



Judicial oversight of the administration's decision to retire a public employee

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Abstract

The relationship arising between the public employee and the administration is a temporary legal relationship, ends by a decision of the administration to terminate the service of the public employee, whether it is at the request of the employee, or the initiative of the administration, or by virtue of the law, the administration usually takes a way to terminate the service of a public employee by retirement, in order to protect the rights of the employee and protect him, the relevant legislation stipulates that decisions related to retirement are subject to judicial oversight, the courts exercise their oversight and oversight over such decisions to protect the public employee from the oppression and arbitrariness of the administration. Our study is summarized in showing the clarity and adequacy of judicial oversight over retirement decisions, especially in light of the legislative and practical situation in Iraq through the formation of the Retirees Cases Council and appealing its decisions in the Court of Cassation in Iraq, and the original is the administrative judiciary, and the adequacy of the legislative guarantees surrounding the process of issuing retirement decisions. We will discuss the issue of judicial oversight over retirement decisions based on the following approaches: The descriptive, analytical and comparative approach, and by dividing this research into two sections, the first deals with the concept of retirement, the second deals with judicial oversight of the decision to refer to retirement, and we concluded the research with the most important conclusions and proposals as follows:

Introduction

The public employment is the basic pillar of the management in achieving its goals for the advancement of society in all its economic, social and political fields, since the public servant is the base and center of this job, this requires that the state should intervene in regulating all issues related to ensuring his good job performance, which is reflected in the regular and steady functioning of the public facility. This requires a good organization of the functional systems related to this basic and vital element, it highlights the role of the judiciary in extending its oversight over decisions to refer to retirement, by describing retirement as a final administrative decision that can be implemented, realizing its effects directly for those against whom it was issued. It is necessary to verify the legality of the decision to refer to retirement, in order to achieve a balance between the authority of the administration in exercising its authority to refer to retirement, and the interest and right of the public employee, the protection of the public facility, and ensuring its continuity in an orderly and steady manner.

First – Problem of the study

The problem of the study emerges in the statement of the adequacy of the functional legislation that regulates the retirement, the extent to which the balance is achieved between the discretionary authority of the administration in referring to retirement and the rights of the public employee referred to retirement, especially with regard to his financial rights, especially in light of the legislative and practical situation in Iraq through the formation of the Retirees Cases Council and appealing its decisions in the Court of Cassation in Iraq, and the origin is the administrative judiciary, and the adequacy of the legislative guarantees surrounding the process of issuing retirement decisions.

Second – Aims of the study

The study aims to clarify the nature of the decisions of retirement and to determine the nature of the discretionary authority of the administration in front of these decisions, with an investigation into the differentiation between retirement and similar job conditions and the reasons for the termination of the job relationship that the employee may be exposed to. The study also aims to demonstrate the importance of judicial oversight over employee retirement decisions within the comparative frameworks between the Jordanian legal system and the laws of Iraq and other legal systems.

Third – the importance of the study

The importance of the study appears in removing the ambiguity about the concept of retirement and indicating the discretionary authority of the administration in these decisions, the importance also emerges in explaining the

adequacy of judicial oversight over retirement decisions by standing on the authority of the judiciary specialized in looking into these appeals between the administrative judiciary or the civil judiciary, especially in light of the decisions of the Iraqi Retirement Cases Council and the statement of legislative guarantees surrounding the process of issuing retirement decisions.

Fourth – Hypothesis

- 1- What are retirement decisions and what distinguishes them from others.
- 2- What is the discretionary power of management in making retirement decisions.
- 3- The adequacy of the legislative guarantees accompanying the process of issuing retirement decisions.
- 4- The extent of the adequacy of judicial oversight related to employee retirement decisions and who is the competent judicial authority to consider appeals related to retirement decisions.
- 5- The extent to which the judicial oversight includes the legality and appropriateness of oversight, and the ability of the judiciary to compensate those against whom the retirement decision was issued.

Fifth – Methodology

In order to achieve the goal of the study, the researcher will adopt the following approaches:

Description approach: By explaining the various legal texts related to employee retirement decisions as a reason for the termination of the job relationship, as well as researching judicial rulings and jurisprudential opinions on the subject.

Analysis approach: Through extrapolation and deduction of judgments, ideas and recommendations that may be presented in this study from judicial rulings and jurisprudential opinions, analysis and comment on them.

