1983 August 22

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS GOULIELMOS,

Applicant,

v.

1. THE EDUCATIONAL SERVICE COMMITTEE,
2. THE MINISTRY OF EDUCATION,

Respondents.

(*Case No.* 158/82).

Administrative Law—Administrative acts or decisions—Executory act—Only an executory act can be made the subject-matter of a recourse under Article 146.1 *of the Constitution—A confirmatory act is not of an executory nature and cannot be made the subject-matter of such a recourse—But when the administration confirms a previous executory act after a new inquiry then the resulting new act or decision is itself executory.*

Administrative Law—Omission—In the sense of Article 146.1 *of the Constitution—"Continuing Omission"—How does it affect the running of time under Article* 146.3 *of the Constitution.*

Legitimate interest—Article 146.2 *of the Constitution—Unreserved acceptance of administrative act or decision—Deprives acceptor of such legitimate interest.*

Words and phrases " 'Ενδικοφανὴς ἱεραρχικὴ προσφυγή"—"Χαριστικὴ Προσφυγή"—"Αἴτησις θεραπείας"—" 'Απλὴ ἱεραρχικὴ προσφυγή"—" 'Ιεραρχικὴ Αἴτηση"—*Section* 5(2) *of the Public Educational Service Law,* 1969 (*Law* 10/69).

Public Educational Service Law, 1969 (*Law* 10/69)—*Hierarchical application in section* 5(2) *of the Law.*

On 27.8.1968 the respondent Committee decided to appoint the applicant to the post of Metal Work Instructor Class "C", on probation as from 1.9.1968. It, also, decided that on appoint-

ment to the permanent establishment applicant would be emplaced on the starting point of the salary scale and his incremental date would be the 1st of September commencing from the year following his appointment. Applicant accepted the offer of appointment, embodying the above decision, on 12.10. 1968 without lodging any complaint or making any reservation. On 18.3.1970 the applicant addressed to the Chairman of the respondent Committee a letter complaining that he did not receive any increments. The Committee turned down his complaint by letter dated 28.3.1970 wherein it was stated that on his appointment to the permanent establishment on 1.9.1968 he was emplaced on the starting point of the salary scale of his post, his previous "educational service from 15.3.1966—15.7. 1966 and 15.10.1966-31.8.1968 having been calcualated towards the technical experience required for appointment for the purposes of the then legislation in force"; and that his first incremental date was the 1.9.1969 and that the aforesaid increment was already paid to him.

The applicant upon receiving the letter of 28.3.1970 did not take any steps either by means of a recourse or otherwise. On 25.2.1982, having been confirmed in the post of Instructor "C" on 9.10.1970 and promoted to Instructor "B" on 11.3.1975, he addressed a letter to the Commission reverting to the "subject of the three increments which were calculated as technical experience for his appointment on a permanent basis on 1.9.1968. The Commission turned down the complaint of the applicant and informed him of its decision by letter dated 16.3.1982. Hence this recourse.

Respondents raised a preliminary objection that the sub judice decision lacks executory character and that the recourse was filed out of time. They, also, alleged in their address that the applicant possessed no existing legitimate interest because on 12.10.1968 he accepted unreservedly the administrative decision of the respondents.

Held, that an administrative act is only amenable within a competence, such as of this Court under Article 146 of the Constitution if it is executory; that a confirmatory decision of the administration is not of an executory nature and cannot be made the subject-matter of a recourse but when the admi-

nistration confirms a previous executory act after a new enquiry then the resulting new act or decision is itself executory too, and therefore justiciable; that in taking the sub judice decision the respondent Commission did not carry out a new inquiry because no new facts were placed before it by the applicant; and that, therefore, the sub judice decision was not of any executory character but merely confirmatory of the decision of 27.8.1968; accordingly it cannot be made the subject of a recourse.

Held, further, on the question whether there is continuing omission by the administration in the sense of Article 146.1 *of the Constitution*: That an omission, in the sense of paragraph 1 of Article 146 of the Constitution, means an omission to do something required by Law, as distinct from the non-doing of a particular act or the non-taking of a particular course as a result of the exercise of discretionary powers; that where the omission is of a continuing nature and has continued up to the date of the hearing the Court has jurisdiction to adjudicate on a recourse and there can be no question of the recourse being filed out of time under Article 146.3 of the Constitution; that the facts of this case do not establish an "omission" or a "continuing omission" because the respondent Commission has exercised its powers according to Law and has never flinched from exercising its duty; and that since there is no continuing omission the recourse is out of time.

Held, further, (1) that the applicant has no legitimate interest envisaged by Article 146.2 of the Constitution having freely and unreservedly accepted the executory and valid decision of the respondent as early as 12.10.1968.

