

An Unlawful Dismissal Order Issued by the State Official on the Basis of Incompetent Resolution of NACC *

Supreme Administrative Court Judgment No. A. 1037/2558, dated 27th August B.E. 2558 (2015)

Mr. S. (P) v. Director-General, Department of Lands (D)

According to Section 301 paragraph one (3) of Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and Section 19 (3) of the Organic Act on Counter Corruption, B.E. 2542 (1999) the National Anti – Corruption Commissioner (NACC) has powers and duties to inquire and decide whether a State official has become unusually wealthy or has committed an offence of corruption, malfeasance in office or malfeasance in judicial office. In this case, only the corruption offence was the disciplinary offence in the competence of the NACC. When the other three offences were not under the NACC competence, the resolution of the NACC did not bind the Defendant. The report, documents and opinion of the NACC was not the disciplinary inquiry file of the disciplinary inquiry committee according to Section 92 of the Organic Act on Counter Corruption, B.E. 2542 (1999). In addition, there was no rule of the Department of Lands stating that the Plaintiff had official duty to survey plots of land by his own. And there was no evidence that the Plaintiff conspired with someone in intentionally issuing or omitting to issue land title deeds for undue benefits of his own or the others against Section 82 paragraph three the Civil Service Act, B.E. 2535 (1992). The dismissal order of the Defendant by the resolution of the NACC was unlawful.

Legal Principles : *The Exercise of Discretion, Disciplinary Sanction, Audi Alteram Partem (The Right to be Heard)*

Administrative Court Procedure : *Act on Establishment of Administrative Courts and Administrative Court Procedure, B. E. 2542 (1999) : Section 9 paragraph one (1)*

Legal Provisions : *Constitution of the Kingdom of Thailand, B.E. 2540 (1997) : Section 301 paragraph one (3)*

Organic Act on Counter Corruption, B.E. 2542 (1999) : Section 19 (3)

Civil Service Act, B.E. 2535 (1992) : Section 82 paragraph three, Section 85, Section 92 paragraph one, Section 102 paragraph two

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Rule of Civil Service Commission No.18 on the Inquiry Process (B.E.2540) (1997) issued under the Civil Service Act, B.E. 2553 (1992)

Land Code : Section 58 bis paragraph one

Rule of the Department of Lands on Duty and Responsibility of Official in the Project of Land Survey and Measurement for Land Title Deed Issuance in Tambon, B.E. 2521 (1978) : Clause 7

Rule of the Department of Lands on Land Survey and Measurement, B.E. 2529 (1986) Clause 44 and Clause 47.1

Judgment (Summary)

While being a Land surveyor level 6 and the Assistant Director of Land Survey of the Land Survey Division for Land Title Deed Issuance, the Department of Lands, the Plaintiff was accused of disciplinary breach by the National Anti – Corruption Commissioner (NACC) claiming that the Plaintiff was involving illegal issuance of land title deeds for 24 plots of land. The NACC passed a resolution that the Plaintiff was guilty of disciplinary offences as follows: (1) committing an offence of corruption; (2) performing official duties with an intention not to comply with the law, regulation of official authority, cabinet’s resolution, or government policy, causing detriment to the authority; (3) making false report to the supervising official, causing detriment to the authority; and (4) committing an act which is attributable as gross misconduct as prescribed by the Civil Service Act, B.E. 2553 (1992). The Defendant by the NACC’s resolution issued an order to dismiss the Plaintiff from his position without appointing the disciplinary inquiry committee to inquire the facts. The Plaintiff appealed to the Office of the Civil Service Commission but the complaint was denied. The Plaintiff then filed the case to the Administrative Court to revoke the dismissal order of the Defendant.

