1980 August 5

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SAVVAS MENELAOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF INTERIOR, AND/OR THE COMMANDER OF POLICE,

Respondents.

(*Case No.* 112/75).

Disciplinary proceedings—Natural Justice—Rules of—Applicable to disciplinary proceedings—Disciplinary organ wrongly and in violation of the said Rules took into consideration a pending disciplinary case against the applicant which had not been heard and which was fixed for hearing on another day—Sub judice decision annulled.

Natural Justice—Rules of—Applicable to disciplinary proceedings.

The applicant, a Police Constable, was tried disciplinarily for, *inter alia*, undignified conduct, and was sentenced to pay a fine of £3. The District Commander of qolice reviewed the case, under regulation 18(4) of the Police (Discipline) Regulations, and increased the fine to £13. On appeal to the Commander of Police by the Acting Deputy Commander of Police, under regulation 20(3)(c) of the aforesaid Regulations, the Commander of Police imposed on the applicant the sentence of dismissal from the service; and hence this recourse. In imposing this sentence the Commander of Police took into consideration, amongst others, another disciplinary charge against the applicant which was fixed for hearing on another date. The main contention of counsel for the applicant was that in reaching the above decision the Commander of Police was influenced by another disciplinary offence which was fixed for hearing on a separate date and in doing so he acted contrary to the principles of disciplinary justice.

Held, that the rules of natural justice are applicable to disciplinary proceedings; that a disciplinary organ, when trying a case, cannot take into consideration a pending case against an applicant which until that time had not been tried and there is no decision with regard to it; that as the Acting Commander of Police has taken, also, into consideration a case against the applicant which until that time had not been heard and which was fixed on another date for hearing, he allowed himself wrongly and in violation of the principles of natural justice, to be influenced by it and thus to impose finally the punishment of dismissal from the service; and that, therefore, his decision must be annulled (pp. 473–484 *post*).

Sub judice decision annulled.

Cases referred to:

Enotiadou v. *Republic* (1971) 3 C.L.R. 409;

Lambrou v. *Republic* (1972) 3 C.L.R. 379;

Haros v. *Republic*, 4 R.S.C.C. 39 at pp. 43, 44;

Markoullides v. *Republic*, 3 R.S.C.C. 30 at p. 35;

Kalisperas v. *Republic*, 3 R.S.C.C. 145 at pp. 151, 152;

Hadjisavva v. *Republic* (1972) 3 C.L.R. 174 at p. 200;

Hadjigeorghiou v. *Republic* (1968) 3 C.L.R. 326 at pp. 340, 341, 342, 345;

Pantelidou v. *Republic*, 4 R.S.C.C. 100 at p. 106;

Morsis v. *Republic*, 4 R.S.C.C. 133 at p. 137;

Tzavelas and Another v. *Republic* (1975) 3 C.L.R. 490 at pp. 502, 503, 504 and 505;

Decisions of the Greek Council of State in Case Nos. 519/1932, 360/1949, 888/1933.

Recourse.

Recourse against the decision of the respondents to dismiss applicant from the ranks of the police force.

E. Efstathiou, for the applicant.

N. Charalambous, Counsel of the Republic, for the respondents.

Cur. adv. vult.

HADJIANASTASSIOU J. read the following judgment. Time and again it has been said that the Supreme Court has exclusive jurisdiction to adjudicate finally on a recourse made to it on a

complaint that a decision, an act or omission of any organ, authority or person exercising any executive or administrative authority is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

The complaint of the applicant in the present case is against both the Minister of Interior and the Commander of Police. By the present recourse, he seeks a declaration that the act and/or decision of the respondents dated 31st May, 1975 to dismiss him from the ranks of the police force, is null and void and of no effect whatsoever.

The applicant, Savvas Menelaou, had joined the ranks of the police force of Cyprus as a constable on 5th January, 1964. Having served for a period of eleven years on 21st February, 1975, a disciplinary charge was preferred against him in case No. 1/75, by which he was accused for undignified conduct, insubordination, and disobedience, contrary to the Police Regulations.

The applicant is married with two children; he became a refugee as a result of the Turkish invasion. He was tried by the Presiding Officer and was found guilty on three charges, and a fine of £3 was imposed on him on the first and second counts only. On 13th March, 1975, the Commander of Police of the District of Larnaca, reviewed the case of the applicant in accordance with regulation 18(4) of the Police (Disciplinary) Regulations, and increased the fine from £3 to £13. There was an appeal against that decision, and on 5th April, 1975, the case was fixed for hearing on 30th May, 1975 before the Acting Commander of Police. On that date, during the hearing of the appeal, certain other matters were brought to the notice of the Acting Commander of Police, which had nothing to do with case No. 1/75 under appeal, but with another disciplinary charge against the applicant in case No. 8/75 which was fixed for hearing on another date. The sentence imposed upon the applicant on that date was that of dismissal from the service.

Counsel appearing for the respondents opposed the application and claimed that the decision attacked was rightly and legally reached by the Acting Commander of Police, after a correct exercise of his discretionary powers, and after weighing properly and examining all the circumstances of the case. In support of

the opposition, counsel put forward the following facts: On 26th March, 1975, the Acting Deputy Commander of Police appealed to the Commander of Police against the said decision in accordance with regulation 20(3)(c) of the Police (Disciplinary) Regulations, because in his opinion the punishment imposed on the applicant, viz., £13.—fine was insufficient having regard to the following reasons: (1) that the applicant having joined the police force on the 5th January, 1964, was burdened with ten disciplinary charges, apart from the present one; and (2) that these convictions were of a serious nature, some of them referring to assaulting another member of the force, discreditable conduct, insubordination, and improper behaviour.