Comparative approach: Through a comparative study of judicial oversight on these decisions in Iraq and Jordan and any other legislation whenever the study requires it.

Research form: We divided the study into two sections, in the first we dealt with the concept of retirement, and in the second we dealt with judicial oversight on the decision to retire, and we concluded the study with the most important conclusions and suggestions as follows.

Chapter One

The concept of retirement

Retirement is a kind of insurance and social protection for the employee and his family by guaranteeing a continuous financial resource after the end of his job service, to guarantee a dignified human life for the employee and his family after

retirement. It is one of the cases in which the working relationship between the state and the employee ends, and in light of which the latter is entitled to the end-of-service gratuity, and then the pension, when a set of legally stipulated conditions are met.

The determination of the legal age for retirement is affected by the previous circumstances and considerations, in particular the state's need for human resources in proportion to its financial capabilities, taking into account stability in determining the retirement age for employees, and must be determined by law, and that it may not be modified by a reduction or decrease - when circumstances call for it - with a retroactive effect in order to preserve the stability of legal positions.

In this chapter, we will study the concept of referring the public employee to retirement in the first requirement, and the provisions for determining the legal age for retirement in the second requirement, as follows:

Section one

The concept of the public employee retirement

The employee's relationship with the administration is not an eternal relationship that ends only by death of the public employee. On the contrary, the functional bond expires in many ways, including the employee's cessation of public office upon reaching a certain age, or when his services accepted for retirement reach a certain limit, at which point the employee stops occupying the public position, and this is what is called the legal retirement age, which is the age at which the legislator estimates that the employee becomes unable to perform the work entrusted to him efficiently and effectively due to his advanced age.

The reason for setting a legal retirement age is due to the fact that the employee must give way to the new young employees to take their role in the public service, where the latter need to sustain their activity on a continuous and renewed basis, which can only be achieved by young employees who have a good mental ability to maintain the regular and steady functioning of public facilities, referral to retirement is considered a natural means of termination of service when the employee reaching the legal age specified for termination of service occurs, or upon a request submitted by the employee by his own volition and without interference from the administrative authority to which he is affiliated¹. In this section, we will study the following:

Branch one

The identification of retirement

In this section, we will explain the linguistic and idiomatic meaning of retirement, as follows:

¹ Dr. Mustafa Ahmed Abu Amr: Principles of the Social Insurance Law, 1st Edition, Al-Halabi Human Rights Publications, Beirut, 2010, p. 76.

First - The meaning of retirement in the language

Retired, he is retired, and the object is retired, and (the person's retirement has been referred to the pension. He left his job, and the retirement pension is: money received by the one who was referred to retirement). The employee has reached a certain age at which he is presumed to be unable to work, and the minimum age for retirement is set between 60 and 65 years and is lower for women², and the meaning of sitting with folding and sitting with conquest: (sitting), as for its meaning in Lisan al-Arab, then sitting is the opposite of standing³.

While the meaning of sat in the seat⁴, he sat down from standing up, retired with so-and-so, and the employee from work:

Referred to the pension (retirement): a sickness that affects the one who suffers (the sitting), in the Holy Quran "Not equal are those believers remaining [at home] - other than the disabled - and the mujahideen, [who strive and fight] in the cause of Allah"⁵.

Second: The idiomatic meaning of retirement

Clarifying the terminological concept of retirement requires addressing the laws that have known it, then we clarify the jurisprudential definition of it, as follows:

Definition of Retirement in Iraqi Legislation: The Iraqi constitution in force for the year 2005 guarantees the employee's right to retire, through the text of Article (30/Second) thereof (Second: The state guarantees social and health security for Iraqis in the event of old age, illness, work disability, homelessness, orphanhood or unemployment), based on this constitutional text, the retirement laws guaranteed the retirement rights and social security for the above groups, and we will briefly address the most important retirement laws currently in force as follows:

Unified Retirement Law No. (9) of 2014: This law did not provide a specific definition of retirement, but we can deduce by merging Article (1 / IX) and Article (3) a definition of retirement under it to know that it is (The termination of the service of a person whose services are entitled to a pension or a pension award after referring him to retirement due to reaching the legal age for retirement or at his request or for his illness, disability, old age or death).

