1986 November 28

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THELMA G. KOTSONI,

Applicant,

v.

THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Case No. 852/85).

Administrative Law—General principles—Objection against an administrative act—Recourse for annulment filed before determination of objection—When and in what circumstances applicant entitled to treat the objection as rejected —Objection determined after filing of recourse—When and in what circumstances recourse can be treated as directed against the relevant decision determining the objection.

Executory act—Objection against an administrative decision—Such decision merges in the decision determining the objection and, thus, looses its executory character.

Educational Officers —Transfers —The Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) (Amending) Regulations 71/85—Reg. 23(2)—Ultra vires enabling law.

On 13.9.85 the respondent Commission decided to transfer the applicant, a secondary school teacher, from Acropolis "A" to Pedhoulas Gymnasium for 8 teaching periods. The decision was taken in accordance with the list prepared in virtue of Regs. 22 and 24 of the aforesaid regulations.

The applicant lodged an objection against her said transfer on the ground of wrong calculation of her units. On

25.9.85 the Commission met in order to examine the objection relating to the transfers effected on 13.9.85.

As the applicant did not see her name on the list of those officers, whose objections were accepted, she assumed that her objection was dismissed and, as a result, filed the present recourse, challenging both her aforesaid transfer and the dismissal of her objection.

In fact applicant's objection was not determined on 25.9.85, but it was dismissed on 23.10.85, that is after the filing of this recourse. Thus, the question arose whether the sub judice decision has lost its executory character.

Held, annulling the sub judice decision: (1) Acts, against which an objection is made, merge in the decision disposing of the objection and loose, as a result, their executory character. It follows that the sub judice transfer has lost its executory character.

(2) In the light of the above the question is whether this recourse may be treated as directed against the dismissal of the objection. The position in Greece is now that if an objection is made in accordance with the relevant law against an administrative decision and the time provided by such law for the determination has elapsed without any decision having been reached or communicated to the applicant, the applicant may file a recourse against the silent rejection of an objection and if after such filing a decision is reached on the objection, such decision is treated as being challenged by such recourse. Though in Greece these matters are regulated by Statute (Law 3713/28 and Legislative Order 3830/58), our Courts have accepted them as general principles of administrative Law.

(3) In this case the objection was filed within the time limit provided in Reg. 25(2), which, also, prescribes a period of 7 days for the determination of the objection. Reg. 4, however, states that the time limits in these Regulations would be indicative for the first year of their application and 1985 was indeed the first year. As, however, the respondent Commission actually met to consider the objection on 25.9.85 and the applicant did not see

her name on the list of those, whose objections were accepted, she was, in the circumstances, entitled to treat her objection as rejected. It follows that this recourse may be treated as directed against the decision of the 23.10.85, dismissing applicant's objection.

(4) Reg. 23(2) is ultra vires the enabling Law *(Aristides* v. *The Republic* (1986) 3 C.L.R. 466 adopted). It follows that the sub judice decision has to be annulled.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

Economides and Others v. *The Republic* (1978) 3 C.L.R. 230;

Mitidou v. *CY.T.A.* (1982) 3 C.L.R. 555;

Demetriou and Others v. *Municipal Committee of Larnaca* (1983) 3 C.L.R. 1315;

Polyviou v. *Improvement Board of Ayia Napa* (1985) 3 C.L.R. 1058;

Strongiliotis v. *Improvement Board of Ayia Napa* (1985) 3 C.L.R. 1085;

Aristides v. *The Republic* (1986) 3 C.L.R. 466.

Recourse.

Recourse against the decision of the respondent to transfer applicant to Pedhoulas Gymnasium for eight teaching periods.

K. Talarides, for the applicant.

A. Vassiliades, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant prays by the present recourse for the following relief:

(1) That the decision of the Educational Service Commission to transfer her to Pedhoulas Gymnasium for 8

periods, be declared null and void and of no legal effect.

(2) That the dismissal by the Educational Service Commission, of the objection of the applicant against her aforesaid transfer, be declared as null and void and of no legal effect.

The applicant is a teacher of the French language in the Secondary Education.

By a decision of the Educational Service Commiss on dated 13.9.1985, the applicant was transferred as from the 16th September, 1985, from Acropolis A' to Pedhoulas Gymnasium for 8 teaching periods. The applicant was transferred on the basis of the list prepared in this respect in accordance with Regulations 22 and 24 of the Educational Officers (Treaching Staff) (Appointments, Postings, Transfers, Promotions and Collateral Matters) (Amending) Regulations of 1985. (No. 71/85). In accordance with that list which was prepared by the respondent on 9.8.85 the applicant was credited with 15.8 units and was third in line for transfer. The number of units is allocated to each officer by the Ministry of Education on the basis of the particulars of each officer.