(2) That section 5(2) of Law 10/69 allows a re-examination of its decision by the Educational Service Commission on an application to it not in the sense of "ἐνδικοφανὴς ἱεραρχικὴ προσφυγὴ" as envisaged by the Greek Administrative Law but in the sense of "χαριστικὴ προσφυγὴ" or "αἴτησις θεραπείας" or "ἁπλὴ ἱεραρχικὴ προσφυγὴ", in which case the decision on such an application definitely lacks executory character being of a confirmatory nature.

Cases referred to:

Constantinidou and Others v. *Republic* (1974) 3 C.L.R. 416 at p. 418;

Holy See of Kitium v. *Municipal Council of Limassol*, 1 R.S.C.C. 15;

Piperis v. *Republic* (1967) 3 C.L.R. 295;

Myrianthis v. *Republic* (1977) 3 C.L.R. 165;

Kolokassides v. *Republic* (1965) 3 C.L.R. 542 at p. 551;

Ioannou v. *Republic* (1982) 3 C.L.R. 1002;

Kelpis v. *Republic* (1970) 3 C.L.R. 196 ;

Miliatos v. *Republic* (1982) 3 C.L.R. 1161;

HjiAnastassiou v. *Republic* (1982) 3 C.L.R. 1173;

Cyprus Tannery v. *Republic* (1980) 3 C.L.R. 405;

Police Association v. *Republic* (1972) 3 C.L.R. 1;

Mustafa v. *Republic*, 1 R.S.C.C. 44 at p. 47.

Recourse.

Recourse against the refusal of the respondents to grant applicant increments retrospectively as from 1968 on the basis of his particular service on contract in the educational service.

A.S. Angelides, for applicant.

R. Vrahimi (*Mrs.*), for the respondents.

Cur. adv. vult.

LORIS J. read the following judgment. The applicant in the present case served on contract as Metal Work Instructor—Class C—(Technical Education) for the following periods: 15.3.1966 up to 15.7.1966 and from 1.9.1966 up to 31.8.1968.

On 27.8.1968 the Educational Service Committee decided to appoint applicant to the permanent post of Metal Work Instructor—Class C—on probation, as from 1.9.1968; extract of the relevant minutes of the Educational Service Committee dated 27.8.1968 appear in appendix A attached to the opposition.

The aforesaid decision of the Educational Service Committee was communicated to the applicant by means of a letter dated 1.10.1968 (vide blue 29 in the personal file of the applicant which is exh. "X" before me.) Applicant accepted his said appointment in writing on 12.10.1968 (vide blue 32 in exh. "X"). In connection with the said decision of the E.S.C. (appendix A), the relevant offer communicated to the applicant

(blue 29) and the acceptance of the applicant (blue 32) it is significant to note the following:

(a) The decision provided and it was so communicated to the applicant in clear and unambiguous words in the offer, that on appointment to the permanent establishment he would be emplaced on the starting point of the salary scale and his incremental date would be the 1st of September commencing from the year following his appointment.

(b) The applicant when accepting the said offer for appointment on 12.10.1968 did not lodge any complaint or make any reservation; he accepted the offer embodying the decision of the E.S.C. unreservedly.

About two years later, on 18.3.1970 applicant addressed to the Chairman of the E.S.C. a letter (vide appendix B attached to the opposition) complainting that he did not receive any increments in spite of the fact that he is "working for 4 years".

On 28.3.1970 the Chairman of the E.S.C., obviously acting on behalf, and conveying the views, of the Committee, addressed a letter to the applicant in reply (vide appendix "Γ" to the opposition) informing the latter that:

(a) on his appointment to the permanent establishment on 1.9.1968 he was emplaced on the starting point of the salary scale of his post, his previous "educational service from 15.3.1966–15.7.1966 and 15.10.1966–31.8.1968 having been calculated towards the technical experience required for appointment for the purposes of the then legislation in force".

(b) His first incremental date was the 1.9.1969 and that the aforesaid increment was already paid to him.

The applicant having received the said letter on 28.3.1970 did not take any steps whatever either by means of a recourse or otherwise; he slept over the matter for a period of 12 whole years and it was only as late as 25.2.1982 (having been (a) confirmed in the post of Instructor "C" on 9.10.1970—blue 43—and (b) promoted to Instructor "B" on 11.3.1975—blue 86—in the meantime), when he decided to address to the Chairman

of the E.S.C. a letter (appendix "Δ" to the opposition) reverting on what he termed as "the subject of the three increments which were calculated as technical experience for his appointment on a permanent basis" on 1.9.1968.

The E.S.C. examined the said application at its meeting of 15.3.1982 and turned down the said complaint of the applicant (vide minutes of the meeting in appendix E to the opposition) informing applicant accordingly by letter dated 16.3.1982 (vide appendix "ΣΤ" to the opposition).

The applicant impugnes this latter decision of the E.S.C. (communicated to him by the said letter of 16.3.1982) by means of the present recourse praying for:

"1. Declaration of the Court to the effect that the act and/or decision of Respondent No. 1 dated 16.3.1982, by virtue of which the claim of the applicant for increments on the basis of the actual totality of his service was turned down, is unlawful, void and of no legal effect.