In addition, counsel put forward that the personal file of the accused contained reports regarding the way he was living, viz., of having immoral relations with women and young girls, in spite of the fact that he is married since 1966 and the father of two young girls of seven and four years of age.

On 30th May, 1975, the appeal was heard by the Acting Commander of Police, who having examined the circumstances of the case, and having listened to what has been said against and in favour of the applicant, and having gone through his personal file, reached the conclusion that the only proper punishment against the applicant was that of dismissal from the ranks of the police force. In reaching his decision, he had this to say:-

" Ἤκουσα μετὰ προσοχῆς τὰς ἀγορεύσεις τοῦ ἐκκαλοῦντος τὴν ὑπόθεσιν ταύτην κ. Π. Μαχλουζαρίδη, Ἀναπλ. Βοηθοῦ Ἀρχηγοῦ (Διοικήσεως), τοῦ Ἀστυνομικοῦ Διευθυντοῦ Λάρνακος καὶ τὴν ἀπάντησιν τοῦ κατηγορουμένου Ἀστυφύλακος 2207 Σάββα Μενελάου. Ἐπίσης ἐμελέτησα τόσον τὰ πρακτικὰ τοῦ Πειθαρχικοῦ Δικαστηρίου ὅσον καὶ τὸν Προσωπικὸν Φάκελλον τοῦ κατηγορουμένου ὁ ὁποῖος δὲν περιέχει τίποτε ἄλλο παρὰ ἐκθέσεις καὶ ἀναφορὰς ἐναντίον του. Ἡ στάσις τοῦ κατηγορουμένου τόσον σήμερον ἐνώπιον τοῦ Δικαστηρίου τούτου ὅσον καὶ ἐνώπιον τοῦ Ἀστυν. Διευθυντοῦ Λάρνακος ὅταν ἀναθεώρησεν τὴν ὑπόθεσιν ταύτην δὲν ἦτο ἡ ἁρμόζουσα δι' ἕνα Ἀστυνομικὸν ὁ ὁποῖος ἀνῆκεν εἰς μίαν Ὑπηρεσίαν εἰς τὴν ὁποίαν ἡ Πειθαρχία εἶναι τὸ σπουδαιότερον στοιχεῖον διὰ τὴν ὁμαλὴν καὶ ἁρμονικὴν λειτουργίαν της. Οὗτος ὅταν ἐκλήθη ἐνώπιον τοῦ Ἀστυνομικοῦ Διευθυντοῦ Λάρνακος τὴν 13.3.1975 διὰ τὴν ἀναθεώρησιν τῆς ὑποθέσεως εἶπεν

εἰς αὐτὸν: 'Ξέρω τοὺς λόγους ποὺ τὸ ἐκάμνετε ἀλλὰ ἐσεῖς θὰ τὸ μετανιώσετε. Πάντα ἔτσι κατατριέσετε τοὺς Μακαριακοὺς. 'Εν τούτη ἡ πίκκα σας. "Αν ἤμουν τζὲ ἐγὼ Γριβικὸς εἶσιεν νὰ μοῦ κάμετε παρατήρησιν μόνον. Αὔριον θὰ πάω στὸ Προεδρικὸ νὰ τὰ ἀναφέρω οὔλλα'.

"Οταν ἕνας 'Αστυνομικὸς δεικνύει τοιαύτην συμπεριφορὰν ἔναντι ἑνὸς 'Αστυν. Διευθυντοῦ καὶ ὅταν οὗτος καθ' ὅλον τὸ διάστημα τῆς ἐνδεκαετοῦς ὑπηρεσίας του δὲν κατώρθωσε νὰ ἐπιδείξῃ τίποτε περισσότερον παρὰ σωρείαν πειθαρχικῶν παραπτωμάτων διὰ τὰ ὁποῖα ἐτιμωρήθη ἐπανειλημμένως τότε διερωτοῦμαι ποία πρέπει νὰ εἶναι ἡ ἐπιβληθησομένη εἰς αὐτὸν ποινὴ διὰ νὰ διορθωθῇ. Ζυγίζων μετὰ προσοχῆς ὅλα τὰ ἀνωτέρω κατέληξα εἰς τὸ συμπέρασμα ὅτι δὲν ἀπομένει καμμία ἄλλη τιμωρία παρὰ ἡ ἀπόλυσις τοῦ 'Αστυνομικοῦ τούτου ἐκ τῶν τάξεων τῆς 'Αστυνομικῆς Δυνάμεως".

And in English it reads:-

"I have listened carefully to the addresses of Mr. P. Machlouzarides, Acting Deputy Commander (administration) who is appellant in this case, the Divisional Police Commander of Larnaca; and the reply of the accused Police Constable 2207 Savvas Menelaou. I have also studied both the record of the Disciplinary Court and the personal file of the accused, which contains nothing but reports and statements against him. The attitude of the accused today before this Court, as well as before the Police Commander of Larnaca when he was reviewing the present case, was inappropriate for a police officer who belonged to a service where discipline is the major element for its smooth and regular functioning. When called before the Police Commander of Larnaca on 13.3.75 for the review of the case, he said to him: 'I know why you are doing this, but it is you who will be the one to regret it. You've always persecuted the supporters of Makarios in this manner. This is the cause of your pique. Had I also been a supporter of Grivas you would have only reprimanded me. Tomorrow I shall go to the Presidential Palace and report everything.'