The Supreme Administrative Court held that according to Section 301 paragraph one (3) of the Constitution of Kingdom of Thailand, B.E. 2540 (1997) and Section 19 (3) of the Organic Act on Counter Corruption, B.E. 2542 (1999) the NACC has powers and duties to inquire and decide whether a State official has become unusually wealthy or has committed an offence of corruption, malfeasance in office or malfeasance in judicial office. Under Section 91 of the Organic Act on Counter Corruption when the NACC conducts the inquiry and passes a resolution that a particular allegation has no prima facie case, such allegation shall lapse. Any allegation which, according to the NACC's resolution, has a prima facie case shall be pursued as follows: (1) if a prima facie case for a disciplinary offence is found, it shall be proceeded with in accordance with Section 92; (2) if a prima facie case for a criminal offence is found, it shall be proceeded with in accordance with Section 97. The

offences of malfeasance in office and malfeasance in judicial office are criminal offence according to Penal Code; the offence of corruption is a disciplinary offence. According to Section 92 of the Organic Act on Counter Corruption, B.E. 2542 (1999), when the NACC found that the Plaintiff committed corruption offence, the report and existing documents together with the opinion of the NACC shall be sent to Defendant, the superior of the Plaintiff, for the purpose of considering the disciplinary penalty for the offence in respect of which the NACC has passed the resolution, without the appointment of a disciplinary inquiry committee. As for the offences No. (2) – (4), they were not, however, under the competence of the NACC. The resolution of the NACC did not bind the Defendant. The report, documents and opinion of the NACC were not deemed as the disciplinary inquiry file of the disciplinary inquiry committee under the Civil Service Act. The Defendant had duty to appoint a disciplinary inquiry committee to inquire the Plaintiff and provide the Plaintiff the opportunity to sufficiently know the facts thereto and to oppose and produce his evidence according to Section 92 of the Organic Act on Counter Corruption, B.E. 2542 (1999), Section 102 of the Civil Service Act, B.E. 2535 (1992), and Rule of Civil Service Commission No.18 on the Inquiry Process (B.E.2540) (1997) issued under the Civil Service Act, B.E. 2553 (1992). When the Defendant issued an order dismissing the Plaintiff due to the disciplinary offences No. (2) – (4) basis without appointing a disciplinary inquiry committee to inquire the Plaintiff, the order was against material process or procedural as prescribed in Section 102 of the Civil Service Act, B.E. 2535 (1992), and Rule of Civil Service Commission No.18 on the Inquiry Process (B.E.2540) (1997) issued under the Civil Service Act, B.E. 2553 (1992).

For the dismissal order on the offence of corruption basis, it was raised to the question whether or not the Plaintiff conducted gross disciplinary breach according to Section 82 paragraph three of the Civil Service Act, B.E. 2535 (1992). There are three compositions to be considered as follows: (1) the official shall be liable if he or she has official duty to perform; (2) the official unlawfully acts or omits such duty with the intention to do so; (3) the act or omission of such duty has purpose to acquire undue benefits for his or her own or for other persons. According to the inquiry report of the NACC, when the Plaintiff found that the disputed land might not be able to issue land title deed under Section 58 bis paragraph one of the Land Code, he consulted his colleagues and reported to the superior as prescribed by Clause 7 of the Rule of the Department of Lands on Duty and Responsibility of Official in the Project of Land Survey and Measurement for Land Title Deed Issuance in Tambon, B.E. 2521 (1978) and Clause 44 and Clause 47.1 of the Rule of the Department of Lands on Land Survey and Measurement, B.E. 2529 (1986). The report of the Plaintiff also caused the appointment a land examination committee to examine the disputed plots of land. In addition, there was no rule of the Department of Lands stating that the Plaintiff had official duty to survey plots of land by his own; the duty and

responsibility of land title deed issuance was prescribed for the Director of Land Survey of the Land Survey Division for Land Title Deed Issuance (Mr. C) and the Provincial Land Registrar (Mr. V), not the Plaintiff. And there was no evidence that the Plaintiff conspired with someone in intentionally issuing or omitting to issue land title deeds for undue benefits of his own or the others against Section 82 paragraph three the Civil Service Act, B.E. 2535 (1992). The dismissal order of the Defendant was unlawful. The Supreme of Administrative Court affirmed the decision of the Administrative Court of First Instance in the revocation of the Defendant's order with retrospective effect as from the effective date of the order, and also had remarks stating the Plaintiff should be eligible for reinstatement to his former position and benefit restoration within 30 days and 60 days consecutively.