

1965,  
Jan. 14,  
Feb. 3  
March 1

—  
STYLIANOS  
CONSTANTINOU  
and  
THE GREEK  
COMMUNAL  
CHAMBER  
THROUGH THE  
DISCIPLINARY  
BOARD

[TRIANAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE  
CONSTITUTION

STYLIANOS CONSTANTINOU

*Applicant,*

and

THE GREEK COMMUNAL CHAMBER  
THROUGH THE DISCIPLINARY BOARD,

*Respondent.*

(Case No. 6/64).

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*Elementary Education Schoolteacher—Transfer and subsequent dismissal of by the Disciplinary Board set up under the Greek Communal Law No. 8/63—Recourse against both transfer and dismissal—Recourse against transfer fails as being out of time—Recourse against dismissal succeeds as dismissal taken through not properly exercised discretion.*

*Administrative Law—Discretion—Exercise of by an administrative body—Court not entitled to interfere with such discretion if properly exercised—Prerequisites necessary for a discretion to be found to have been properly exercised.*

*Greek Communal Law 8/63—Recourse against dismissal without following the procedure under section 5(5) thereof—Objection provided under section 5(5) is by way of review and not by way of completion of the administrative act concerned.*

Applicant filed this recourse against (a) his dismissal from the post of elementary schoolteacher and (b) his transfer from Kiti to Troulli.

Applicant who would have ordinarily retired at the age of 55 in June, 1964, was about to serve his last school year as a permanent elementary schoolteacher, when in August 1963, he was informed that he was being transferred from Kiti to Troulli.

Applicant objected against such transfer, in writing, on the 29th August, 1963, to the Review Committee set up for the purpose under Greek Communal Law No. 8/63, but he was informed by letter dated 20th September 1963, that his objection had been rejected.

Applicant by then started working at Troulli, but did not move his place of abode to Troulli. After, however, he received the letter of the 20th September, 1963, he wrote on the 27th September, 1963, to the Director of the Greek Education Office, informing him that as he intended "to challenge on appeal" the decision in question, he was discontinuing his service at Troulli as from the 1st October, 1963, until the adjudication on his appeal. Presumably he had in mind to make, in effect, a recourse under Article 146, a thing which he did not eventually do, then.

On the 5th October, 1963, Applicant was notified by the Director of the Greek Education Office to return to his post and was informed that in case he failed to do so the question of his dismissal would be raised before the appropriate authority.

The applicant refused to comply and eventually the matter came up before the Disciplinary Board on the 29th October, 1963, and Applicant attended for the purpose; his attention was drawn to the consequences of his conduct, including dismissal and loss of pension, and after he had replied that he refused to comply with the transfer to Troulli and was ready to face the consequences, the Board decided to dismiss him from the service.

Such decision was conveyed to Applicant by letter dated the 4th November, 1963.

At the commencement of the hearing an objection was taken by counsel for Respondent to the effect that the recourse is out of time, under Article 146(3) in so far as the transfer of Applicant is concerned, because that was a matter which had been finally confirmed by the Review Committee and Applicant had been informed accordingly by letter of the 20th September, 1963, which he must have received before the 27th September, 1963, when he replied to it. As this recourse was filed on the 17th January, 1964, it is clear that it has been filed well after the time-limit of seventy-five days laid down under Article 146(3).

On behalf of the Applicant it was put forward that his transfer and dismissal form in reality only one and the same transaction.

*Held, I. As regards the objection that the recourse is*

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*out of time, under Article 146.3 in so far as the transfer of Applicant is concerned :-*

(a) It is correct that the transfer and the dismissal of Applicant are related to each other but they do not form what is known as a composite administrative act, so that in challenging his dismissal Applicant would be entitled to challenge also the validity of his transfer. The transfer and the dismissal are administrative acts separate of each other, made by organs separate and independent of each other, and the first act, the transfer, does not form either a condition precedent for the latter act, the dismissal, nor is such dismissal the necessary administrative consequence and continuation of the transfer.

(b) This recourse in so far as it relates to the validity of the transfer of Applicant, as such, fails and is dismissed as being out of time.

(c) As regards the claim of Applicant against his dismissal there is no doubt that it is within time, as it was communicated by letter dated 4th November, 1963, and the recourse was filed on the 17th January, 1964.

*II. On whether the discretion of the Respondent Disciplinary Board in the matter has been properly exercised :-*

(a) It is well settled that an administrative court is not entitled to interfere with the exercise of the discretion of an administrative body, such as is the Disciplinary Board for the purposes of Article 146, so long as such discretion has been exercised in a proper manner.