When a police officer behaves in such a manner towards a Police Commander, and when during his eleven years' service he has succeeded in showing nothing more than a

multitude of disciplinary offences for which he was punished repeatedly, then I wonder what punishment should be imposed to reform him. Weighing carefully all the above, I have come to the conclusion that there remains no other punishment but the dismissal of this police officer from the ranks of the Police Force."

Counsel on behalf of the applicant, in support of his application put forward a number of legal points, viz. (a) that the respondents have acted illegally and/or in excess and/or in abuse of powers vested in such organ; (b) that the decision of the respondents is contrary to the principles for the administration of justice, and/or for the administration of disciplinary justice and/or contrary to fundamental legal principles which are based on the jurisprudence for the trial of disciplinary charges; (c) the decision of the respondents is contrary to the provision of the Police Law, and to the Police Regulations; (d) the said decision is contrary to the Constitution and to the principles of natural justice; (e) the decision attacked was taken and was based on wrong criteria, and on a wrong basis and under a misconception of the real facts; (f) the decision attacked was based on unfounded conclusion and on non existing evidence and on inadmissible evidence, and was the result of an arbitrary conclusion and/or the result of an illegal decision; (g) the decision attacked was taken by an inappropriate organ and was taken in an arbitrary manner; and (h) the decision attacked is contrary to the principles of Law, because the penalty imposed on the applicant is a very heavy sentence, having regard to the offence committed by the applicant; and that in reaching that decision he was influenced by another disciplinary offence which was fixed for hearing on a separate date, and in doing so, acted contrary to the principles of disciplinary justice.

On the contrary, counsel appearing for the respondents argued that the Acting Commander of Police, in spite of the fact that he took also into consideration matters related to a disciplinary offence not yet tried, nevertheless, he continued, that that was not contrary to the rules of natural justice, because they showed what was the conduct of the applicant till that time. He further argued that the Court should have in mind that the disciplinary punishment has nothing to do and is not related to a criminal trial. In support of his grounds of law, counsel relied on

Kyriakopoulos, "Law of Civil Servants" at p. 242; and on a case of this Court, *Ioanna Enotiadou* v. *The Republic of Cyprus, through The Public Service Commission*, (1971) 3 C.L.R. 409.

Counsel went on to add that in the present case, the Acting Commander of Police, although he took into consideration in assessing the punishment to be imposed on the applicant, the facts of the case under trial, his whole behaviour, as well as facts of a pending case against the applicant, nevertheless, once the disciplinary case is pending against the applicant, no violation of the natural justice has taken place; and that from the trend of our Case Law the Administrative Court should have in mind that the principles of natural justice expounded in Articles 12 and 30 of our Constitution are not always applicable in disciplinary trials, as had been said in *Ninos Lambrou* v. *The Republic of Cyprus, through* (1) *The Minister of Education*, (2) *the Educational Service Committee* (1972) 3 C.L.R. 379.

The first question is whether the principles of natural justice are applicable to disciplinary proceedings.

In *Nicolaos D. Haros and The Republic of Cyprus through The Minister of the Interior*, 4 R.S.C.C. 39, the applicant, at the material time a Police Sergeant, was, on the 23rd October, 1961, charged under the Police (Discipline) Regulations, 1958 to 1960, for bringing discredit to the reputation of the Police Force, and for being insubordinate by words or demeanour and, having been found guilty on the first charge after a hearing before a presiding officer in accordance with the said Regulations, was on the 18th November, 1961, fined £10. The decision of the Presiding Officer was reviewed and confirmed on the 9th November, 1961, under reg. 18(4) by a reviewing officer. On the same day the applicant, acting in accordance with the provisions of reg. 19(1), appealed to the Acting Commander of Police against the finding of guilt but not against the quantum of punishment, but his appeal was dismissed. The Commander, acting in accordance with the provisions of reg. 20, altered the punishment to one of reduction to the ranks, without a hearing taking place before him or the applicant being informed of, or given an opportunity to be heard on, the intention to alter the original punishment. Forsthoff, P., delivering the judgment of the Court had this to say with regard to the nature of disciplinary proceedings and to the rules of natural justice at pp. 43, 44:

"The Court is of the opinion that the proceedings under

the aforesaid Regulations whether in the first instance, on review or on appeal, amount to the exercise of executive or administrative authority, in the sense of Article 146, and that, therefore, this Court has competence in the matter. The Court has reached this conclusion because, *inter alia*, under the order of things established by our Constitution disciplinary control in the public law domain is treated as an executive matter and not as judicial matter, as is clearly shown by the closely analogous case of disciplinary control over public officers which, by operation of Article 125, is entrusted to the Public Service Commission, an exclusive organ.

Disciplinary control, as provided for under the relevant regulations, is a manifestation of the exercise of executive power, though admittedly the procedure to be followed has some judicial characteristics, and it is not an instance of the exercise of judicial power, which is the adjudication between parties to a dispute by an independent Court...