Law of Retirement and Social Security for Workers No. (39) for the year 1971: This law defines retirement as: (the termination of the service of the insured worker who is entitled to a pension for reaching the legal age with the condition of service for a certain period or insured service for a certain period, or

² Ibn Manzoor, Muhammad Ibn Makram: Lisan al-Arab, Dar Sader, Beirut, p. 230.

³ Ahmed Muhammad Ali al-Maqri al-Fayumi: The Lighting Lamp in Sharh al-Kabeer, Grand Amiri Press in Bulaq, Cairo, 1316 AH, p. 345.

⁴ Dr. Ahmed Mokhtar, d. Daoud Abda: The Basic Arabic Lexicon, without a place to be printed, 1989, p. 34.

⁵ Al-Fayrouz Abadi, Majd Al-Din Muhammad bin Yaqoub, Al-Mutih Dictionary, Dar Al-Fikr for Printing and Publishing, Lebanon, 1999, p. 34.

his death during the validity of his insured service period).

Military Service and Retirement Law No. (3) of 2010: This law refers to the definition of retirement in Article (45) of it, which stipulates that: (The military referral upon reaching the legal age, each according to his rank, or upon termination of his contract after completing the legally prescribed period for retirement, and the imam upon reaching the legal age of (60) sixty years)⁶.

The Internal Security Forces Service and Retirement Law No. (18) of 2011: This law defines retirement as (referring a policeman who is entitled to a pension or a pension award for his service to retirement due to reaching the legal age, or when one of the cases stipulated in Article 31 is achieved, his resignation or his death).

1- Legal definition of retirement

Some of the jurisprudence went to the effect that retirement is: (the mandatory termination of the work relationship of the insured when he reaches the age determined by his work system)⁷, Another aspect went in its definition as: (Anyone who left his job, whether compulsorily because of reaching the age of retirement or voluntarily because of his health conditions)⁸.

It was also defined as: (the employee has reached the legally prescribed retirement age for leaving the public service)⁹.

The researcher believes that the above definitions agree that there is a strong correlation between retirement and the retired, and perhaps the reason for this trend is the final goal of retirement, which is the dismantling of the functional link between the employee and the state.

Branch two

Distinguishing the retired person from other suspected legal situations

First: Distinguishing retirement from resignation

Resignation means the termination of the functional relationship that the employee was associated with the administration with a voluntary act on his part that was accepted by the administration¹⁰.

We also mean that it is the employee's expression of his express will (in

⁶ See the Iraqi Military Service and Retirement Law No. (3) of 2010, and for expansion see Dr. Muhammad Abdul Hamid Abu Zaid: The Reference in Administrative Law, Cairo, second edition, 2007, p. 23.

⁷ Dr. Muhammad Abd al-Hamid Abu Zaid: Permanence of the General Facility, Dar al-Nahda al-Arabiya, Cairo, first edition, 1995, p. 23.

⁸ Dr. Fawzat Farhat: General Administrative Law, Book One (Administrative Organization - Administrative Activity), first edition, University of Lebanon, 2004, p. 369.

⁹ Amer Ibrahim Ahmed Al-Shammari: Punishments for the Functional Association (a comparative study), Master's thesis, College of Law, Al-Nahrain University, 2007, p. 26.

¹⁰ Dr. Kamel Saeed: Explanation of General Provisions in the Jordanian Penal Code and Comparative Law, Part One, Dar Al-Fikr, Amman, second edition, 1983, p. 45.

writing) and his desire to leave work in the administration, and this expression does not produce its effect except with the approval of the administration and from the date of this approval and this is the explicit resignation¹¹.

Among the guarantees that the employee enjoys in the field of public office is that he is free to leave his work whenever he feels that for any reason he is unable to continue his giving and exert his effort in the service of the state. The procedures for explicit resignation are that the employee must submit a written request to his competent reference, and therefore the resignation does not produce its effect unless it is accepted explicitly or implicitly, as the Iraqi legislator is aware of this and promised the employee to resign by law in the event that a period of (30) days has expired from the date of Submit it without deciding whether it is positive or negative¹². While the law states that the terms of the resignation request must be specified, the request must be in writing, that the request must be issued by a valid will and be free of conditions, and there are cases mentioned by the legislator in which the employee's resignation is implicit, that the employee behaves in a certain way that the law makes it a presumption of his intention to leave the job. These cases came in Article (37) of the amended Iraqi Civil Service Law No. (24) of 1960¹³.

