

1985 April 10

[DEMETRIADES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

GEORGHIOS CONSTANTINIDES.

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF AGRICULTURE AND
NATURAL RESOURCES,

Respondents.

(Case No. 33/81).

Administrative Law—Administrative acts or decisions—Executory act—Confirmatory act—Cannot be attacked by recourse for annulment because it lacks executory character—Applicant’s claim for the grant to him of additional increments—Rejected repeatedly by respondents on the same grounds—No new facts put forward by him when submitting his claim—Recourse against last rejection not maintainable because sub judice rejection a confirmation of the view already expressed—And because recourse was out of time—Article 146.3 of the Constitution. 5 10

Between 1976 and 1980 applicant had repeatedly applied to the respondents for the grant to him of four increments so that on his retirement he could reach the top of the salary of the post he was holding; and the respondents were always rejecting his claim on the same grounds and for the same reasons. The first rejection of his claim was made on the 11th September, 1976 and the last on the 14th November 1980. 15

Applicant challenged the previous rejections by means of recourses, which were withdrawn upon an undertaking by the respondents to re-examine his case. Upon a recourse against the last rejection the respondents sub- 20

mitted, by way of preliminary objection, that the sub
judice decision was not of an executory nature as it simply
confirmed the practice followed or was a previous deci-
5 sion in the same matter and therefore it could not be
made the subject of a recourse under Article 146 of the
Constitution; and that, also, the recourse was out of time.

Held, that confirmatory acts cannot be attacked by re-
cOURSE for annulment because they lack executory char-
acter; that between the date of the withdrawal of his last
10 recourse and the date his counsel wrote the letter for re-
consideration of his case no new facts to be considered
by the respondents were put forward by him and as a
result the sub judice decision could not be anything else
15 but a confirmation of the view already expressed by the
respondents as regards the claim of the applicant for the
grant to him of the four increments; that, therefore, the
sub judice decision is not of an executory nature but it is
only a confirmation of previous decisions taken by the
20 administrative organs to which the applicant addressed his
demand; and that, further, this recourse was filed out of
time and it must be dismissed accordingly (see Article
146.3 of the Constitution).

Recourse dismissed.

Recourse.

25 Recourse against the refusal of the respondents to grant
applicant four increments before his retirement.

N. Clerides, for the applicant.

S. Matsas, for the respondents.

Cur. adv. vult.

30 DEMETRIADES J. read the following judgment. By his
recourse the applicant applies to this Court for a declara-
tion that the decision of the respondents, which was com-
municated to his counsel by letter dated 14th September,
1980, and by means of which he was informed that after
35 re-examination his claim for the grant to him of four in-
crements before his retirement from the Public Service was
rejected, is null and void and of no effect whatsoever.

The grounds of law, on which the applicant bases his application, read as follows:

“Under Article 146 of the Constitution the Supreme Court of Cyprus has exclusive jurisdiction to declare any act and/or decision of any organ or authority of the Republic null and void.

Under Article 28 of the Constitution all citizens are equal before the Law, administration and justice and they enjoy all the rights and freedoms provided by the Constitution without any direct or indirect discrimination.

Under Article 29 of the Constitution every citizen has the right to make applications to any organ or Public Authority and if he is not satisfied by their decision he can have recourse to the Court.”

The respondents opposed the application on the following grounds of Law:

1. That the act and/or decision of the respondents is not an executory administrative act and/or decision in the sense of Article 146 of the Constitution, but simply confirmatory of a practice followed and/or a preparatory one.
2. The application is out of time.

In addition and/or in the alternative, the respondents rely on two further grounds of Law, namely that-

- (A) the act and/or decision was correctly and lawfully taken after all relevant circumstances and facts of the case were taken into consideration and that it is duly reasoned under the circumstances, and
- (B) there has been no violation of Articles 28 or 29 of the Constitution.

The undisputed facts of the case, as they appear from the documents and files produced, are the following:

The applicant was appointed in the post of Senior Inspector of Works (Temporary) in the Water Development Department of the Ministry of Agriculture and Natural

Resources as from the 1st October, 1973 and on the 15th April, 1976, he was permanently appointed to that post. On the 16th July, 1976, the applicant applied, by letter, to the respondents for the grant to him of four increments so
5 that on his retirement, which was due on the 30th April, 1978, he could reach the top scale of the post of Senior Inspector of Works. By their letter dated 11th September, 1976, the Personnel Department of the Ministry of Finance turned down the applicant's request.