The Court is also of the opinion that the definitions of 'public officer' and 'public service' as set out in Article 122 are very clear in this respect and that as the security forces of the Republic are not included therein, policemen are not subject to disciplinary control by the Public Service Commission, under Article 125, and they continue to be subject to the discipline of the Police.

The Court, further, found no merit in the submission that there could have been no proceedings under the Regulations in question until a criminal charge of insult had been decided upon by a competent Court. It is correct to say that, as a rule, it is not proper to pursue disciplinary proceedings while a criminal charge in respect of the same matter is pending but since no criminal charge was pending there was no impropriety whatsoever in the disciplinary proceedings, being taken against the applicant, and, as a matter of fact section 55 of the Police Law, Cap. 285, is a clear indication to the contrary of the submission made by counsel for applicant in this respect....

Concerning the allegation that the provisions of regulation 20 are contrary to the rules of natural justice the Court

is of the opinion that the said rules, which also under Article 12 are made applicable to offences in general, should be adhered to in all cases of disciplinary control in the domain of Public Law (vide *Andreas A. Markoullides and The Republic (Public Service Commission)*, 3 R.S.C.C. 30 at p. 35, *Nicos Kalisperas and The Republic (Public Service Commission) & another*, 3 R.S.C.C. 146 at p. 151) and that, therefore, the provisions of regulation 20 should be applied subject to the aforesaid rules.

In view of the foregoing, it follows that the decision on appeal of the Commander, which was made without hearing the Applicant, was arrived at through a procedure contrary to the said rules, and has, therefore, to be declared to be null and void and of no effect whatsoever. It is up to the Commander now to consider again the appeal in question in the light of this Judgment."

See also the cases of *Andreas Markoullides* v. *R.*, 3 R. S.C.C. 30 at p. 35; *Nicos Kalisperas* v. *R.*, 3 R.S.C.C. 145 at pp. 151–152; *Hadjisavva* v. *R.*, (1972) 3 C.L.R. 174 at p. 200; *Hadjigeorghiou* v. *R.*, (1968) 3 C.L.R. 326 at pp. 340, 341, 342, 345; *Maro Pantelidou* v. *R.*, 4 R.S.C.C. 100 at p. 106; and *Stelios Morsis* v. *R.*, 4 R.S.C.C. 133 at p. 137.

In *Ioanna Enotiadou* (*supra*), relied upon by counsel for the respondents, Mr. Justice Triantafyllides, P., dealing with the decision of the Public Service Commission to retire the applicant compulsorily from the public service, on disciplinary grounds, in dismissing the recourse had this to say at pp. 415, 416:–

"The next matter with which I have to deal is whether or not it was proper for the Commission, on the material before it, to find the applicant guilty of the charge brought against her and, particularly, of that relating to improper behaviour with another female member of the staff of the hostel: It is well settled that an administrative Court in dealing with a recourse made against a disciplinary conviction cannot, as a rule, interfere with the subjective evaluation of the relevant facts as made by the appropriate organ (see, *inter alia*, the decisions of the Council of State in Greece in cases 2654/1965 and 1129/1966); moreover, a perusal of the reasons given for finding the applicant guilty, including the reasoning in support of the majority and minority views

in connection with the charge of improper behaviour with another female member of the staff, shows that the conviction of the applicant on all charges was warranted by the material before the Commission.

It was, lastly, submitted by applicant that it was not open to the Commission to impose on her a general punishment in respect of all the charges. In view of the nature of the punishment imposed, namely compulsory retirement of the applicant from the public service, because, obviously she was, in the circumstances, considered to be totally unsuitable as an Assistant Superintendent of Homes, I can see nothing erroneous from the point of view either of principle or of good administration in imposing the said punishment as a general punishment in respect of all the disciplinary offences concerned".

The next case is *Ninos Lambrou* v. *The Republic* (*Minister of Education and Another*), (1972) 3 C.L.R. 379. Triantafyllides, P., dealing with the question of the principles of fair hearing, regarding disciplinary proceedings, had this to say at pp. 386–387:-

"... A disciplinary charge is not, of course, a criminal charge; also, in view of the decisions of the Commission of Human Rights of the Council of Europe in cases 423/58 (see Collection of Decisions of the Commission No. 1) and 1931/63 (see Yearbook of the European Convention of Human Rights No. 7 at p. 212), I am of the opinion that the disciplinary proceedings against the present applicant were not proceedings for the determination of any civil right or obligation of his....

Even if, contrary to the above, it were to be held that Article 30 of the Constitution was applicable to the disciplinary proceedings against the applicant, and, therefore, by virtue of paragraph (2) of such Article—which corresponds to paragraph (1) of Article 6 of the European Convention on Human Rights—the applicant was entitled to a fair hearing before the respondent Committee, it must be borne in mind that in considering his case the Committee did not have to resolve any complicated legal issues but only had to ascertain correctly the relevant facts, and that

it has been decided by the European Commission of Human Rights in case 1013/61 (see Yearbook of the European Convention on Human Rights No. 5 at p. 158) that the application of the principle of a fair hearing 'cannot be determined in abstracto but must be considered in the light of the special circumstances of each case' and that 'when a case does not give rise to any serious legal dispute but only necessitates a correct establishment of the facts, the barring of the parties from the right to be represented or assisted by practising lawyers in the procedure cannot be held to constitute a denial of a fair hearing'. Thus, in the light of all the foregoing I am of the opinion that the application of the aforesaid regulation 18(1) did not deprive the applicant of a fair hearing."