Thus, resignation is similar to voluntary retirement in that each of them is a written request directed by the employee and of his own free will to his superior, and both of them lead to the termination of the employee's relationship with the public job after the administration ascertains that the legal conditions are met, as well as taking the formal procedures to refer to retirement.

As for the difference between them, it is manifested in the fact that retirement requires that the retiree reach a specific legally defined year for referral to retirement, in addition to spending a specified period in the service with the intention of enabling him to fulfill his retirement rights, unlike the resignation that does not require the retiree to reach a certain age, but rather it is submitted at any moment during life functional¹⁴.

The employee appointed in the state departments and the public and mixed sectors is not entitled to retirement rights until ten years have passed since his actual service in those departments, unlike the resignation, which can provide whatever the employee's service is, and he deserves the alternative reward, the retirement salary, if his service is less than (15) years¹⁵.

Second - Distinguishing retirement from dismissal

Dismissal means the termination of the service of the public employee, and

¹¹ Dr. Ghazi Faisal Mahdi: Explanation of the Provisions of the Unified Retirement Law No. 9 of 2014, Law and Judicial Library, 2014, p. 99.

¹² Dr. Daman Hussein Al-Obaidi, Administrative Councils and Committees with Judicial Jurisdiction in Iraq, Master's Thesis submitted to the College of Law and Politics at the University of Baghdad, 1984, p. 87.

¹³ Dr. Ghazi Faisal Mahdi: previous reference, p. 92.

¹⁴ Dr. Ghazi Faisal Mahdi: previous reference, p. 96.

¹⁵ Dr. Daman Hussein Al-Obaidi, previous reference, p. 76.

this does not mean the end of the job link between him and the administrative body in which he was working, as this link remains in some forms. The survival of this association is supported by the continuation of the authority of the administration over the employee to track him after leaving the service and bringing him to trial¹⁶.

The State and Public Sector Employees Discipline Law No. (14) of 1991 of Iraq stipulated in Article (8) that (the penalties that may be imposed on the employee are: The penalty was imposed on him as follows:

- 6- For a period of no less than one year and not more than three years, if the employee is punished with two or one of the following penalties for two times, and the third time, within five years from the date of imposing the first penalty, commits an act that requires him to be punished by one of them: 1. Reprimand 2. Decreased salary 3. Demotion.
- 7- The period of his stay in prison if he is sentenced to imprisonment or imprisonment for a crime not prejudicial to honor, starting from the date of the ruling against him, and the period of his detention is considered part of the term of dismissal and the half of the salaries paid to him during the period of hand withdrawal shall not be refunded.

From the above text, it is clear that the dismissal is the temporary dismissal of the employee from the public position, the law requires it to be determined by the decision of the same dismissal with the necessity of being causal, in addition to that, the law has drawn the way for the administration to impose this penalty.

As for the penalty of dismissal of the public employee, according to the text of Article (8 / Eight) of the above law, as stated: (Eighth: It is the final removal of the employee from the job, and it is not permissible to re-employ him in the state departments, the public sector, by a reasoned decision of the Minister in one of the following cases:

- 8- If it is proven that he committed a dangerous act that would make his stay in the service of the state harmful to the public interest.
- 9- If he is convicted of a felony arising from his position or committed in his official capacity.
- 10- If he is punished with dismissal and then re-employed, he commits an act that requires dismissal again.

It is clear to us from the above text that the dismissal is by the final removal of the employee from the service, as a result of which it is not permissible to employ him again in the state departments in general. A reason mentioned by the legislator exclusively and in one of three cases.

In this way, retirement is similar to dismissal and dismissal in that each of them takes place by a decision by the administration and against the will of the employee, as in the case of the availability of one of the cases of dismissal or dismissal. The employee is referred to retirement upon reaching a certain age specified by law in compulsory retirement. And accepting a request for real

¹⁶ Dr. Ghazi Faisal Mahdi: previous reference, p. 91.

resignation or a judgment in voluntary retirement¹⁷.

Retirement differs from dismissal in that the former is a natural termination of the relationship between the state employee, while dismissal are disciplinary penalties that lead to the termination of the functional relationship as an exception when the employee commits a violation.

Retirement also differs from dismissal and dismissal in the matter of re-appointment, as the law permits the re-appointment of the retired in state departments and the public sector according to certain conditions, unlike the matter in the dismissal whose three-year period must elapse or the expiry of its cause such as imprisonment, but if the employee was punished with dismissal, then he cannot be re-appointed permanently in the state departments and the public sector.

