's reliance on the Sworn Certification dated 25 January 2008 alone, in imposing the penalty of REPRIMAND upon BenPres and directing it to replace Sycip as independent director, is erroneous.

WHEREFORE, premises considered, the Appeal is hereby **GRANTED**. The ***Letter-Order dated 25 June 2008*** is hereby **SET ASIDE.** The Corporation Finance Department is directed to further investigate and determine proper compliance by Ben Pres Holdings Corporation (now Lopez Holdings Corporation) with SRC Rule 38(6)(B)(iii) of the Amended Implementing Rules and Regulations of the Securities Regulation Code,

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[23] Section 3.

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Section II(5) of the Code of Corporate Governance and Section 3 of the BenPres Amended Manual on Corporate Governance, and to resolve the matter with dispatch.

Let a copy of this **DECISION** be furnished to the Company Registration and Monitoring Department of the Commission for its information.

SO ORDERED.

Mandaluyong City, 09 June 2011.

TERESITA J. HERBOSA
Chairperson

MA. JUANITA E. CUETO
Commissioner

RAUL J. PALABRICA
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

ELADIO M. JALA
Commissioner