10 By his letter dated the 10th August, 1977, the applicant reverted again to the matter of the increments applied for by him alleging that his complaint had not been duly investigated. His claim was forwarded by the Director-General of the Ministry of Agriculture and Natural Resources
15 to the Personnel Department of the Ministry of Finance which, on the 22nd December, 1977, replied that in view of a relevant decision of the Council of Ministers No. 3697 of the 27th February, 1964, and after a careful study of the request of the applicant, they could not accede to it.
20 This reply of the Personnel Department of the Ministry of Finance was communicated to the applicant by the Director of the Water Development Department on the 9th January, 1978.

The applicant then, by letter dated 17th February, 1978,
25 applied to the Minister of Agriculture and Natural Resources for the solution of his problem, but the Acting Director-General of this Ministry informed the applicant on the 18th March, 1978, that the Minister, having studied his case, had reached the conclusion that his claim could
30 not be satisfied.

The applicant then filed Recourse No. 142/78 which was deemed to be abandoned by him in view of the following order made by the Court on the 13th November, 1978:

35 "This recourse is adjourned sine die provided that if within three months from today the applicant does not take any new action with a view to giving effect to his proposal and informs the Court accordingly, this recourse will stand dismissed."

40 On the 7th March, 1979, that is after the expiration of

the three months envisaged by the Court's order of the 13th November, 1978, the applicant applied to the respondents for a re-examination of his case alleging discrimination as in the case of his colleague Mr. G. Serghides additional increments were granted to him under similar circumstances.

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It is pertinent to state here that the applicant retired from the service on the 30th April, 1978, and that on the same day M. Serghides also retired having previously been promoted to the post of Superintendent of Works.

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To this letter the respondents replied on the 13th March, 1979, informing the applicant that the grant of additional increments to him was prohibited by the above said decision of the Council of Ministers adding, also, that as Mr. Serghides was promoted to a higher post no question of discrimination arose. As a result of the above reply, the applicant filed Recourse No. 187/79, by means of which he had applied for the following relief:

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"A) A declaration of the Court that the act and/or decision of the respondent refusing to re-examine applicant's petition dated the 7.3.1979 communicated to applicant by his letter dated 13.3.1979 should be declared null and void and of no effect whatsoever.

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B) A declaration of the Court that the failure of the respondent to re-examine applicant's petition dated the 7.3.1979 ought not to have been made and that respondent should have re-examined applicant's petition in the light of the new facts embodied in such petition."

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The grounds of Law and the facts relied upon in Recourse No. 187/79 are the same with those in the present recourse.

On the 27th June, 1980, Recourse No. 187/79 was withdrawn after the following statements were made by counsel appearing for the applicant and the respondent:

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"Mr. Clerides: I understand from my learned friend that if the applicant in this recourse or his counsel lodge an application with the proper authority on the

basis of the facts contained in the present recourse and any other additional facts they deem fit to include in such an application, the respondent will undertake to examine such an application and give a reasoned decision to it not later than three months from the date of such application.

Mr. Kyriakides: This is so. Respondent undertakes to examine any application on the lines as stated by Mr. Clerides.

Mr. Clerides: In the circumstances and upon the respondent's undertaking I seek leave to withdraw this recourse.

Mr. Kyriakides: I have no objection and claim no costs."

As a result of the above counsel for the applicant sought by a letter addressed to the Minister of Agriculture and Natural Resources on the 5th September, 1980, the re-examination of his case. The new facts placed before the Minister were to the effect that the applicant was discriminated against as Serghides was promoted whereas in his case the Government had refused to grant to him certain increments applied for by him and that the Government, contrary to the Constitution and the accepted principles of proper administration, had based its decision on a firm policy and not on the examination of the particular circumstances of the case of the applicant.

On the 14th November, 1980, the respondents informed counsel for the applicant that after a consideration of the abovesaid material the Ministry of Finance could not review their previous decision in the matter in that the applicant had not been discriminated against as his case was different from the case of Serghides who was granted the increments after his promotion to a higher post, which promotion had not been attacked by the applicant, and that the claim of the applicant had been particularly examined and was rejected in accordance with the existing procedure and regulations.

From the above facts of the case it is abundantly clear that the applicant's claim from 1976 up to the date of the

filing of the present recourse was one and the same, namely the grant to him of four increments so that on his retirement he could reach the top of the salary scale of the post he was holding.

It is, also, clear that the respondents were always rejecting the applicant's claim on the same grounds and for the same reasons. The fact that increments were granted to Mr. Serghides is irrelevant for the purposes of the present proceedings as such increments were granted to him because of his promotion to a higher post which had never been attacked by the applicant.