2. Declaration of the Court to the effect that the continuous omission of the respondents to accept the granting to the applicant as from 1968 when he was appointed as permanent educationalist, and/or their refusal to pay to the applicant increments retrospectively as from 1968 on the basis of his particular service on contract in the educational service, is void, illegal and whatever was omitted ought to be done.

3. The reply of respondent No. 1 dated 16.3.1982 substantially omits to answer the claim of the applicant as submitted on 25.2.1982, for this reason such an omission ought to be declared void by order of the Court and what was omitted ought to be done."

The respondents in their opposition raised two preliminary objections to the effect:

1. That the impugned decision of Respondent No. 1 dated 16.3.1982 is not of an executory character.

2. That the present recourse for annulment is out of time as the decision of Respondent No. 1 dated 16.3.1982

is confirmatory of an earlier decision of the respondent dated 28.3.1970.

In the alternative the respondents allege that they acted correctly and lawfully after having correctly exercised their discretionary power and carrying due inquiry into all relevant matters in this case.

Pursuant to the directions of this Court the parties filed written addresses and had the opportunity to clarify on 31.3.1983 viva voce certain points; on this latter occasion the respondents produced the personal file of the applicant, which is marked "X".

The applicant relies on 6 grounds of Law set out in his recourse whilst the respondents by their express preliminary objections set out in the opposition plunge deeply into the sphere of the jurisdiction of this Court by alleging that the decision impugned lacks executory character and that the present recourse was filed out of time. I say express preliminary objections set out in the recourse because in their written address they indirectly raise another point notably absence of existing legitimate interest in the applicant who has accepted unreservedly on 12.10.1968 the administrative decision of the respondents; in this respect it may be added that "as litigation under Article 146 of the Constitution is a matter of Public Law, the presence of an existing legitimate interest has to be inquired into by an administrative Court even acting ex proprio motu" (*Constantinidou & Others* v. *The Republic* (1974) 3 C.L.R. 416 at p. 418).

As my primary duty is to see that the recourse was filed in time (*Holy See of Kitium* v. *The Municipal Council of Limassol*, 1 R.S.C.C. 15) I intend to examine first the objections raised in the opposition together with the interconnected topic of "continuous omission" raised by the applicant.

On 27.8.1968 the Educational Service Committee (established under s. 7(2) of Law 12/65) decided to appoint applicant to the permanent post of Metal Work Instructor—Class C—on probation as from 1.9.1968.

The then relevant legislation was Law 10/63 of the Greek Communal Chambers as amended by Laws 2/64 G.C.C., Law 24/66 and Law 4/68 (the latter with effect as from 1.9.1967).

The qualifications of Instructor of Technical School—Class C—were set out in s. 11(3)(iii)(b) of Law 10/63 G.C.C. which reads as follows:

"ἀπολυτήριον Μέσης Τεχνικῆς Σχολῆς καὶ διετῆ τοὐλάχιστον τεχνικὴν πεῖραν εἰς τὸν τομέα τῆς εἰδικότητος τὴν ὁποίαν προορίζονται νὰ διδάξουν καὶ ὄντες κάτοχοι εἰδικοῦ πιστοποιητικοῦ ἀποκτωμένου ἐν τῷ ἐξωτερικῷ ἢ ἐν Κύπρῳ μετὰ παρακολούθησιν παιδαγωγικῶν μαθημάτων καὶ ἐγκρινομένου ὑπὸ τοῦ Γραφείου Παιδείας".

("school leaving certificate of a Secondary Technical School and at least two years' technical experience in the field of his specialization which they are intended to teach and being the holders of a special certificate obtained abroad or in Cyprus after following paedagogic lessons and approved by the Education Office").

Technical experience was thus defined in s. 2 of Law 10/63 G.C.C.

"'Τεχνικὴ πεῖρα' σημαίνει πεῖραν κτηθεῖσαν πρὸ ἢ κατὰ τὴν διάρκειαν τῶν σπουδῶν ἢ μετὰ τὴν ἀποπεράτωσιν τῶν σπουδῶν τοῦ καθηγητοῦ διὰ τακτικῆς καὶ πλήρους ἀπασχολήσεως προσηκόντως βεβαιουμένης καὶ ἀποδεικνυομένης ὡς ἱκανοποιητικῆς εἰς ἀναλόγους τῆς εἰδικότητος αὐτοῦ τεχνικὰς ἐργασίας καὶ ἀποτελοῦσαν πρόσθετον προσὸν διὰ τὸν κατέχοντα ταύτην καθηγητήν: Νοεῖται ὅτι πεῖρα κτηθεῖσα κατὰ τὴν διάρκειαν τῶν σπουδῶν σημαίνει πεῖραν μὴ ἀποτελοῦσαν μέρος τῶν πρὸς ἀπόκτησιν τοῦ πτυχίου σπουδῶν τοῦ καθηγητοῦ".