With respect, once it is established that the principles of natural justice are applicable also in cases of disciplinary offences, the case quoted, to say the least, is distinguishable once in *Haros* (*supra*) it was made very clear that those principles are applicable in disciplinary proceedings. For these reasons I am of the opinion that those principles are applicable also in the present case.

Turning now to Kyriakopoulos on the "Law of Civil Servants", (1954), on the nature of disciplinary offences, I read at p. 242:-

" 'Η ἐφαρμογὴ τοῦ πειθαρχικοῦ δικαίου ἀποτελεῖ ἄσκησιν ἐνεργοῦ διοικήσεως καὶ οὐχὶ δικαιοδοσίας, ἀνήκει εἰς τὴν διοικητικὴν λειτουργίαν καὶ δὲν συνιστᾷ ἀπονομὴν δικαιοσύνης. Διὸ καὶ αἱ κατ' ἐφαρμογὴν τῶν κανόνων τοῦ πειθαρχικοῦ δικαίου ἐκδιδόμεναι *πράξεις, δι' ὧν ἐπιβάλλονται πειθαρχικαὶ* ποιναὶ εἶναι καὶ κατ' οὐσίαν διοικητικαὶ πράξεις. Μόνον δὲ οὕτω δύναται νὰ ἐξηγηθῇ πῶς δὲν ἀντίκειται εἰς τὸ σύνταγμα ἡ *παρὰ διοικητικῶν ἀρχῶν ἄσκησις πειθαρχικῆς* ἐξουσίας καὶ ἡ ἐπιβολὴ πειθαρχικῶν ποινῶν".

Then at p. 289:

" 'Οσάκις μὴ συντρεχούσης παραλλήλου προσφυγῆς, προσβάλλεται πειθαρχικὴ τις ἀπόφασις δι' αἰτήσεως ἀκυρώσεως, ἡ τοιαύτη προσβολὴ προκαλεῖ καὶ τὸν ἔλεγχον τῆς νομιμότητος ὁλοκλήρου τῆς πειθαρχικῆς διαδικασίας καὶ τῶν ἐν

αὐτῇ ἐμπιπτουσῶν πράξεων[1]. Τὸ Σ.τ.Ε. ἐν τῇ ἀκυρωτικῇ αὐτοῦ δικαιοδοσίᾳ, δὲν ἐλέγχει τὴν κρίσιν τοῦ πειθαρχικοῦ δικαστοῦ περὶ τῆς βαρύτητος τοῦ παραπτώματος καὶ τῆς ἐπιβληθείσης ποινῆς, διότι ταῦτα ἀπόκεινται εἰς τὴν ἐλευθέραν ἐκτίμησιν τοῦ δικάσαντος ὀργάνου[2]. Ἐλέγχον ὅμως ἀπὸ ἀπόψεως νομιμότητος τὴν ἐλευθέραν ἐκτίμησιν τοῦ πειθαρχικοῦ δικαστοῦ, δικαιοῦται νὰ ἐρευνήσῃ μὴ οὗτος περιέπεσεν εἰς πλάνην περὶ τὰ πράγματα. Ἐν τῇ περιπτώσει ταύτῃ τὸ Σ.τ.Ε. ἀποβλέπει εἰς τὰ πραγματικὰ περιστατικὰ ἐπὶ τῷ τέλει ὅπως ἐξακριβώσῃ ἂν ὀρθῶς ἐφηρμόσθη ὁ νόμος καὶ δὲν ἐπλανήθη τὸ δικάσαν ὄργανον δεχθὲν ὡς γεγονότα περιστατικά, τὰ ὁποῖα ἀποδεδειγμένως δὲν ὑφίστανται ἐν τοῖς πράγμασι[3], καὶ οὐχὶ ἵνα ἀποφανθῇ ἐπ' αὐτῶν ὡς δικαστήριον οὐσίας.....

Κατ' ἀκολουθίαν τῶν ἀνωτέρω ἐκτεθέντων, δέον νὰ δεχθῶμεν, ὅτι πειθαρχικὴ ἀπόφασις, δι' ἧς κολάζονται δι' ἐνιαίας ποινῆς πλείονα πειθαρχικὰ ἀδικήματα τοῦ ὑπαλλήλου, καθίσταται ἀκυρωτέα ἐὰν, ἔστω καὶ ἓν τούτων, δὲν συνιστᾷ κατὰ νόμον πειθαρχικὸν ἀδίκημα· διότι ἄδηλον καθίσταται ἂν τὸ πειθαρχικὸν ὄργανον θὰ ἐπέβαλε τὴν αὐτὴν ποινὴν μόνον διὰ τὰς λοιπὰς πράξεις, αἱ ὁποῖαι συνιστῶσιν ὄντως πειθαρχικὰ ἀδικήματα[4]".

And in English it reads:-

"The application of the disciplinary law constitutes an exercise of active administration and not jurisdiction; it pertains to the administrative function and does not constitute administration of justice. For this reason, the acts issued in pursuance of the rules of disciplinary law whereby disciplinary sentences are imposed, are in substance, administrative acts. Only in this way is it possible to explain why the exercise of disciplinary power and the imposition of disciplinary sentences by the administrative authorities is not contrary to the Constitution.