Section two

Provisions for determining the legal age for retirement

First, it is necessary to determine the age at which the attainment led to the retirement of the public servant, and the Iraqi legislator specified the method by which the age of the retired person is verified, this is in Article (34-First) of the Unified Retirement Law No. 9 of 2014, where it stipulated that the document on which the appointment was made or the age was confirmed must be reliable for the purpose of verifying the real age of the employee or retiree, and no judicial or administrative correction issued after that is considered.

As for the extent of the permissibility of extending the service after reaching the age of retirement, the principle is that the Iraqi law prohibits extending the service of the employee after referring him to retirement without completing the legal age, but there are two exceptions to this¹⁸.

The first exception: It is specific to ambassadors outside Iraq, where the law permits the extension of their service after they reach the legal retirement age.

Where Article (10) stipulates paragraph (b) of the annex on the foreign service, which is an annex to the Civil Service Law No. (24) of 1960.

B - The Council of Ministers, based on a proposal by the Minister, may extend the use of the ambassador for a period not exceeding two years after completing sixty-three years of age.

The second exception: It is specific to university professors, where the law permits the extension of their service after completing the legal age for that (63 years). Where it came in Article (11) paragraph first of the Iraqi University Service Law No. (23) for the year 2008 stipulates: (The service of the professor and assistant professor may be extended based on his written approval, a recommendation from the College Council, and the approval of the University Council).

¹⁷ Dr. Muhammad Hassanein Abdel-Al, *Judicial Control over Administrative Control Decisions*, Dar Al-Nahda Al-Arabiya, second edition, Cairo, 1991, p. 122.

¹⁸ Dr. Suleiman Muhammad Al-Tamawi: *The General Theory of Administrative Decisions, Comparative Study*, 3rd Edition, Dar Al-Fiqh, Cairo, Egypt, 1996, p. 421.

Chapter Two

Judicial oversight of the decision to refer to retirement

Judicial oversight of the work of the administration in general means that the courts exercise in the work of the administration, and the judicial body that exercises oversight over administrative decisions varies according to the judicial system followed in the country, and it consider the most successful form of oversight to guarantee the rights and freedoms of individuals, given the independence, immunity, integrity and sufficient legal knowledge of the judiciary, which is not available to the same degree in parliamentary oversight and administrative oversight¹⁹.

Section one

Oversight by the administrative judiciary on the formal elements in the decision to refer to retirement

Judicial oversight over the actions of the administration is a guard of legality in standing firm to protect the individual against the influence and overpowering of the public authority, which is always feared over the rights and individual liberties. Justice requires that judicial oversight should be within reach of citizens, and all residents of the state, with the lowest financial cost and formal procedures, speedy settlement of judicial disputes, and the proximity of judicial facilities to litigants²⁰. We will divide this requirement as follows:

Branch one

Oversight of the specialty base in the decision to refer to retirement:

The Unified Retirement Law No. 9 of 2014 specifies the reasons for retirement, as it stipulated in Article 29 of the Unified Retirement Law No. 9 of 2014 that: (First – A council called (The Board of Audit of Retirees Issues) shall be formed to consider the objections submitted regarding the decisions issued by the Commission in retirement cases.

As for Article 30 of the above-mentioned law, it stipulates that: (First - for those concerned or their legal representatives, to object before the council within (90) ninety days from the date of notification of the commission's decision, fact or judgment.

Third – The objector and the defendant or their legal representatives may appeal the Council's decision to the Federal Court of Cassation within (60)

¹⁹ Dr. Rasha, Muhammad Al-Hashemi, *Judicial Oversight of the Administration's Authority to Impose Sanctions on its Contractor, Comparative Study*, 1st Edition, Al-Halabi Human Rights Publications, 2010, p. 124.

²⁰ Dr. Sami Gamal El-Din, *Oversight of Administration Activities, Administrative Judiciary*, p. 198. The principle of legality means complete submission to the law, whether on the part of individuals or on the part of the state.

sixty days from the date of being notified of it.

This indicates the Iraqi legislator's interest in providing legal protection for employees by granting the right to object to the aggrieved party from being referred to retirement in accordance with the methods specified under the above formality.