(b) The decision to dismiss Applicant has been reached without due regard being paid to all relevant considerations and that, consequently, the discretion of the Disciplinary Board in the matter has not been exercised in a proper manner.

*III. As regards the dismissal of Applicant :*

(a) The disciplinary punishment imposed on Applicant in this Case has to be annulled. By failing to pay due regard to relevant considerations the Disciplinary Board has in effect reached its decision to dismiss Applicant through defective reasoning.

IV. As regards costs :

*There should be no order made as to costs.*

*Recourse succeeds in part.*

*Dismissal of Applicant annulled.*

*Observation 1:-* The fact that Applicant in the meantime has passed the normal age limit for retirement does not, in my opinion, preclude the Disciplinary Board from reconsidering the matter because such a course would be in accordance with the requirements of a provision in the Constitution Article 146(5), and also would relate back to the factual and legal situation existing at the material time i.e. the 29th October, 1963, when the said Board first dealt with the matter, before Applicant's normal time of retirement.

*Observation 2:-* I would observe that the Applicant in this Case has filed the recourse under adjudication, against his dismissal, without having first objected to the Review Committee under section 5(5) of Greek Communal Law 8/63. In my opinion, his non-lodging of an objection, as above, is not a bar to the making of this recourse because the objection under section 5(5) is by way of review and not by way of completion of the administrative act concerned, (*Pelides and The Republic*, 3 R.S.C.C. p. 13 and 19).

Cases referred to:

*Saruhan and The Republic* (2 R.S.C.C. p. 133 at p. 136).

*Decision 1406/1954 of the Greek Council of State* (1954 Γ p. 1737).

*Decision 1229/1957 of the Greek Council of State* (1957 Β p. 574).

*Morsis and The Republic* (reported in this vol. at p. 1 ante);

*Decision 1622/1955 of the Greek Council of State* (1954 Γ p. 361).

*Pelides and The Republic*, (3 R.S.C.C. p. 13 and 19).

**Recourse.**

Recourse against the decision of the respondent to transfer applicant from Kiti village to Troulli village and the sub-

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sequent decision to dismiss him from his permanent post of elementary school teacher.

*Chrysses Demetriades* for the applicant.

*G. Tornaritis* for the respondent.

*Cur. adv. vult.*

The facts of the recourse sufficiently appear in the following judgment delivered by:—

TRIANTAFYLLOIDES, J.: This is a recourse against:

- (a) the dismissal of Applicant from the post of elementary schoolteacher, and
- (b) his transfer from Kiti to Troulli.

Actually claim (b) of the motion for relief refers to a state of things chronologically earlier than those to which refers claim (a), because, as it will be seen from the history of the matter, it was Applicant's transfer which led to his dismissal.

Applicant who would have ordinarily retired at the age of 55 in June, 1964, was about to serve his last school-year as a permanent elementary schoolteacher, when in August, 1963, he came to know that he was being transferred from Kiti to Troulli.

Applicant objected against such transfer, in writing, on the 29th August, 1963, to the Review Committee set up for the purpose under Greek Communal Law No. 8/63.

His objection was examined by the said Committee on the 16th September, 1963, and Applicant appeared before the Committee in order to support such objection.

By letter of the 20th September, 1963, Applicant was informed that his objection had been rejected.

At the time Applicant had already started working at Troulli, without having yet moved his place of abode from Kiti to Troulli. After, however, he received the letter of the 20th September, 1963, he wrote on the 27th September, 1963, to the Director of the Greek Education Office, informing him that as he intended to "challenge on appeal" the decision in question he was discontinuing his service at Troulli as from the 1st October, 1963, until the adjudication on his appeal. Presumably he had in mind to make, in

effect, a recourse under Article 146, a thing which he did not eventually do, then.

On the 5th October, 1963, Applicant was summoned in writing by the Director of the Greek Education Office to return to his post and was informed that in case he failed to do so the question of his dismissal would be raised before the appropriate authority.

As Applicant refused to comply he was summoned in writing, on the 23rd October, 1963, to appear before the Disciplinary Board, set up under Greek Communal Law No. 8/63, in order to answer relevant charges framed under rule 5(η) and (θ) of the Disciplinary Regulations (13/1962), published on the 22nd June, 1962, and kept in force under section 11 of Law 8/63 (in the said letter of the 23rd October, 1963, the relevant rule is stated as being "section 4 para. H and Θ", through an obvious clerical error).

The matter came up before the Disciplinary Board on the 29th October, 1963, and Applicant attended for the purpose. As it appears from the relevant minutes his attention was drawn to the consequences of his conduct, including dismissal and loss of pension, and after he had replied that he refused to comply with the transfer to Troulli and was ready to face the consequences, the Board decided to dismiss him from the service.