(" 'Technical experience' means experience acquired before or during the studies or after the conclusion of the studies of the school master by regular and full occupation duly certified and proved as satisfactory in analogous to his specialization technical jobs and constituting additional qualification for the schoolmaster possessing it: Provided that experience acquired during the studies means experience not being part of the studies for obtaining the degree by the schoolmaster").

With the marginal note "Recognition of technical experience for purposes of increments" in s. 20 of the same Law we read:

"20. Εἰς καθηγητὰς τὸ πρῶτον διοριζομένους εἰς Τεχνικὰς, Γεωργικὰς ἢ Ἐπαγγελματικὰς Σχολὰς δύναται νὰ παρέχεται μία πλήρης προσαύξησις δι' ἕκαστον τῶν δύο πρώτων ἐτῶν τεχνικῆς πείρας, ἣν κέκτηνται, ἡμίσεια δὲ προσαύξησις δι' ἕκαστον τῶν ὑπολοίπων ἐτῶν τοιούτης πείρας, ἀλλ' ἐν πάσῃ περιπτώσει οὐχὶ πέραν τῶν 6 προσαυξήσεων ἐν συνόλῳ: Νοεῖται ὅτι τὰ ἀπαιτούμενα διὰ τὸν διορισμὸν καὶ τὴν κατάταξιν ἔτη τεχνικῆς πείρας δὲν λαμβάνονται ὑπ' ὄψιν διὰ σκοποὺς προσαυξήσεων".

("20. To schoolmasters appointed for the first time in Technical, Agricultural or Professional Schools may be granted a full increment for each of the first two years of technical experience, which they possess, and half an increment for every one of the rest of such experience, but in any case not more than six increments in all: Provided that the required for appointment and classification years of technical experience are not taken into consideration for the purpose of increments").

It is crystal clear from the relevant provisions of the law in force at the time the decision of the E.S.C. was taken, that an instructor of Technical School–Class C—required the following qualifications:

(a) Certificate of graduation of a Secondary Education Technical School.

(b) At least 2 years "technical experience" as defined in the law.

(c) Special certificate as regards "Paedagogical" lessons.

As regards increments the E.S.C. had a discretion, exercisable on first appointment, to grant to an appointee increments for technical experience as envisaged by s. 20 of the Law subject to the express restriction that the required technical experience qualifying for appointment could not be calculated for incremental purposes.

Having in mind the requisites envisaged by the law at the time of such appointment let us now proceed to examine the relevant decision of the E.S.C. as it emerges from the minutes of the proceedings at the meeting of the E.S.C. held on 27.8.1968,

in connection with the said appointment of the applicant (Appendix 'A' attached to the opposition).

The first observation is that all five members of the Educational Service Committee envisaged by s.7(2) of Law 12/65 were present; and in the absence of any indication to the contrary it can be presumed that the decision was unanimous.

The qualifications of the applicant taken into consideration were:

(a) Certificate of graduation of the Technical School of Nicosia (1964).

(b) The technical experience of the applicant taken into consideration was as follows:

(i)	For the period	1. 7.64—25.8.64
(ii)	" " "	15. 3.66—15.7.66 and
(iii)	" " "	15.10.66—31.8.68

i.e. the whole period during which the applicant was serving on contract with the Technical Education as Metal Work Instructor—Class C—was taken into consideration.

In this respect it must be emphasized that it is abundantly clear from the personal file of the applicant that the above mentioned technical experience was the only technical experience allegedly possessed by the applicant at the time.

The E.S.C. bearing in mind (a) that the applicant had the aforesaid technical experience which hardly exceeds 28 months (b) the provisions of s. 11(3)(iii)(b) which require as a necessary qualification for appointment at least two years technical experience, proceeded to appoint the applicant in the permanent establishment of Instructor—Class C—on probation, as from 1.9.1968 calculating his aforesaid technical experience as technical experience qualifying for his appointment pursuant to the provisions of s. 11(3)(iii)(b) of the Law and made it abundantly clear that such technical experience could not be calculated for incremental purposes pursuant to the proviso of s. 20 of the same Law by emplacing the applicant on the starting point of the salary scale of the post of Instructor—Class C—.

Under the circumstances it was reasonably open to the E.S.C. to reach their aforesaid decision which was communicated to the applicant on 1.10.1968 (blue 29) who accepted same freely and unreservedly on 12.10.1968 (blue 32). This decision of the administration was never challenged by the applicant; on the contrary as stated above it was accepted by him unreservedly on 12.10.1968; and it is well settled that a person who expressly or impliedly accepts an act or decision of the administration is deprived because of such acceptance of a legitimate interest entitling him to make an administrative recourse for the annulment of such act or decision (*Piperis* v. *The Republic* (1967) 3 C.L.R. 295, *Myrianthis* v. *The Republic* (1977) 3 C.L.R. 165, *Conclusions of The Greek Council of State* 1929–1959 p. 261).