In its decision No. (5196/2019) on 15/12/2019, the Staff Judiciary Court stated that one of the conditions for considering special cases in the referral to retirement is to check the formal conditions for them, including checking the jurisdiction to consider the case and saying otherwise leads to the decision not being considered without affects the principle of truth²¹.

Branch Two

Oversight by the administrative judiciary over the form and procedures in the decision to refer to retirement:

The form of the administrative decision means the template in which the decision is placed, whether it is in a written form or an unwritten form, and if the form of the administrative decision is represented by its external appearance. The procedures are those steps that are followed before issuing the decision in its final form. It is not sufficient for the validity of the decision, whether it is issued by a competent administrative authority or a competent administrative member. Rather, the administration must follow, regarding its preparation and issuance, procedures and forms that differ according to different administrative decisions, compliance with these rules is a necessary condition for the correctness of the administrative decision, otherwise it is defective by defective form and procedure²².

As the competencies of the Board of Audit of Objectors Cases were contained in the current law, i.e. the Unified Retirement Law No. 9 of 2014 as amended, as Article (29/first) of the Unified Retirement Law No. 9 of 2014 as amended stipulates the formation of the Retirement Cases Audit Board to consider the objections submitted regarding the decisions that Issued by the Commission in the issues of the Commission in the cases of retirement, and consists of: A - A judge whose rank is not less than the second category, to be named by the head of the Supreme Judicial Council, b - A legal employee from each of the following bodies whose title is not less than a director of members: 1 Ministry of Defense, 2 Ministry of Interior, 3 Ministry of Finance.

Second - Council decisions are issued by a majority, and in the event of an equality of votes, the side with which the president voted shall prevail.

²¹ Dr. Said Moghaddam: The public function between development and transformation from the perspective of human resource management and professional ethics, second edition, Diwan of University Publications, Algeria, 2013, p. 43.

²² Amer Ibrahim Ahmed Al-Shammari: The penalties for ending the functional bond (a comparative study), previous reference, p. 23.

Section Two

Oversight by the administrative judiciary on the objective elements of the decision to refer to retirement:

It is the oversight that the courts exercise over the objective pillars of the decision to refer to retirement, and the judicial authority that conducts this oversight varies, according to the judicial system followed in the state, and it is the most successful form of oversight to ensure the retirement rights of employees, in view of the independence, immunity, integrity, and sufficient legal administration of the judiciary, which is not available to the same degree in parliamentary oversight and administrative oversight. We will divide this requirement as follows:

branch One

Oversightling the corner of the place in the administrative decision

Most of the Iraqi jurisprudence agree that the text of Article (7/Second/E) of the Second Amendment Law No. (106) of 1989, which provided for an explanation of the aspects of the appeal against the cancellation or its reasons, was ambiguous and confused²³.

As the aforementioned text included synonymous and similar terms for one meaning and one meaning, which lost the text of its clarity and coherence, including what the legislator used of expressions showing what the administration must abide by in the legal rules it issues in order for these actions to be free from challenge by canceling their illegality as he said If "the order or decision includes a breach or violation of the law, regulations or instructions"²⁴. Then he said: "If the order or decision includes a mistake in the application of the laws or instructions or in their interpretation," although (the breach), (the error in the application), and (the error in the interpretation) all fall under the defect of violating the law or the defect of the place as they branch off. Pictures of violation of the administrative decision of the law, it may be a direct violation of the legal rule, it may also be achieved when the administration makes a mistake in interpreting the legal rule, so the rule gives a meaning other than the meaning intended by the legislator, whether this error in the interpretation is intentional or unintentional²⁵.

²³ Article (7/Second/e) of the Second Amendment Law No. (106) of 1989 to the State Consultative Council Law states that: (In particular, the following are considered as grounds for appeal:

- 1- That the order or decision includes a breach, or a violation of the law, regulations, or instructions.
- 2- That the order or decision was issued in violation of the rules of jurisdiction or defective in its form.
- 3- That the order or decision includes a mistake in the use of authority, and it is considered in the judgment of decisions and orders that may be challenged, the refusal or abstention of the employee or bodies in the state departments and the socialist sector to take a decision or order that they should have taken legally).

²⁴ Dr. Ghazi Faisal Mahdi, Explanation of the Provisions of the Unified Retirement Law No. 27 of 2006 as amended, Edition 1, 2008, p. 34.