On the same date (the 13th September, 1985) the applicant, having received information about the number of units with which she was credited, wrote a letter to the Ministry of Education requesting a reconsideration of the calculation of her units claiming amongst others, that she should have been credited with two years' service away from her place of residence, which were given, in accordance with the proviso to regulation 14(2), to displaced officers who were serving in schools of the Republic during the years 1974 - 1976.

The Ministry of Education credited the applicant with six more units in respect of her claim notified the respondent accordingly, by letter dated the 14th September, 1985. With the new calculation of units the applicant's priority for transfer had changed so that other persons were placed first in line before her.

Upon taking notice of her aforesaid transfer, the appli-

:ant objected to the respondent, by letter dated the 16th September on the ground of wrong calculation of her units. The respondent met on the 25th September, 1985 and considered the objections against the transfers which were effected on 13.9.1985. There is nothing in the minutes of this meeting, as to the result of the consideration of the objections.

As the applicant did not see her name in the list of hose officers whose objections were accepted, which was published in the press, she assumed that her objection was rejected, and therefore, filed the present recourse, on the 2nd of October, 1985.

On the date the recourse was filed, the respondent met once again for considering objections including the applicant's objection. In the minutes of such meeting the following are stated with regard to applicant's objection:

> "On the basis of her order in the list of teachers subject to transfer (see minutes of 13.9.1985), she was transferred to the Gymnasium of Pedhoulas for 8 periods. Mrs. Kotsoni submitted an objection on the ground that she has not been credited with 2 years of service away from her residence which are granted according to regulation 14(2) (proviso) for service in public schools of the Republic during the school-year 74/77, to displaced educationalist. This teacher during the years 1974/1977 was absent on leave without pay (which later was changed by the Ministry of Education to educational leave with financial assistance).
>
> The Commission has reservations as to whether educational leave can be considered as 'Service in Public Schools' and decided to examine the matter further. For this reason it postpones the taking of a decision on the subject of Mrs. Kotsoni."

Further, the respondent addressed, again on the same ate, a letter to the Attorney-General's office, seeking legal dvice on the matter. The Deputy Attorney-General of the epublic replied by letter dated the 14th October, 1985, the effect that the applicant could not be considered as aving served, during the years of her absence in schools

of the Republic. The Ministry of Education informed the respondent by letter dated 19.10.1985 that in view of the advice of the Deputy Attorney-General the six additional units could not be given to the applicant and as result her units were 15.839 and not 21.839. Copy of such letter was sent to the applicant.

The respondent met on the 23rd October, 1985 and considered finally the objection of the applicant in the light of the advice of the Deputy Attorney-General and rejected same, on the ground that on the basis of her number of units, she was subject to transfer.

Counsel for the applicant based his arguments on the grounds that the sub judice transfer is contrary to Regulation 25, that the interpretation attached to Regulation 14(2) by the Attorney-General and the respondent is wrong, that the respondent acted in abuse of powers and that regulations 23(2) and 25(2) of the 1985 Regulations are ultra vires the Law.

Counsel for the respondent conceded that regulation 23 (2) on which the sub judice transfer is based is ultra vires the Law, in view of the judgment of Triantafyllides, P., in the case of *Aristides* v. *Republic* (1986) 3 C.L.R. 466. He raised, however, the preliminary objection that the recourse cannot be pursued because the sub judice decision has lost its executory character.

I consider it necessary to deal with the preliminary issue first.

Counsel for the respondent argued, in this respect, that the original decision to transfer the applicant has lost its executory effect from the time that the applicant filed an objection against such decision, and it has merged in the final decision, which was the rejection of the applicant's objection on 23.10.1985, reached after the filing of the present recourse and against which no recourse was filed.

Counsel for the applicant in his reply argued in respect of the preliminary issue that the objection was dismissed before the 30th of September, but in any event, even if it was dismissed on the 23rd of October, this is not fatal since

the recourse is directed both against the decision to transfer the applicant and the rejection of her objection. It is counsel's contention that the decision to transfer the applicant is a separate final act which does not require any approval in order to be valid and it cannot merge in the final decision rejecting the objection because it produces legal results which cannot be affected by the outcome of the objection. In counsel's submission, the applicant is not precluded from filing a recourse before any decision on the objection is reached and if the objection is in the meantime accepted the recourse applies to the period during which the transfer took place. Counsel finally argued that even if a recourse is filed prematurely, it becomes mature and, therefore, acceptable if by the date of the hearing of the recourse the decision challenged has been reached.

The present recourse is directed both against the decision of the respondent to transfer the applicant (dated 13.9.1985) and the rejection of the applicant's objection against the said transfer.

I shall deal first with the first part of applicant's prayer for relief.