About 2 years after this final decision of the E.S.C. the applicant addressed to the Educational Service Committee a letter dated 18.3.1970 (appendix "B" to the opposition) complaining that he did not receive any increments "so far"; on 28.3.1970 a letter emanating from the E.S.C. was sent to the applicant in reply (appendix "C" to the opposition); in this connection I feel it my duty to state, with respect, that the letter of 28.3.1970 cannot be, as alleged by learned counsel of applicant, "a personal informative act of the Chairman of the E.S.C."; the letter is headed on top "The office of the Educational Service Committee" and it is signed underneath by the Chairman of E.S.C. in the same way letter of 16.3.1982 (appendix) "ΣΓ" to the opposition) is headed and signed.

According to the presumption of regularity the letter of 28.3.70 emanates from the E.S.C. and expresses the views of the Committee and not only those of its Chairman. From the contents thereof it is clear that a sort of enquiry was carried out by the E.S.C. and a decision was taken; without any enquiry the E.S.C. would not be in a position to point out to the applicant that his increment of 1.9.1969 was already paid to him; and without acquainting themselves with the facts of this particular case and deciding on the matter, they would not be in a position to signify their adherence to a course already adopted by their decision of 27.8.1968. I feel that I should not deal any further with the decision of the E.S.C. contained in their letter of 28.3.1970 addressed to the applicant; suffice

it to say that the applicant did never challenge by recourse or otherwise the decision in question which signified as already stated, the adherence of the E.S.C. to their decision of 27.8.1968.

In order to complete the picture it may be stated as well that the applicant was confirmed by the E.S.C. in the post of Instructor "C" on 9.10.1970 (vide blue 43 in the file) and promoted to Instructor "B" on 11.3.1975 (blue 86). On none of these occasions did he challenge the relevant decisions of the E.S.C. or raise any claim to "retrospective increments" as from 1968.

On 25.2.1982, that is about 14 years after the final and conclusive decision of the E.S.C. of 27.8.1968, the applicant addressed a letter (appendix "Δ" to the opposition) to the Chairman of the E.S.C. reverting on "the subject of these increments which were calculated as technical experience for his appointment on a permanent basis" on 1.9.1968.

The E.S.C. examined the aforesaid application at its meeting of 15.3.1982 and rejected the said complaint of the applicant informing applicant accordingly by a letter dated 16.3.1982 (appendix "ΣΤ" to the opposition) signifying therein its adherence to its decision of 27.8.1968.

In considering this decision of the E.S.C. I must decide in the first place whether this decision is of an executory character or not.

In this connection I consider it pertinent to deal as briefly as possible with the legal aspect on this matter before indulging into the factual aspect.

As early as 1965 the Full Bench of this Court in the case of *Kolokassides* v. *The Republic* (1965) 3 C.L.R. 542 at p. 551 held, affirming the decision of the learned trial Judge (Triantafyllides J., as he then was) that:

> "An administrative act (and decision also) is only amenable within a competence, such as of this Court under Article 146, if it is executory (εκτελεστή); in other words it must be an act by means of which the "will" of the administrative organ concerned has been made known in a given matter, an act which is aimed at producing a legal situation concern-

ing the citizen affected and which entails its execution by administrative means (see Conclusions from the Jurisprudence of the Council of State in Greece 1929–1959, pp. 236–237)".

It is also an established principle of Administrative Law that a confirmatory decision of the administration is not of an executory nature and therefore it cannot be made the subject-matter of a recourse. According to Stassinopoulos on the Law of Administrative Disputes, 4th ed. at p. 175 a confirmatory act or decision is one which repeats the contents of a previous executory act and signifies the adherence of the administration to a course already adopted; but when the administration confirms a previous executory act after a new enquiry then the resulting new act or decision is itself executory too, and therefore justiciable. (Vide *Ioannou* v. *The Republic* (1982) 3 C.L.R. 1002).

As to the question when does a new enquiry exist Stassinopoulos (supra) at p. 176 states the following:

"When does a new enquiry exist, is a question of fact: In general, it is considered to be a new inquiry the taking into consideration of new substantive legal or real material....".

Further there is authority for the proposition that mere re-examination of an administrative decision from the legal aspect only does not amount to a new enquiry (vide *Kelpis* v. *The Republic* (1970) 3 C.L.R. 196 and the Decisions of the Greek Council of State 1929–1959 p. 241).

The requisites of a confirmatory act or decision of the administration are set out in the text-book of Professor Th. Tsatsos "The Application for Annulment before the Council of State" 3rd ed. at p. 132. They read as follows:

"....Ειδικώτερον άπαιτεῖται διὰ νὰ εἶναι νεωτέρα πρᾶξις βεβαιωτικὴ προγενεστέρας:

(α) Ταυτότης τῆς ἐκδούσης ἀμφοτέρας τὰς πράξεις ἀρχῆς ἢ ἱεραρχικὴ ἐξάρτησις τῆς ἐκδούσης τὴν προγενεστέραν πρᾶξιν ἀπὸ τὴν ἐκδοῦσαν τὴν νεωτέραν ἐκτὸς ἐὰν πρόκειται περίπτωσις μεταβιβάσεως λόγῳ τυπικῆς ἱεραρ-

χικῆς προσφυγῆς τῆς ἁρμοδιότητος τῆς ἐκδούσης τὴν πρώτην πρᾶξιν ἀρχῆς εἰς τὴν ἐκδοῦσαν τὴν δευτέραν.