Before proceeding with the grounds of Law on which the present recourse has been based, it is pertinent to examine, at this stage, the preliminary objections raised by counsel for the respondents. It has been submitted in this respect by him that the sub judge decision is not of an executory nature as it simply confirms the practice followed or a previous decision in the same matter and, therefore, it cannot be made the subject of a recourse under Article 146 of the Constitution. Also, that the present recourse is out of time. Reference has been made, in this respect, to the Conclusions from the Case-Law of the Council of State in Greece 1929-59, where the following are stated (at p. 240);

«Πράξεις βεβαιωτικά. Ἀπαραδέκτως προσβάλλονται δι' αἰτήσεως ἀκυρώσεως, ὡς στερούμεναι ἐκτελεστικοῦ χαρακτήρος, αἱ βεβαιωτικά πράξεις, ἤτοι αἱ πράξεις αἱ ἔχουσαι τὸ αὐτὸ περιεχόμενον πρὸς προεκδοθεῖσαν ἐκτελεστήν, ἐπιβεβαιοῦσαι ταύτην, ἀνεξαρτήτως τοῦ ἂν ἐκδίδωνται αὐτεπαγγέλτως ἢ τῇ αἰτήσει τοῦ ἐνδιαφερομένου. Οὕτω εἶναι βεβαιωτικὴ ἡ πράξις ἢ συνιστῶσα ἀπλὴν ἐπανάληψιν προγενεστέρας, ἢ στηριζομένη ἐπὶ τῆς αὐτῆς πραγματικῆς καὶ νομικῆς βάσεως. Πράξις δηλοῦσα ἀπλὴν ἐμμονὴν τῆς Διοικήσεως εἰς προηγουμένην πράξιν, ἔστω καὶ μὴ ἐπαναλαμβάνουσα τὸ περιεχόμενον ταύτης, ἀποτελεῖ ἐπίσης βεβαιωτικὴν πράξιν, ὡς λ.χ. ἡ ἐμμονὴ εἰς προγενεστέραν ἄρνησιν. Οὕτω ἐκρίθησαν βεβαιωτικά πράξεις ἡ ἄρνησις τῆς Διοικήσεως ὅπως ἀνακαλέσῃ προηγουμένην ἐκτελεστήν πράξιν, ἢ ἀπόρριψις ἀπλῆς ἱεραρχικῆς προσφυγῆς ἢ αἰτήσεως θεραπείας».

5 (“Confirmatory acts. Unacceptably they are attacked
by recourse for annulment, as lacking executory character,
confirmatory acts i.e. acts which have the same contents
with a pre-issued executory one, confirming same, irrespective
of whether they are issued on the motion of the administration
or on the application of the interested party. Thus confirmatory
is an act which consists of a mere repetition of a previous one,
based on the same factual and legal basis. An act stating a
10 mere persistence of the administration to a previous act,
even though it does not repeat its contents also constitutes
a confirmatory act, as for instance the persistence to a
previous refusal. Thus the refusal of the Administration to
revoke a previous executory act, the dismissal of a simple
15 hierarchical recourse or an application for relief were considered
as confirmatory acts”).

20 In my view, the statements made by counsel appearing for
the parties in Recourse No. 187/79 do not create any new
legal situation or an obligation by the respondents to take
a new decision. For such a situation to arise the applicant
had to supply the respondents with facts that were not
before them when they were taking the decision attacked
by Recourse No. 187/79. It is clear from the facts and
25 the history of this case that all along the only request
of the applicant was to be granted four increments so that
on his retirement he could be eligible to receive a pension
calculated at the top of the salary scale of the post he
was holding. However, between the date of the withdrawal
30 of that recourse and the date his counsel wrote the letter
dated 5th September, 1980, no new facts to be considered
by the respondents were put forward by him and as a result
the sub judice decision could not be anything else but a
confirmation of the view already expressed by the respondents
35 as regards the claim of the applicant for the grant to him
of the four increments.

40 In the circumstances of the case, I find that the sub judice
decision is not of an executory nature but it is only a
confirmation of previous decisions taken by the administrative
organs to which the applicant addressed his demand.

As regards now the second issue raised by counsel for

the respondents, namely that the recourse was filed out of time, it is provided by Article 146.3 of the Constitution that a recourse must be made within seventy-five days of the date when the decision or act of an administrative organ came to the knowledge of the person making the recourse. In the present case in view of my above conclusion, I am of the opinion that this recourse was filed out of time and it must be dismissed accordingly. 5

In the result, this recourse is dismissed, but in the light of the history of the case, I feel that the applicant should pay the costs of the respondents. 10

Recourse dismissed with costs against applicant.