In the Conclusions from the Case Law of the Council of State in Greece (1929 - 1959), it is stated at pp. 241 - 242, that acts against which an objection is made, merge in the decision disposing of the objection and loose, as a result, their executory character. This stand was taken by the Council of State in a number of cases (see the cases referred to in the Digest of Case Law of the Council of State in Greece, 1961 - 1970, Vol. p. 172, paragraphs 1698, 1704, 1709; also the Digest of Case Law for the years 1971 - 1975, Vol. 1, pp. 104, 108 and especially paragraphs 1816, 1821, 1825, 1849, 1852, 1853, 1864, 1867 - 1869, 1907 and 1923).

The same view has been expressed by our courts in a number of cases: (See *Economides & Others* v. *Republic* (1978) 3 C.L.R. 230, at p. 235; *Mitidou* v. *CY.T.A.* (1982) 3 C.L.R. 555; *Demetriou & Others* v. *Municipal Committee of Larnaca* (1983) 3 C.L.R. 1315 at pp. 1321, 1322, where other cases are also mentioned; *Polyviou* v.

Improvement Board of Ayia Napa (1985) 3 C.L.R. 1058 at pp. 1066 - 1067; *Strongiliotis* v. *Improvement Board of Ayia Napa* (1985) 3 C.L.R. 1085 at p. 1090).

As it emanates from the minutes of the various meetings of the respondent, the decision rejecting the objection of the applicant was taken on the 23rd October, 1985, and the decision of 13.9.1985 has thus merged in the above decision, loosing its executory character and cannot, therefore, be challenged directly.

What remains to be considered is whether the subsequent decision on the objection can be considered as being challenged by the present recourse.

In a line of decisions decided by the Council of State in Greece before 1971, the fact that a recourse was filed against an administrative decision, before the decision determining an objection against it was reached, was not considered as an obstacle in pursuing the recourse. In such cases the final decision reached after the filing of the recourse, was considered as having been challenged by the same recourse, if it was reached before the hearing of the recourse (See Digest of Cases of the Council of State in Greece, 1961 - 1970, Vol. 1, pp. 311 - 312, especially paragraphs 5140, 5141, 5144, 5158 - 5160 and 5165).

This practice was, however, stopped by Decision No. 3596/71 and the position was thereafter clarified as follows:

It an objection is made in accordance with the provisions of the relevant law against any administrative act and the time prescribed by the relevant law for determining such objection (or if no time is prescribed the time provided by the Constitution) has elapsed without any decision having been reached or communicated to the applicant, the applicant may file a recourse against the silent rejection of the objection and if after the filing of the recourse but before its hearing a decision is reached on the objection, such decision is treated as being challenged by the same recourse. (See Decisions Nos. 617, 618, 925/73)

Although these matters are provided by law in Greece, (section 46 of Law No. 3713/1928 and 15 N.Δ. 3830/1958) our courts have accepted them as general principles of administrative law (see the cases of our courts cited earlier).

The objection in the present case was made on the 16th September, that is, within the time limit prescribed by regulation 25(2) of the Regulations (Κ.Δ.Π. 71/85). The time prescribed by the aforesaid Regulation for resolving objections is seven days from their submission. The applicant's objection should have been determined, in accordance with regulation 25(2) by the 23rd September the latest, and after that date she was entitled to presume that her objection was rejected. However, regulation 4 of the 1985 Regulations states that the time limits mentioned in these Regulations would be only indicative for the first year of their application. And 1985 was indeed the first year of their application.

There is no indication as to the lapse of time that would have been reasonably expected to pass before any person affected could treat his objection as silently rejected and file his recourse, against the silent rejection. The respondent, however, met on the 25th September and decided upon the objections and the names of those officers whose objections were accepted were published in the daily press. The applicant was not informed that her objection was not determined on that date, but was still under consideration.

I find that under the circumstances the applicant was entitled to treat her objection as rejected and file the present recourse. I have, therefore, though with some reluctance decided to treat the recourse as challenging also the decision of the 23rd October, rejecting the applicant's objection, which was reached before the hearing of the recourse.

Coming now to the merits of the case, it was held by Triantafyllides, P., in the case of *Aristides* v. *The Republic* (1986) 3 C.L.R. 466 that regulation 23(2) is ultra vires the Law on the ground that the Council of Ministers to which no power is given in this respect by Law 10/69, partakes

in a decisive manner in the performance of the task of the Commission, in a way which is incompatible with sections 5 and 39(1) of the Law. (See pp. 471 - 472 of the judgment).

I fully agree and adopt what was said by Triantafyllides, P. in the above case and I find that the sub judice transfer, having been based on an ultra vires Regulation, is contrary to the law and should, therefore, be annulled.

In the result this recourse succeeds and the sub judice decision is hereby annulled.

Sub judice decision annulled.