J. Y. Interpretation No.243（July 19, 1989）*

ISSUE: May a public functionary who is subjected to an administrative decision of either removal from office or recording of a demerit institute an administrative litigation?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; J.Y. Interpretations Nos. 187 and 201（司法院釋字第一八七號及第二〇一號解釋）; Articles 2 and 24 of the Public Functionary Service Act（公務員服務法第二條及第二十四條）; Public Functionaries Merit Evaluation Act（公務人員考績法）; Regulation Governing the Evaluation of Performance by Members of Public School Faculty and Staff（公立學校教職員成績考核辦法）; Precedent P.T. No. 19 (Ad. Ct. 1951)（行政法院四十年判字第十九號判例）; Precedents P.T. No.398 (Ad. Ct. 1962)（行政法院五十一年判字第三九八號判例）; Precedent P.T. No. 229 (Ad. Ct. 1964)（行政法院五十三年判字第二二九號判例）; Precedent T.T. No. No. 19 (Ad. Ct. 1965)（行政法院五十四年判字第十九號判例）; Precedent P.T. No. 414 (Ad. Ct. 1968)（行政法院五十七年判字第四一四號判例）.

KEYWORDS:

right to file administrative appeal（訴願權）, right to sue（訴

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* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purpose only.

訟權）, right to hold public office（服公職權）, capacity pf public functionary（公務員身分）, decision of removal from office（免職處分）, disciplinary measure（懲戒處分）, administrative act（行政處分）, administrative litigation（行政爭訟）, decision of recording of a demerit（記過處分）, internal order（職務命令）.**

HOLDING: An administrative decision made by either a central or a local government authority to remove a public functionary from his office pursuant to the provisions of the Public Functionaries Merit Evaluation Act or other applicable laws and/or regulations has a direct impact on the constitutionally guaranteed right of such public functionary to hold public office. Therefore, such public functionary may, as a matter of course, exercise his right to file an administrative appeal or right to sue as provided for under Article 16 of the Constitution. Such public functionary has petitioned the competent authorities and the personnel authorities, respectively, for a review and a second review of the decision at issue pursuant to relevant laws and, by doing so

解釋文：中央或地方機關依公務人員考績法或相關法規之規定，對公務員所為之免職處分，直接影響其憲法所保障之服公職權利，受處分之公務員自得行使憲法第十六條訴願及訴訟之權。該公務員已依法向該管機關申請復審及向銓敘機關申請再復審或以類此之程序謀求救濟者，相當於業經訴願、再訴願程序，如仍有不服，應許其提起行政訴訟，方符有權利即有救濟之法理。行政法院五十一年判字第三九八號、五十三年判字第二二九號、五十四年裁字第十九號、五十七年判字第四一四號判例與上開意旨不符部分，應不再援用。至公務人員考績法之記大過處分，並未改變公務員之身分關係，不直接影響人民服公職之權利，上開各判例不許其以訴訟請求救濟，與憲法尚無牴觸。

or resorting to other similar procedures to petition for relief, an administrative appeal and re-appeal proceeding should be deemed to have been sought. If such public functionary is not satisfied with the decisions of the aforesaid authorities, he should be allowed to institute an administrative litigation so as to bring the matter in line with the legal principle that there is a remedy where there is a right. Those portions of the opinions, as given in Precedents P.T. No. 398 (Ad. Ct. 1962), P.T. No. 229 (Ad. Ct. 1964), T.T. No. 19 (Ad. Ct. 1965) and P.T. No. 414 (Ad. Ct. 1968), which are not in line with the intent described above, should no longer be cited and applied. In respect of the decision of a major demerit made under the Public Functionaries Merit Evaluation Act, since the capacity of a public functionary is not altered thereby and, thus, no right of a national to hold public office is directly affected, the aforesaid Precedents, in denying the public functionary his right to seek relief through litigation, are not in violation of the Constitution.

Precedent P.T. No. 19 (Ad. Ct. 1951) 行政法院四十年判字第十九號判

is intended to interpret the application of Articles 2 and 24 of the Public Functionary Service Act. The internal order at issue was given by a superior agency within the parameters of its power of supervision, but was not an unfavorable disposition that would affect the capacity of the public functionary, who was not entitled to sue for relief in connection therewith. The said Precedent is not unconstitutional.