Such decision was conveyed to Applicant by letter dated the 4th November, 1963.

At the commencement of the hearing an objection was taken by counsel for Respondent to the effect that the recourse is out of time, under Article 146(3), in so far as the transfer of Applicant is concerned, because that was a matter which had been finally confirmed by the Review Committee and Applicant had been informed accordingly by letter of the 20th September, 1963, which he must have received before the 27th September, 1963, when he replied to it. As this recourse was filed on the 17th January, 1964, it is clear that it has been filed well after the time-limit of seventy-five days laid down under Article 146(3).

On behalf of the Applicant it was put forward that his transfer and dismissal form in reality only one and the same transaction.

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I find that the objection was well taken by counsel for Respondent, and actually at his final address at the hearing counsel for Applicant, himself, did not appear to press for separate relief on the basis of claim (b) of the motion for relief, relating to the transfer.

It is correct that the transfer and the dismissal of Applicant are related to each other but they do not form what is known as a composite administrative act, so that in challenging his dismissal Applicant would be entitled to challenge also the validity of his transfer. The transfer and the dismissal are administrative acts separate of each other, made by organs separate and independent of each other, and the first act, the transfer, does not form either a condition precedent for the latter act, the dismissal, nor is such dismissal the necessary administrative consequence and continuation of the transfer.

The transfer, as such, is a completed administrative act the effect of which was disobeyed by Applicant and this has led to the taking place of another and separate administrative act, his dismissal.

In the circumstances this recourse in so far as it relates to the validity of the transfer of Applicant, as such, fails and is dismissed as being out of time.

As regards the claim of Applicant against his dismissal there is no doubt that it is within time, as it was communicated by letter dated 4th November, 1963 and the recourse was filed on the 17th January, 1964.

It is well settled that an administrative court is not entitled to interfere with the exercise of the discretion of an administrative body, such as is the Disciplinary Board for the purposes of Article 146, so long as such discretion has been exercised in a proper manner.

In order that a discretion should be found to have been exercised in a proper manner it is necessary, *inter alia*, that in the exercise thereof due regard must have been paid to all relevant considerations and no irrelevant factor should have been taken into account. These prerequisites are to be found referred to in, *inter alia*, the judgment in *Saruhan and the Republic* (2 R.S.C.C. p. 133 at p. 136).

In this case I have reached the conclusion that the decision to dismiss Applicant has been reached without due regard

being paid to all relevant considerations and that, consequently, the discretion of the Disciplinary Board in the matter has not been exercised in a proper manner.

The relevant considerations to which, in my opinion, due regard has not been paid are the circumstances relating to Applicant's transfer, in so far as they were relevant—as indeed they were—to the question of the disciplinary punishment to be imposed on Applicant.

The Disciplinary Board quite properly did not proceed to review the propriety of the transfer, as such, and indeed it had no competence to do so; on the other hand—and this has been also testified to by a witness called on behalf of Respondent, Mr. Andreas Christodoulides, a member on that occasion of the Disciplinary Board—the said Board did not treat at all the circumstances relating to Applicant's transfer as matters relevant to the exercise of its discretion as a disciplinary organ; in particular the Board did not go into such circumstances while assessing the punishment to be imposed on Applicant for his persistent refusal to comply with his transfer.

It appears that the Board looked upon the transfer of Applicant in the abstract only, as an order which he had been stubbornly disobeying. This is clear both from the evidence of Mr. Christodoulides and the minutes of the Board; it has also been the line adopted by Respondent in this Case, both in the Opposition and in argument during the hearing.

In my opinion though the transfer had to be treated as an act which could not be set aside by the Disciplinary Board, it ought to have been gone into to the extent of examining the circumstances in which it was made and the objections of the Applicant thereto, because such matters constituted factors directly relevant to the gravity of the conduct of Applicant in disobeying such transfer. They could not absolve the Applicant from the guilt of disobedience but they could alleviate the consequences of such disobedience.

Had dismissal been the only punishment which the Disciplinary Board was entitled to impose in the circumstances then the disregard of considerations relating to Applicant's transfer would not have affected the validity of Respondent's course of action because such considerations would, in

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reality, be not relevant. Under, however, rule 6 of the relevant Disciplinary Regulations a number of punishments, other than final dismissal, were open to the Board.

It is significant to bear in mind, in this connection, that at the time Applicant had less than a year to serve before retirement. Moreover, Applicant was—and it has not been disputed—a good educationalist in the true sense of the term; he did not limit himself to the narrow school limits but he discharged fully his mission in the wider planes of society through starting, organizing and heading various cultural activities.