(β) Ταυτότητος τοῦ προσώπου ἢ τῶν προσώπων εἰς ἃ αἱ πράξεις ἀφορῶσι.

(γ) Ταυτότητος τῆς νομίμου διαδικασίας.

(δ) Ταυτότητος τῆς πραγματικῆς αἰτιολογίας ἀμφοτέρων τῶν πράξεων.

(ε) Ταυτότητος τοῦ διατακτικοῦ..."

("..... Particularly for a later act to be confirmatory of a previous one it is required that:

(a) Identity of the issuing authority of both acts or hierarchical dependence of the issuing authority of the previous act on the authority issuing the later act unless it is a case of transfer due to simple hierarchical recourse in the competence of the authority issuing the first act to the issuing authority of the second.

(b) Identity of the person or persons to whom the acts refer.

(c) Identity of the legal procedure.

(d) Identity of the actual reasoning of both acts.

(e) Identity of the order").

Reverting now to the facts of this case; it is of utmost importance to note that the applicant in his application of 25.2.1982 to the E.S.C. did not place any new facts before the Committee other than those already before the E.S.C. on 27.8.68 when the relevant decision was taken; to be more succinct I must say that the applicant on 25.2.1982 was not placing any facts before the E.S.C.; he was simply voicing his opinion to the effect that the E.S.C. by deciding on 27.8.1968 to emplace him on the starting point of the salary scale "were causing injustice to him".

In this connection it must be stated that the 2 certificates for "technical experience" referred to by learned Counsel for applicant in his written address and appended thereto (The one from Cyprus Sulpher and Copper Company Ltd., dated

11.6.1982 and the other from D.O.M.S. dated 13.9.1982, were never placed before the E.S.C. either on 27.8.1968 or 15.3.1982. This is abundantly clear (a) from the relevant dates of the reports in question (11.6.1982 and 13.9.1982) and the date of the present recourse which was filed on 31.3.1982, (b) from the correspondence exchanged between counsel for applicant and the E.S.C. after the filing of the present recourse as it appears from the personal file of the applicant.

It is apparent from the minutes of 15.3.1982 (appendix "E" to the opposition) and the letter of 16.3.1982 (appendix "ΣΤ" that the E.S.C. on 15.3.1982 having no new facts before it went through the personal file of the applicant and taking into consideration the qualifications required by the existing legislation at the time of the appointment of the applicant on probation, in the post of Instructor—Class C— (27.8.1968), confirmed the decision of the E.S.C. of 27.8.1968 and informed the applicant accordingly signifying its decision to adhere to the decision of the E.S.C. of 27.8.1968.

Thus the decision of the E.S.C. of 15.3.1983 communicated to the applicant on 16.3.1982 was not of an executory character but merely confirmatory of the decision of 27.8.1968.

Before concluding on this point I feel duty bound to deal specifically with two submissions (apart from those already dealt with) advanced by learned counsel for applicant in connection with his stand that the decision of the E.S.C. of 15.3.1983 could not be of a confirmatory nature.

Learned counsel relying mainly on the text-book of Professor Tsatsos "The Application for Annulment before the Council of State" (supra) on the question of the requisites of a confirmatory act or decision of the Administration submitted the following:

A. The decision of the E.S.C. of 27.8.1968 and the decision of the E.S.C. of 15.3.1982 were not emanating from the same administrative organ; in the former case, he submitted the administrative organ was the one established under law 12/65, a law providing for the transfer of the exercise of the powers of the Greek Communal Chamber, which has ceased to function and was based on the law of neces-

sity, whilst the administrative organ which gave its decision on 15.3.1982 was a completely different organ created by law 10/69. Elaborating on this submission counsel of applicant relied mainly on the case of *Miliatos* v. *The Republic* (1982) 3 C.L.R. 1161 and *HjiAnastassiou* v. *The Republic* (1982) 3 C.L.R. 1173. In both aforesaid cited cases (decided by the learned President of this Court) the sole issue was whether in view of the provisions of Article 124.6 of the Constitution, section 4(5) of the Public Service Law 1967 (Law 33/67) was validly enacted; it is true that in the aforesaid decisions the learned President stated that "The Public Service Commission which was created by Law 33/67 is not the Commission which was set up pursuant to Article 124 of the Constitution;" this statement refers obviously to the composition of the P.S.C. and was made as a result of the comparison of the qualifications of the Chairman and members of the P.S.C. envisaged by Law 33/67, vis-a-vis the relevant provisions of the Constitution.