例，係對公務員服務法第二條及第二十四條之適用，所為之詮釋，此項由上級機關就其監督範圍內所發布之職務命令，並非影響公務員身分關係之不利益處分，公務員自不得訴請救濟，此一判例，並未牴觸憲法。

REASONING: Under Article 77 of the Constitution, the discipline of a public functionary is a power entrusted to the Judicial Yuan, under which the Committee on the Discipline of Public Functionaries is established to take charge of disciplinary matters. A decision to remove a public functionary from his office is, in essence, a disciplinary action regardless of the language used in rendering such decision. Whether the exercise of such power and authority and the provision of administrative relief are adequate under the Constitution is a question for the relevant authorities to answer after a comprehensive and thorough review of the current practice and the appropriate adjustment

解釋理由書：公務員之懲戒，依憲法第七十七條規定，屬於司法院職權範圍，司法院設有公務員懲戒委員會，為主管懲戒事項之司法機關。對於公務員所為具有懲戒性質之免職處分，不論其形式上用語如何，實質上仍屬懲戒處分，此項權限之行使及其救濟程序如何規定，方符憲法之意旨，應由有關機關通盤檢討，而為適當之調整。

thereof.

Whether a public functionary who is subjected to an administrative decision may institute an administrative litigation depends on the subject matter of such decision, as has been made clear in J.Y. Interpretations Nos. 187 and 201. An administrative decision made by either a central or a local government authority to remove a public functionary from his office pursuant to the provisions of the Public Functionaries Merit Evaluation Act or the Regulation Governing the Evaluation of Performance by Members of Public School Faculty and Staff has a direct impact on the constitutionally guaranteed right of such public functionary to hold public office. Before the relevant laws are properly amended or modified, any public functionary who is subjected to such disposition may, as a matter of course, exercise his right to file an administrative appeal and right to sue as guaranteed under Article 16 of the Constitution by petitioning a judicial authority for relief.

因公務員身分受行政處分得否提起行政爭訟，應就處分之內容分別論斷，業經本院釋字第一八七號及第二〇一號解釋闡釋在案，中央或地方機關依公務人員考績法或公立學校教職員成績考核辦法，對公務員所為之免職處分，直接影響其憲法所保障服公職之權利，在相關法律修正前，受處分之公務員自得行使憲法第十六條訴願及訴訟之權，於最後請求司法機關救濟。

The public functionary has petitioned

受免職處分之公務員已依法向該

the competent authorities and the personnel authorities, respectively, for a review and a second review of the decision at issue pursuant to relevant laws and, by doing so or resorting to other similar procedures to petition for relief, an administrative appeal and re-appeal proceeding should be deemed to have been sought. If such public functionary is not satisfied with the decisions of the aforesaid authorities and believes that his lawful rights have been infringed upon thereby, he should be allowed to bring an administrative litigation so as to bring the matter in line with the legal principle that there is a remedy where there is a right. Precedent P.T. No. 398 (Ad. Ct. 1962) says, "According to Article 1 of the Administrative Appeal Act, no administrative appeal may be instituted unless any right or interest of a person is infringed upon as a result of an inequitable or illegal disposition made by either a central or a local government agency. In respect of the disciplinary measure received by a public functionary, regardless of the level of the government in which such public functionary is serving, in his capacity as a public function-

管機關申請復審及向銓敘機關申請再復審，或以類此之程序謀求救濟者，相當於業經訴願、再訴願程序，如仍認為原處分、再復審核定或類似之決定違法損害其權利，應許其提起行政訴訟，方符有權利即有救濟之法理。行政法院五十一年判字第三九八號判例：「依訴願法第一條規定，提起訴願，唯人民對於中央或地方官署所為不當或違法之處分致損害其權利或利益者，始得為之。至各級公務人員以公務員身分所受主管官署之懲戒處分，則與以人民身分因官署處分而受損害者有別，自不得對之提起訴願。」五十三年判字第二二九號判例：「公務員以公務員身分受行政處分，純屬行政範圍，非以人民身分因官署處分受損害者可比，不能按照訴願程序提起訴願，原告現雖解職，已無公務人員身分，但該項處分既係基於原告之公務人員關係而發生，自仍不能視其為人民受官署之處分而許其對之提起訴願。」五十四年裁字第十九號判例：「行政訴訟之提起，須以官署對人民之處分違法，致損害其權利，經過訴願再訴願而不服其決定者，始得為之。原告以公務人員身分，而受主管官署人事行政上之處分，顯與以人民身分受官署違法處分而損害其權利之情形有別，除有正當理由

ary, no such administrative appeal may be brought in connection therewith because such measure differs in its nature from the disposition made by a government agency which infringes upon the rights of anyone as a civilian." Precedent P.T. No. 229 (Ad. Ct. 1964) states, "An administrative act subjecting a public functionary to any disciplinary action in his capacity as a public functionary is purely a matter of administrative discretion, which is not comparable to a disposition made by a government agency which infringes upon the rights of anyone as a civilian, and, as such, no administrative appeal may be instituted under any administrative appeal proceedings in respect thereof. In spite of the discharge of the Plaintiff from his office and, consequently, loss of his capacity as a public functionary, no administrative appeal may be filed by the Plaintiff, who should not be regarded as a civilian having been subjected to an administrative decision made by a government agency, because the administrative act at issue occurred at a time when the Plaintiff was still a public functionary." "An administrative suit may not be brought