²⁵ Dr. Hussein Abdel-Al Muhammad, Administrative Control between Administration and Law, Dar Al-Fikr University, Alexandria, 2004, p. 87.

In its decision No. (5055/2019) on 15/12/2019, the Employees Judiciary Court directed that the plaintiff appeal against the defendant's department's refusal to promote the pension transaction, as it is the competent place in the consideration of the pension transaction, after examining the case and proceeding with its procedures, the court decided to oblige the defendant, in addition to his job, to promote the pension treatment²⁶.

branch Two

Administrative judiciary's oversight of the purpose element in the decision to refer to retirement

First - Oversight by the administrative judiciary on the purpose element in the decision to refer to retirement

The position of the Iraqi legislator from the pillar of purpose is that power is not an end in itself, but rather a means to achieve the public interest. The law did not give the authority to the administration except to help it achieve the public interest. The purpose of the administrative decision means the goal that the management man seeks to achieve, or in other words, it is the result that the decision source aims to achieve. The basic principle in administrative work is that the administration aims to achieve the public interest, unless the legislator specifies another goal, and the pillar of the goal has two forms²⁷.

First - the first image (achieving the public interest): as the administration differs from people in the private law that aims to achieve personal benefit, therefore, the privileges of public law were granted to be used to satisfy public needs, ensure the regular and steady functioning of public utilities, and maintain public order in society. Therefore, it is not possible for the administration to aim at issuing decisions to harm society²⁸.

Second: The second image (the rule for allocating goals): The legislator may find that some decisions are not sufficient for the public interest, in its broad sense, to be its goal. Rather, the administration is required to achieve, through some decisions, certain specific objectives. In this case, the source of the decision does not aim at the public interest alone, but must aim to achieve the private interest set by the legislator. Examples include disciplinary penalties and expropriation decisions for public benefit purposes²⁹. Among the defects in the cornerstone of the goal³⁰:

²⁶ See the decision of the Employees Judiciary Court No. (5055/2019) on 15/12/2019.

²⁷ Dr. Hamdi Suleiman Al-Qubeilat: *The Expiry of the Functional Bond in a Non-Discipline (A Comparative Study)*, First Edition, Dar Wael for Publishing and Distribution, Amman, 2003, p. 33.

²⁸ Dr. Qadir Ahmed Al-Husseini, *Deviation of the Administrative Decision from the Rule of Allocating Goals in Iraqi Legislation (Comparative Study)*, *Al-Taqni Journal*, Volume 23, No. 6, Iraq - Baghdad, 2010, p. 118.

²⁹ Dr. Sarah Khalaf Jassem and Saja Muhammad Abbas, *Ideas similar to the defect of deviation in power*, *Tikrit University Journal of Law*, second year, Volume 2, Number 1, Part 2, Iraq - Salah al-Din, 2018, p. 389.

³⁰ Dr. Ghazi Faisal Mahdi: previous reference, p. 98.

- 11- Abuse of power Before talking about the defect of abuse, we must distinguish between the abuse of power and the abuse of right. The former falls within the scope of common law, as for the second, it is studied within private law and defines abuse as the use of a management man's discretionary power to achieve an unrecognized purpose.
- 12- Deviation in the use of power, which is when the management man uses his discretionary powers with the intention of achieving a goal that avoids the public interest or achieves a goal other than the one specified in the law, an example of this is the transfer of an employee from his workplace to replace him for personal reasons not related to the public interest. And the abuse of power is not the direct result of issuing the administrative decision, but rather the purpose or goal that the source of the decision wanted to achieve.
- 13- Abuse of authority: This defect occurs when management replaces the procedures necessary to issue a certain decision with other procedures to achieve the goal it seeks. This method is used in order to evade formal procedures or to circumvent the implementation of certain decisions that were (judicial decisions)³¹.

Although some legislations have taken one type of defects that taint the cornerstone of the purpose, the Iraqi legislator has taken all its types, amended, where the text is stated as follows: "If the order or decision contains an error in the application of laws, regulations, instructions, or internal regulations, or in their interpretation, or contains abuse or abuse in the use of authority or deviation from it."

Images of deviation, abuse or abuse of the right are the following³²:

- 14- To make the decision with the aim of retaliation.
- 15- The decision is made to achieve a private interest.
- 16- Use of power for a political purpose.
- 17- Using power to circumvent the implementation of judicial decisions.