In the present case no question of comparison arises vis-a-vis the provisions of the Constitution as E.S.C. was the special creation of Law 12/65. The composition and functions of the Educational Service Committee established under Law 12/65 are set out in section 7 (sub-sections 2-7); these sub-sections were repealed by Law 10/69 (vide s. 77) and similar provisions were re-enacted by Law 10/69 (vide sections 4 to 18 inclusive); it is a fact that the enactment of 1969 in respect of the E.S.C. is more detailed than the enactment of 1965 but the composition and functions of the E.S.C. remain substantially the same; in particular the competence of the Committee as set out in s. 7(3) of Law 12/65 is identical with the competence of the E.S.C. envisaged by s. 5(1) of Law 10/69; therefore I have no difficulty in holding that the E.S.C. envisaged by Law 10/69 is the same administrative organ created by Law 12/65.

B. The second submission of counsel for applicant in support of his stand that the decision of the E.S.C. of 15.3.1983 could not be of a confirmatory character, is rather complicated; it may be thus summarised;

(i) Section 5(2) of Law 10/69 has created a hierarchical recourse.

(ii) The application of the applicant dated 25.2.1982 (appendix "Δ" to the opposition) addressed to the E.S.C. was a hierarchical recourse.

(iii) Every decision taken on a hierarchical recourse is of an executory nature.

(iv) The decision of the E.S.C. taken on 15.3.1982 being a decision on the said hierarchical recourse is a decision of executory nature.

Section 5(2) of Law 10/69 reads as follows:

"(2) Οὐδὲν τῶν ἐν τῷ ἐδαφίῳ (1) τοῦ παρόντος ἄρθρου διαλαμβανομένων κωλύει τὴν Ἐπιτροπὴν ὅπως ἐπανεξετάσῃ οἱανδήποτε ἀπόφασιν αὐτῆς ἐπὶ ἱεραρχικῇ αἰτήσει πρὸς αὐτὴν".

("(2) Nothing in subsection (1) of this section contained prevents the Committee to re-examine any of its decision on a hierarchical application to it").

The first observation is that the sub-section provides for hierarchical application (ἱεραρχικὴν αἴτησιν) and not for a hierarchical recourse (ἱεραρχικὴν προσφυγὴν) as submitted by countel for applicant.

Before examining the nature and effect of the above mentioned "hierarchical application" I consider it pertinent to deal very briefly with this topic in the light of the Greek Administrative Law from which it is apparent that the above definition was transplanted.

According to the provisions of the Greek Constitution every citizen of the Greek State has a right to apply individually or jointly with others to public authorities. (Similar provision is to be found in Article 29 of our Constitution). These applications are divided in two broad categories (a) "ἁπλαὶ διοικητικαὶ προσφυγαὶ" (simple administrative recourses (b) "ἐνδικοφανεῖς προσφυγαὶ" (Vide "*Manual of Administrative Law*" by Spiliotopoulos 2nd ed. pp. 189, 190).

The simple administrative recourses are subdivided again

into several categories but as some of the text-book writers differ on naming same I shall confine myself in mentioning.

1. Χαριστική προσφυγή
2. Αἴτησις Θεραπείας
3. Ἁπλή Ἱεραρχική προσφυγή.

The first two applications are directed to the same administrative organ which has given the original decision, whilst in the third occasion the applications are submitted to the superior hierarchically organ in order to impugn the original decision of the inferior organ.

These recourses have the following common characteristics:

(a) No time limit is provided by law

(b) No procedure for the submission thereof is envisaged by the relevant law.

Applications of this nature may be submitted when the relevant Law is silent or where the relevant Law allows applications of this nature, but not when the relevant Law expressly prohibits them.

The hierarchical recourse which is specifically envisaged by the relevant Law which regulates also the time within which it must be submitted as well as other matters of procedure is called "ἐνδικοφανὴς ἱεραρχική προσφυγή" (vide *Lessons of Administrative Law by Stassinopoulos* 1957 ed. p. 152, *Tsoutsos on Administration and Law* 1979 ed. p. 63, *Dagtoglou General Administrative Law* Vol. A pp. 222, 223, Tsatsos on Application for Redress as Administrative Recourse 2nd ed. p. 16 et seq.)

The decisions given in "simple administrative recourses" have no executory character, if they are not issued after new substantial inquiry of the case (vide Manual of Administrative Law by Spiliotopoulos 2nd ed. p. 190).

Decisions given in cases of "ἐνδικοφανοὺς ἱεραρχικῆς προσφυγῆς" are generally speaking of executory character because by means of such an administrative recourse "the re-examination of the substance of the case is made possible, that is a new inquiry, and a different assessment of the

actual circumstances" (vide *Manual of Administrative Law* by Spiliotopoulos 2nd ed. at p. 191.