得向該管監督官署呈請糾正外，自不得依行政訴訟程序以求救濟，且考試院秘書處之通知，亦並非適用訴願程序所為之訴願決定，乃原告遽向本院提起行政訴訟，其起訴自非合法。」五十七年判字第四一四號判例：「公務人員以公務員身分受主管官署或上級官署之處分，純屬人事行政範圍，與以人民身分受官署之處分有別，不得對之提起訴願。」均未分別行政處分之內容，一概限制公務員依法提起訴願及行政訴訟之權利，上開各判例與前述意旨不符部分，應不再援用。至依公務人員考績法僅記大過之處分，並未改變公務員之身分關係，不直接影響人民服公職之權利，上開各判例不許其以訴訟請求救濟，與憲法尚無牴觸。

unless and until a plaintiff has filed an administrative appeal and, subsequently, an administrative re-appeal against such government agency as has made an illegal disposition which infringed upon the right of such plaintiff who is not satisfied with the decisions rendered therein. The Plaintiff, in his capacity as a public functionary, was subjected to an administrative act in respect of personnel administration, which is apparently different from the situation where a disposition made by a government agency infringes upon the right of anyone as a civilian. Other than filing with the relevant supervising authorities in charge of the matter at issue for a corrective decision in regard thereto, no administrative litigation procedure should be resorted to for relief. As an additional note, the notice given by the Secretariat of the Examination Yuan is not a decision made under the procedure applicable to an administrative appeal and, therefore, the Plaintiff has erred in bringing an unlawful administrative suit in this Yuan," so reasoned the court in Precedent T.T. No. 19 (Ad. Ct. 1965). And, finally, Precedent P.T. No. 414 (Ad. Ct. 1968)

restated, "An administrative act subjecting a public functionary to any disciplinary action in his capacity as a public functionary is purely a matter of administrative discretion, which should be distinguished from a disposition made by a government agency which infringes upon the rights of anyone as a civilian, and, as such, no administrative appeal may be instituted against such agency in respect thereof." None of the aforesaid Precedents has tried to distinguish between contents of the administrative acts but, instead, has restricted the right of a public functionary to file an administrative appeal legally and to bring an administrative litigation altogether. Those portions of the opinions as given in such Precedents, which are not in line with the intent described above, should no longer be cited and applied. In respect of the mere decision of a major demerit made under the Public Functionaries Merit Evaluation Act, since the capacity of a public functionary is not altered thereby and, thus, no right of a national to hold public office is directly affected, the aforesaid precedents, in denying the public functionary his right to seek

relief through litigation, are not in violation of the Constitution.

Precedent P.T. No. 19 (Ad. Ct. 1951) states, "The capacity of a public functionary is different from that of a civilian in that a public functionary at a lower level has a duty to obey any order given by his superior agency-in-charge within the scope of its power of supervision and no administrative appeal may be filed under the Administrative Appeal Act in respect of such order. A teacher or member of the staff of a high school or primary school who is appointed by law and/or order and rewarded with remuneration is a public functionary within the meaning of the Public Functionary Service Act, but such is not the case with a hired teacher or staff member." The foregoing Precedent is intended to interpret the application of Articles 2 and 24 of the Public Functionary Service Act. The internal order at issue was given by a superior agency within the parameters of its power of supervision, but was not an unfavorable disposition that would affect the capacity of the public functionary, who was not entitled

行政法院四十年判字第十九號判例：「公務員之身分與人民身分不同，下級公務員對於該管上級官署，就其監督範圍內所發布之命令，有服從之義務，不得援引訴願法提起訴願。依法令委任之中小學教職員，受有俸給者，為公務員服務法上之公務員，聘任之教職員則否。」係對公務員服務法第二條及第二十四條之適用，所為之詮釋，此項由上級機關就其監督範圍內所發布之職務命令，並非影響公務員身分關係之不利益處分，公務員自不得訴請救濟，此一判例並未牴觸憲法。

to sue for relief in connection therewith. The said Precedent is not unconstitutional.

Justice Chien-Tsai Cheng filed dissenting opinion in part.

Justice Chih-Peng Lee filed dissenting opinion, in which Justice Chung-Sheng Lee joined.

本號解釋鄭大法官健才提出一部不同意見書；李大法官志鵬、李大法官鐘聲共同提出不同意見書。