Whenever a parallel recourse not being available, a disciplinary decision is attacked by recourse for annulment, such recourse brings about the examination of the legality

1. Σ.Ε. 710/1933, 102/1934 κ.ἄ.
2. Σ.Ε. 28, 204, 329/1930, 186, 630/1932, 2, 186, 266, 903/1933, 118/1934 κ.ἄ.
3. Σ.Ε. 453, 538, 562, 790, 888/1933, 1001/1934 κ.ἄ.π.
4. Σ.Ε. 368, 519/1932, 852/1933, 414, 775, 1158/1934 κ.ἄ.

of the entire administrative procedure as well as the acts falling within it. The Council of State in its annulling jurisdiction, does not check the judgment of the disciplinary Judge in relation to the gravity of the offence, and the punishment to be imposed, because these matters fall within the free evaluation of the trial organ. But checking from the point of legality, the free evaluation of the disciplinary Judge, it is entitled to investigate whether he misconceived the facts. In such a case the Council of State looks to the real facts in order to ascertain if the law has been applied correctly, and the trial organ has not been wrong in accepting as facts matters which have been proved not really to exist, and not so as to adjudicate upon them as a Court of substance...

In view of the above, we must accept that a disciplinary decision by which several disciplinary offences of the officer are punished by a single sentence, is rendered voidable if, even one of them does not constitute a disciplinary offence according to the law; because it becomes uncertain whether the disciplinary organ would have imposed the same sentence solely for the other acts which really constitute disciplinary offences."

In addition, it is useful to refer to the Decisions of the Greek Council of State in Greece, and to the Digest of Cases of the Greek Council of State, 1953–60, Vol. 2 (A–O), p. 515, paras. 2678–2682, where one finds those principles; and particularly at p. 2679 the author gives particular emphasis with regard to the question of aggravating facts. See also the "Conclusions from Case Law of the Greek Council of State", 1929–1959 at p. 368; see also Digest of Cases, 1935–1952, Vol. 1 at p. 718 para. 2107, and the principles which are expounded by the Administrative Courts in Greece which support the view that in the present case there was real "ipotropi".

Still on the question of the principles of natural justice, and that where there is a pending case against the applicant which though not tried, was taken into consideration by the said organ Mr. Justice Malachtos had this to say in *Demetrios Chr. Tzavelas and Another* v. *The Republic of Cyprus, through the Minister of Interior and the Commander of Police*, (1975) 3 C.L.R. 490, at pp. 502, 503, 504 and 505:

"It is fundamental principle of administrative law that when an enquiry against a public officer is carried out but on advice no disciplinary or other proceedings are taken against him, or when such proceedings are taken but the officer is at the end acquitted, such facts should not in case of his being considered for promotion, be taken into account. Furthermore, the fact that disciplinary proceedings are pending against a public officer without any substantial criteria as regards the basis of the imputed accusations against him, are also not taken into account in cases of promotion. (See Conclusions from Case Law of the Greek Council of State 1929 to 1959, page 356). The submission of counsel for the respondent that it was lawful for the Chief of Police to take into account elements of administrative investigation even if such investigation did not result in disciplinary proceedings against the applicant, cannot, in my opinion, stand. This submission is based as it is stated at page 357, paragraph 7 of the Conclusions from Case Law of the Greek Council of State 1929-1959 on Decision No. 341/49, which is, in my opinion, distinguishable from the case in hand as decided on different facts...

It is clear that in that case the applicant's behaviour in society did not afford a ground for disciplinary proceedings against him as it did not amount to an act or omission for which such proceedings may be instituted, as in the present case. In the case in hand since the accusations against this applicant amounted to neglect of duty resulting from his alleged acts or omissions, and since no disciplinary proceedings were taken against him, the Chief of Police when considering him for promotion was not entitled to take this factor into account which, in the circumstances of this case, is an irrelevant one. Needless to say that when an administrative decision is issued by an authority and such decision is based on an irrelevant factor, as in the present case, such decision should be declared null and void."

Turning once again to the Decisions of the Greek Council of State (1932), in case No. 519/1932, the Full Bench of the Council of State had this to say once the applicant was not called to defend himself at p. 1498:-

" 'Επειδή παράνομος ὡσαύτως τυγχάνει καὶ ὁ λόγος τιμωρίας ὁ ἀφορῶν εἰς τὸ ὅτι ὁ αἰτῶν ἐξηκολούθησε δημοσιογραφῶν καὶ μετὰ τὴν ἀπὸ 3 Φεβρουαρίου 1932 κλῆσιν αὐτοῦ εἰς ἀπολογίαν διότι ὑποτιθεμένου ὅτι ὄντως ὁ αἰτῶν ἐδημοσιογράφησε καὶ μετὰ τὴν κλῆσιν εἰς ἀπολογίαν καὶ ὅτι ἡ δημοσιογραφία αὕτη συνίστα πειθαρχικὸν ἀδίκημα, ὅμως ἡ πειθαρχικὴ δικαιοδοσία δὲν ἐδικαιοῦτο νὰ λάβῃ αὐτὸ ὑπ' ὄψει, ἐφ' ὅσον δὲν εἶχε προηγηθῇ καὶ ὡς πρὸς αὐτὸ κλῆσις τοῦ αἰτοῦντος εἰς ἀπολογίαν".