In view of the above had the particular circumstances of Applicant's transfer and his objections thereto been paid due regard by the Disciplinary Board, such Board *might*—not should, as I am not prejudging this issue—have decided to impose a lesser punishment than final dismissal.

I have refrained carefully from examining the extent of the probability of the Disciplinary Board imposing a lesser punishment or whether or not such lesser punishment would have been proper in the particular circumstances of this Case or, even, whether or not such lesser punishment, as might have been imposed, could have had the same severe consequences for Applicant, regarding pension or otherwise.

I have felt that speculation on the above matters should not have influenced the outcome of my decision in this Case, once I have been satisfied that the manner of the exercise of the discretion of the Disciplinary Board has not been the proper one, in that it has failed to pay due regard to relevant considerations pertaining to the transfer of Applicant—by not taking into account at all such considerations.

The decision of an administrative Court should not be influenced in controlling the manner of the exercise of a discretionary power, by speculation about what might have been the outcome of the exercise of such power had there not existed a particular flaw in the manner of such exercise. Such speculation would amount to anticipating the outcome of the proper exercise of such discretionary power and, thus, substituting to a certain extent the Court's discretion in the place of that of the organ concerned.

In the circumstances I have reached the conclusion that the disciplinary punishment imposed on Applicant in this Case

has to be annulled. By failing to pay due regard to relevant considerations the Disciplinary Board has in effect reached its decision to dismiss Applicant through defective reasoning.

It is now up to the Disciplinary Board to reconsider the matter afresh without omitting to take into account any relevant consideration.

The fact that Applicant in the meantime has passed the normal age limit for retirement does not, in my opinion, preclude the Disciplinary Board from reconsidering the matter because such a course would be in accordance with the requirements of a provision in the Constitution, Article 146(5), and also would relate back to the factual and legal situation existing at the material time i.e. the 29th October, 1963, when the said Board first dealt with the matter, before Applicant's normal time of retirement.

In this connection it would be useful to refer to Decision 1406/1954 of the Greek Council of State (1954 Γ p. 1737) where it was held that on a new consideration of a matter, after annulment of the previously made administrative act in the same matter, the originally existing legal and factual situation ought to be taken into consideration.

Similarly in Decision 1229/1957 of the Greek Council of State (1957 B p. 574) it was held that an organ, after annulment of its original decision in a matter, may proceed to take a new decision therein notwithstanding the fact that such new decision is taken after the lapse of the relevant time-limit as prescribed in the particular Law; it was held there that this is possible because the new decision relates to the situation existing at the time of the making of the first decision in such matter.

It may well be—and I do not purport to decide on this aspect, but I only draw attention to it for consideration by the appropriate authorities—that any new decision of the Disciplinary Board in this matter, based on factors existing at the time of the decision annulled by this recourse, can properly be given retrospective effect, as falling under one of the recognized exceptions to the rule against retrospectivity of administrative acts. Unlike the case of *Morsis and The Republic* (reported in this vol. at p. 1 *ante*) where the requisite disciplinary proceedings had not taken place at all, on the first occasion when a disciplinary decision was reached

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by the Public Service Commission, and, therefore, the second decision of the Commission in the matter could not be given retrospective effect in this present Case the requisite disciplinary proceedings have duly taken place on the 29th October, 1963, but the decision reached was based on defective reasoning viz. that the relevant circumstances of the transfer were not paid due regard, as above explained. In this connection it may be, also, useful to bear in mind the above referred to Decision 1229/1957. In that case a military officer was refused reinstatement and the Council of State annulled the refusal (Decision 1622/1955 1954 Γ p. 361) on the ground that a reason contrary to the provisions of the relevant legislation had been relied upon. Then a new administrative decision was taken in the matter and upon a recourse against it the Council of State held, *inter alia*, that the new decision was properly given retrospective effect.

By way of concluding remark I would observe that the Applicant in this Case has filed the recourse under adjudication, against his dismissal, without having first objected to the Review Committee under section 5(5) of Greek Communal Law 8/63. In my opinion, his non-lodging of an objection, as above, is not a bar to the making of this recourse because the objection under section 5(5) is by way of review and not by way of completion of the administrative act concerned, (*Pelides and The Republic*, 3 R.S.C.C. p. 13 and 19).

On the question of costs, I have reached the conclusion that there should be no order made as to costs. Though Applicant has won his case in part—against his dismissal, but not in respect of the transfer, itself—the fact remains that it was the Applicant through his unnecessary stubbornness who has set in motion the developments in this Case leading to his dismissal and these proceedings eventually.

*Recourse succeeds in part;  
Dismissal of Applicant  
annulled. No order as to  
costs.*