Second- Administrative Judiciary's Oversight of the Reason in the Retirement Decision:

The administrative judiciary's oversight over the reason is represented by the physical presence of the facts on which the administration relied in issuing its decision, considering those facts as the basis on which the decision is based, rather it is the motive for its issuance, hence, it becomes void if it is proven that the facts presented to it are incorrect, it is possible to refer to the opinion of the Iraqi judiciary, where the Administrative Judiciary Court ruled to cancel the administrative decision that the administration signed as a penalty against one of the employees, for what was attributed to him for the loss of a quantity of timber that had perished as a result of the roof falling on it. Therefore, what was attributed

³¹ Dr. Ghazi Faisal Mahdi: previous reference, p. 92.

³² Dr. Badr Muhammad Adel Muhammad, Judicial Control of Decisions in the Kingdom of Bahrain, a comparative study, Dar Al-Nahda Al-Arabiya, Cairo, 1, 2010, p. 87.

to him was incorrect³³.

In this regard, the Iraqi Employees Judiciary Court went in its decision No. (24/4/2016/501/2016) in 2016 that the decision to refer to retirement must be based on legal reasons bearing a legal basis in accordance with the provisions of the law, and otherwise it is subject to cancellation³⁴, this oversight of the physical presence constitutes the first stage of judicial oversight on the reason for the administrative decision. Therefore, it includes absolutely all administrative decisions, and the administrative body must disclose the real reasons that prompted it to issue this decision. Therefore, those facts must be actual, real and specific, and those facts must be legitimate. The correct reasons can be considered if they are sufficient to issue its administrative decision³⁵.

Conclusion

Through the foregoing, the researcher reached a set of conclusions and suggestions, as follows:

First – Results

- 18- Judicial oversight on the defect of abuse of power in retirement decisions consists in monitoring the deviation of the management body with the authority entrusted to it from its intended goal to pursue another illegal or legally required goal.
- 19- Judicial oversight on the defect of violating the law in retirement decisions involves all aspects of cancellation or defects in administrative decisions and rendering them invalid for violating the jurisdiction specified by law.
- 20- Judicial oversight on the defect of purpose in retirement decisions is to monitor the defect that affects the purpose targeted by the administrative decision, and the purpose of the administrative decision is the public interest, or the specific goal.
- 21- Judicial oversight on the defect of lack of jurisdiction in retirement decisions is represented in the oversight of the legally competent authority to issue the decision related to retirement.
- 22- Judicial oversight on the defect of violating the form and procedures in retirement decisions is to monitor the lack of respect for the procedural and formal rules specified for the issuance of administrative decisions in laws and regulations, whether by neglecting those rules in whole or in part.

Second – suggestions

- 23- We suggest to our Iraqi legislator to entrust the jurisdiction to consider

³³ Dr. Mr. Muhammad Ibrahim, Administrative Judiciary's Oversight of the Facts in the Annulment Case, Research published in the Journal of Administrative Sciences, No. 2, S. 1970, pp. 64-65.

³⁴ The decision of the Iraqi Staff Judiciary Court in its decision No. (24/4/2016/501/2016) in 2016.

³⁵ Dr. Suleiman Al-Tamawi, Theory of Abuse of Power, Comparative Study, 3rd Edition, Ain Shams University Press, 1978, p. 316.

objections to the decisions of the National Retirement Commission in the Employees Judiciary Court in the beginning, because the right to retire is one of the rights of service established for the employee, but it may be argued against us that the aforementioned disputes need a specialized body with experience and know-how in resolving them, and that the matter did not include the final deprivation of the right to litigation because the decisions issued by the Council are subject to appeal before the Federal Court of Cassation. Therefore, there is no fear for the rights of retirees as long as the judiciary simplifies its oversight to protect them, because the aforementioned point of view may seem logical and it is possible to transfer the aforementioned council to an administrative court specialized in retirement affairs in the face of days, and this is not dear.

- 24- The researcher suggests to the legislator to intervene and impose a set of procedures and formalities that the administration must follow when issuing its decisions to refer the public employee to retirement in order to provide a degree of protection for the public employee in the face of the discretionary authority granted to the administration.
- 25- We suggest that judicial oversight focuses on searching for the extent to which the decision to refer to retirement violates the main objective in referring to retirement, which is achieving the public interest and violating the rule of allocating goals, and that the administration's failure to observe this makes its decision defective that requires cancellation.

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