And in English it reads:-

"Whereas the ground of punishment relating to the fact that the applicant continued writing for the newspapers even after the 3rd of February 1932 when he was called upon to defend himself is also illegal, because supposing that the applicant indeed wrote for the newspapers after he was called upon to defend himself and that such actions constitute a disciplinary offence, nevertheless the disciplinary jurisdiction could not take this into account since the applicant has not been previously called upon to defend himself on this as well."

In the Decisions of the Greek Council of State (1949) in Case No. 360/1949, the Full Bench of the Council of State had this to say at p. 612:-

" 'Επειδή, ἐκτὸς τοῦ ὅτι καὶ κατὰ τὸ πρῶτον αὐτῆς ἔρεισμα ἡ ὡς ἄνω αἰτιολογία εἶναι ἀτελής, διότι τὰ πραγματικὰ περιστατικὰ τοῦ πειθαρχικοῦ παραπτώματος εἶναι οὐσιωδῶς διάφορα τῶν γενομένων δεκτῶν διὰ τῆς προσβαλλομένης ἀποφάσεως, ὡς τοῦτο προκύπτει ἐκ τῆς ἀντιπαραβολῆς ταύτης πρὸς τὴν αἰτιολογίαν τῆς πειθαρχικῆς ἀποφάσεως (ὑπ' ἀριθ. 102/3-2-1944), εἶναι πλημμελὴς ἰδίᾳ κατὰ τὸ ἕτερον αὐτῆς ἔρεισμα. Διότι, τὸ μὲν 'Αστυνομικὸν Συμβούλιον δὲν προέβει αὐτὸ τοῦτο εἰς τὴν ἔρευναν, ἐὰν ἡ ἀποδοθεῖσα κατηγορία ἦτο καὶ ὄντως βάσιμος, δεδομένου ὅτι εἶχεν ἐμπέσει εἰς τὴν ἀμνηστίαν τοῦ ἀν. ν. 753/1945, μόνη δὲ ἡ ὑποβολὴ μηνύσεως οὐδεμίαν ἠδύνατο ν' ἀσκήσῃ ἐπίδρασιν, ὡς ἐπὶ ἄλλων ὑποθέσεων ἔχει ἀποφανθῆ καὶ τὸ Δικαστήριον τοῦτο ('Ολ. 1716/1948), ἐφ' ὅσον δὲν ἐπηκολούθησε καὶ καταδίκη ἢ ἔστω καὶ βούλευμα παραπεμπτικόν".

And in English it reads:-

"Because besides the fact that the above reasoning is imper-

fect as to its first ground, the real facts of the disciplinary offence being substantially different from those accepted by the decision attacked, this appearing from its comparison with the reasoning of the disciplinary decision (under No. 102/3-2-1944) it is defective especially as regards its second ground. For the Police Council did not itself investigate whether the preferred charge was really a valid one in view of the fact that it had fallen within the amnesty of the an. v. 753/49, and making a formal complaint has no effect at all, as this Court too has decided in other cases (F.B. 1716/1948) so long as no conviction or even committal decision has been reached."

In the Decisions of the Greek Council of State (1933) B III, in Case No. 888/1933 the Full Bench of the Council of State had this to say at p. 620:-

" 'Επειδή, κατά τά εἰρημένα, ἡ ἐπιβληθεῖσα τῇ αἰτούσῃ πειθαρχικὴ ποινὴ δὲν ἀποδίδεται μόνον εἰς τὴν ἔγκρισιν τῶν παρασταθέντων κατὰ τὴν σχολικὴν ἑορτὴν ἔργων, εἰς ἣν γενομένην ὑφ' ὁλοκλήρου τοῦ συλλόγου τῶν καθηγητῶν (πλὴν τεσσάρων, διαφωνήσαντων ὡς πρὸς τινα σημεῖα ἑνὸς ἔργου) μετὰ τὴν συνεδρίαν τῆς 25 Φεβρουαρίου 1933 συμμετέσχε μετὰ τῶν ἄλλων καθηγητῶν καὶ ἡ προσφεύγουσα, καὶ δι' ἣν ἔγκρισιν, ὡς ἐκτίθενται τὰ πράγματα, θὰ ἠδύναντο νὰ καταλογισθῇ πειθαρχικὴ εὐθύνη εἰς βάρος τῶν ἐγκρινάντων ἔργα τοιούτου περιεχομένου, ἔστω καὶ ἐξ ἀμελείας, ἀλλ' ἐν προκειμένῳ ἡ πειθαρχικὴ ἀπόφασις βασίζεται καὶ εἰς τὸν λόγον ὅτι τῇ αἰτούσῃ καὶ τῷ Γυμνασιάρχῃ ὀφείλεται ἡ εἰσήγησις τῶν παρασταθέντων ἔργων, δι' ἐντέχνου ὑποβολῆς ἐπιτευχθεῖσα. Μὴ βεβαιουμένου ὅμως οὐδὲ προκύπτοντος ἐκ τοῦ φακέλλου τοῦ τελευταίου τούτου γεγονότος, εἰς ὃ ἐπίσης ἐστηρίχθη ἡ προσβαλλομένη διοικητικὴ πρᾶξις, καθίσταται αὕτη ἀκυρωτέα ὡς μὴ νομίμως ἐπιβαλοῦσα τὴν περὶ ἧς πρόκειται ποινήν, καὶ δὴ ἐν τῷ συνόλῳ, ἐφόσον ἡ ποινὴ αὕτη ἐπεβλήθη ἐνιαία διὰ τὰς ὡς ἄνω παραβάσεις.