From the above brief reference to the Greek Administrative Law it is clear that the simple hierarchical recourse is completely different recourse from "ἐνδικοφανὴς" hierarchical recourse; in the former case the recourse may be allowed by the Law but no time limit or other procedural matters are regulated in same in which case the decision given is merely confirmatory whilst in the latter case (ἐνδικοφανὴς) the relevant Law provides time limit, the hierarchically superior organ to which it must be addressed (fixing thus competency) the procedure to be followed etc.; in this latter occasion the decision of the hierarchically superior organ is executory.

Reverting now to section 5(2) of Law 10/69: I have already observed that it provides for a "hierarchical application" and not for a "hierarchical recourse"; the 2nd observation is that it does not make the "hierarchical application" compulsory; the sub-section provides that nothing in sub-section (1) "prevents" the Committee from re-examining anyone of its decisions; furthermore it does not provide either the time within which such application is to be submitted nor does it envisage the procedure to be followed. Finally it does not name the hierarchically superior organ to which the application is to be submitted; on the contrary it provides "ἐπὶ ἱεραρχικῇ αἰτήσει πρὸς αὐτήν"; but once the application will have to be submitted to the Committee itself what is the use of the word "hierarchical"? I hold the view that this sub-section, which is unhappily worded I must say, allows a re-examination of its decision by the E.S.C. on an application to it not in the sense of "ἐνδικοφανὴς ἱεραρχικὴ προσφυγὴ" as envisaged by the Greek Administrative Law but in the sense of "χαριστικὴ προσφυγὴ" or "αἴτησις θεραπείας" or "ἁπλὴ ἱεραρχικὴ προσφυγὴ". In which case the decision on such an application definitely lacks executory character being of a confirmatory nature as I have already found.

Having dealt with the preliminary objections taken by the defence I shall now proceed to examine the issue of "continuing omission" raised by the applicant an issue interwoven with the matter of time within which the present recourse ought to have been filed.

An omission, in the sense of paragraph 1 of Article 146 of the Constitution, means an omission to do something required by Law, as distinct from the non-doing of a particular act or the non-taking of a particular course as a result of the exercise of discretionary powers (*Cyprus Tannery* v. *The Republic* (1980) 3 C.L.R. 405).

Omission in the sense of Article 146.1 "presupposes that no action has been taken by the administration in the matter in question". (*Police Association* v. *The Republic* (1972) 3 C.L.R. 1).

The leading case on "continuing omission" is the case of *Hassan Mustafa* v. *The Republic*, 1 R.S.C.C. 44 where it was held by the then Supreme Constitutional Court (at p. 47 of the report) that "Where the omission ... is of a continuing nature the Court has jurisdiction to adjudicate on a recourse concerning such a continuing omission notwithstanding that the omission originally commenced prior to the 16th August 1960. Once the Court has come to the conclusion that the alleged omission in question could be said to have continued up to the date of the hearing there can be no question of the application being filed out of time under para. 3 of Article 146 of the Constitution".

This is very briefly the legal position as regards "omission" (in the sense of paragraph 1 of Article 146 of the Constitution) and "continuing omission". And the question which falls for determination is: do the facts of the present case establish an "omission" and in particular "a continuing omission" rendering the present recourse justiciable?

The answer is positively in the negative. The facts of this case, stated at length earlier on in the present judgment, indicate that the E.S.C. exercised its powers according to Law never flinching from exercising its duty; thus the E.S.C. decided after proper inquiry the matter on 27.8.1968 and despite the fact that its said executory decision became final and conclusive by the acceptance of same by applicant freely and without any reservation on 12.10.1968, did not flinch from re-examining the case and give its confirmatory decision on 28.3.1970, a

decision which was never challenged by the applicant. Finally as late as 15.3.1982 (14 whole years after the decision of 27.8.1968) the E.S.C. indulged into the application of 25.2.1982 and confirming its original decision informed the applicant accordingly on 16.3.1982 by means of a letter (vide appendix "ΣΤ") which signified therein its adherence to the original decision. It is crystal clear to my mind that on no occasion did the E.S.C. fail to take any action in the matter in question.

In the light of the above I hold the view that the sub judice decision of the Educational Service Committee contained in their letter of 16.3.1982 addressed to the applicant is not a decision of executory character but merely a confirmatory decision of the executory decision of the same organ given on 27.8.1968 which was unreservedly accepted by the applicant on 12.10.1968 thus depriving him of a legitimate interest in the matter; furthermore, there is no question of any "omission" let alone a continuous one.

As the decision of 16.3.1982 lacks executory character, the present recourse is not justiciable and as I have already held that there is no continuous omission the present recourse is out of time and therefore is doomed to failure; further acting ex proprio motu (*Constantinidou & others* v. *Republic* (1974) 3 C.L.R. 416 at p. 418) I find that the applicant has no legitimate interest envisaged by Article 146.2 of the Constitution having freely and unreservedly accepted the executory and valid decision of the E.S.C. as early as 12.10.1968.

For all the above reasons the present recourse fails and it is accordingly dismissed. Applicant will pay the costs of the respondents to be assessed by the Registrar of this Court.

Recourse dismissed with costs against the applicant.