Διὰ ταῦτα

Δέχεται τὴν ὑπὸ κρίσιν αἴτησιν ἀκυρώσεως."

And in English it reads:-

"Because according to the foregoing the disciplinary

sentence imposed upon the applicant is attributed not only to the approval of the plays presented at the school ceremony in which approval the applicant took part along with the other teachers, this approval having been made by the whole body of teachers (except four who disagreed as to certain parts of one play) after the meeting of the 25th February 1933, and for which approval as the facts are presented, disciplinary responsibility could have been attributed to those who have approved works of such content, even if solely due to negligence, but in the present case the disciplinary decision is based on the fact that the suggestion of the works presented is attributed to the applicant and the school master achieved by skilful prompting. However, since this last fact on which the attacked administrative acts was based is not established nor appears from the file of the administration, it must be annulled for imposing the said sentence illegally and the annulment must relate to the whole of it, since the said sentence was passed as a single sentence for the above breaches. So, the application for annulment under consideration is accepted."

In the Conclusions of the Greek Council of State 1929–1959, (1961) ed. p. 356 under the heading "Disciplinary Offences and Disciplinary Punishment", I read:–

"Κατὰ τὴν πρὸ τοῦ Ὑπαλ. Κώδικος νομολογίαν αἱ πειθαρχικαὶ ποιναὶ λαμβάνονται ὑπ' ὄψιν ὁποτεδήποτε ἐπιβληθεῖσαι, ἐφ' ὅσον μάλιστα εἶναι χαρακτηριστικαί: 4(51), 1212 (48), 1323 (47). Ἤδη ποιναὶ διαγραφεῖσαι κατὰ τὸ ἄρθρον 134(7) τοῦ Ὑπαλ. Κώδικος δὲν δύνανται νὰ ληφθῶσι νομίμως ὑπ' ὄψει· 1954, 1634 (58). Ὁμοίως δὲν λαμβάνεται νομίμως ὑπ' ὄψιν ποινὴ μὴ διαγραφεῖσα μὲν κατὰ τὸν χρόνον τῆς ἀποφάσεως τοῦ ὑπηρεσιακοῦ συμβουλίου, διαγραφεῖσα ὅμως κατὰ τὸν χρόνον ἐκδόσεως τῆς τελειούσης τὰς προαγωγὰς πράξεως: 2183(58), ὡς καὶ παράπτωμα, διὰ τὸ ὁποῖον τὸ μὲν συμβούλιον πλημμελειοδικῶν ἀπεφάνθη, ὅτι δὲν πρέπει νὰ γίνῃ κατηγορία, τὸ δὲ πειθαρχικὸν συμβούλιον ἐκήρυξε τὸν ὑπάλληλον ἀθῶον: 1942 (58), ὡς ἐπίσης τὸ γεγονὸς καὶ μόνον, ὅτι ἐκκρεμεῖ εἰς βάρος του κατηγορία ἄνευ οὐσιαστικῆς κρίσεως περὶ τῆς βασιμότητος τῶν ἀποδιδομένων εἰς τὸν ὑπάλληλον κατηγοριῶν: 360(49), 1870(47) ἴδε καὶ 455(51)".

And in English it reads:-

"According to the case law prior to the Civil Service Code, disciplinary punishments are taken into consideration whenever imposed, especially when they are characteristic 4(51), 1212(48), 1323(47). Now sentences deleted by Article 134(7) of the Civil Service Code cannot be lawfully taken into account 1594, 1634, (58). Likewise a sentence cannot be taken lawfully into account when it has not been deleted at the time of the decision of the Service Council, but has been deleted at the time of the issue of the act perfecting the promotions 2183(58), nor an offence for which the council of Judges for the trial of misdemeanour has decided that no charge should be preferred while the Disciplinary Council declared the servant innocent: 1942 (58), nor the mere fact that a charge is pending against him without judgment on the merits regarding the validity of the charges laid against the servant: 360(49), 1870(47) see also 455(51)."

Having considered the arguments of both counsel, and in the light of the authorities quoted at length, I have reached the conclusion that the rules of natural justice are applicable to the disciplinary proceedings and because the Acting Commander of Police has taken also into consideration a case against the applicant which until that time had not been heard and which was fixed on another date for hearing, he allowed himself wrongly in my view, and in violation of the principles of natural justice, to be influenced by it and thus to impose finally the punishment of dismissal from the service. In reaching this conclusion, I have relied on Cyprus cases, and particularly on cases decided by the Greek Council of State, viz., that the disciplinary organ, when trying a case, cannot take into consideration a pending case against an applicant which until that time had not been tried and there is no decision with regard to it.

For all these reasons and indeed because of the excellent work done by both counsel in this case, I feel I should not complete this case without expressing my indebtedness to both counsel.

In the light of the authorities and for the reasons I have given

at length I annul the decision of the Acting Commander of Police. I do not propose making an order for costs.

Sub judice decision annulled. No order as to costs.