1964
Sept. 3,
Oct. 22, 29,
Nov. 12

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COSTAS NEOPHYTOU
and
THE REPUBLIC OF CYPRUS THROURH THE PUBLIC SERVICE COMMISSION (AN INDEPENDENT BODY)

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COSTAS NEOPHYTOU,

Applicant,

and

THE REPUBLIC OF CYPRUS THROUGH THE PUBLIC SERVICE COMMISSION (AN INDEPENDENT BODY),

Respondent.

(*Case No.* 305/62)

Administrative and Constitutional Law—Recourse under Article 146 *of the Constitution—Time for filing the recourse—Article* 146.3 *of the Constitution—A doubt or uncertainty as to the commencement of the period of* 75 *days prescribed by Article* 146.3 *and resolved in favour of the applicant—Legitimate interest—Article* 146.2 *of the Constitution—Public Officers—Promotion (or appointment)—Lack of necessary qualifications—A person who does not possess the necessary qualifications for promotion (or appointment) has no legitimate interest in the outcome of the administrative action concerning such promotion (or appointment) and, therefore, has no legitimate interest in the sense of paragraph* 2 *of Article* 146 (supra) *entitling him to file the recourse under that Article against the aforesaid promotion (or appointment).*

Administrative and Constitutional Law—Public Officers—Promotions to fill vacancies in CYTA. (The Cyprus Telecommunication Authority) decided by the Public Service Commission under Article 125 *of the Constitution—Duties and powers of the Commission in relation thereto—Proper inquiry—Interview of candidates not always necessary—In the instant case such interview was not necessary—Presence of the representative of the Authority (CYTA) is required and proper at the meetings of the Commission when evaluation of candidates takes place—Not when the decisions are taken—Though in the instant case the Commission acted in a relatively* en masse *manner, still it has duly discharged its duties and arrived at decisions of its own—The Selection and Promotion Board of CYTA* (supra)*—Its functioning is not inconsistent with the duties of the aforesaid Commission under Article* 125 *of the Constitution—It is a method of ensuring that the recommendations of the Management, to which in cases*

of technical staff of commercial undertakings such as CYTA due weight must be given—Are decided upon or at least considered and discussed, with the possibility of an opposing view being recorded, by the aforesaid Board—Substantive qualifications of the Interested Party viz. *the person promoted and whose promotion is the subject matter of the recourse—The Court will not have to decide whether a person promoted (or appointed) was so qualified in a case such as the present one where it was reasonably open to the Public Service Commission to find that he was indeed so qualified—Onus—The onus of proving that the promotion (or appointment) of the Interested Party should be annulled is on the applicant—And in this case he failed to discharge such onus.*

Administrative Law—Public Authorities are expected to take maximum care of all records connected with their actions, so that their actions may be subject to proper control in the public interest.

This is a recourse under Article 146 of the Constitution filed on the 7th December, 1962, against the decision of the Public Service Commission, dated the 30th March, 1962, to promote a certain M. T. in preference and instead of the applicant to the post of Inspector (Underground) in the Cyprus Telecommunications Authority, hereinafter referred to as the CYTA. It is common ground that the said decision was never published, the applicant alleging that it first came to his knowledge as late as the 28th September, 1962, whereas the respondent alleged that it had come to the former's knowledge much earlier. As stated above the recourse was filed on the 7th December, 1962. Paragraph 3 of Article 146 of the Constitution provides that a recourse under that Article shall be made against an act or decision within 75 days of the date when such act or decision was published within 75 days after it came to the knowledge of the person making the recourse.

On the other hand, it has been established that the applicant did not possess the necessary formal qualifications for promotion, neither at the time the decision complained of was taken (30th March 1962) nor indeed at the time of the filing of the recourse (7th December 1962) *viz.* he had not completed by that time the ten years' period of service with CYTA required by the relevant scheme of service. In fact this period would be completed much later, some time in November, 1963. Paragraph 2 of Article 146 of the Constitution provides that the recourse under that Article can

be made by any person whose actual legitimate interest has been directly affected by the act or decision (or omission) complained of.

In the circumstances, the respondent raised two preliminary objections :

(1) That this recourse is out of time, *i.e.* it has not been made within the seventy-five days' period prescribed under Article 146.3 (*supra*).

(2) That no legitimate interest of the applicant has been affected in the sense of Article 146.2, (*supra*), so as to entitle him to file this recourse, in that he did not possess the necessary qualifications for promotion.

Held, on the above preliminary objections :

(1) (*a*) The recourse is within time, in view of the fact that the period between the 28th September, 1962, and the 7th December, 1962, is less than 75 days and in view of the fact that there exist doubt and uncertainty about knowledge by the applicant before such date of the decision subject-matter of this case.

(*b*) This view is supported by the principles adopted in Greece by a long Jurisprudence of the Greek Council of State and, also, by the principle that provisions as such contained in paragraph 3 of Article 146 of the Constitution, which limit the right of access to court, should be restrictively interpreted and applied and, in case of doubt, should be applied in favour of, and not against, the citizen.

(2) Applicant was not entitled to file this recourse, under Article 146.2, because neither when the Interested Party was promoted nor when he filed his recourse did he possess the necessary qualifications entitling him to be promoted to the post of Inspector (Underground). His recourse, therefore, has to be dismissed on this ground.

Having held that the recourse was not maintainable on the ground of lack of legitimate interest in the sense of paragraph 2 of Article 146 of the constitution, the learned Justice proceeded, however, to decide the case on the merits also, with a view to saving time and expense in case it would be held at later possible proceedings on appeal that the applicant was entitled under Article 146.2 to make the recourse. With regard to this part of the case, the substantive one,

the learned Justice dealt with various submissions of counsel on behalf of the applicant and :

Held, on the merits :

(1) In *Petsas and the Republic* (3 R.S.C.C. 60 at p. 63) it was held that " the mere fact that the Commission (editor's Note : The Public Service Commission under Article 125 of the constitution) did not call the candidates for an interview does not involve a wrong exercise of discretion. In a matter like this it is not improper for the Commission to base its decision on the application form and other relevant documents ". In the present case, too, the applications of candidates were before the Commission as well as other relevant information.

(2) It is correct that Mr. K., the representative of CYTA was not present at the meeting of the Public Service Commission of the 30th March 1962 when the decisions for promotion were taken. But in my opinion, it might not have been very correct for him to be present at such meeting as he could not take part in the actual taking of decisions. His presence was only required and proper when the evaluation of candidates took place ; he could then assist, as he did in fact, by giving necessary information.

(3) It has been submitted that the decision to promote the Interested Party, together with a great number of other decisions concerning promotions, were taken *en masse* and, therefore, it was not a proper discharge of the duty of the Public Service Commission under Article 125 of the constitution. There is no doubt that a considerable number of proposals for filling of vacancies were put together to the Public Service Commission and it is correct that in *exhibit* 5 what is sought from the Commission is " covering approval ". This is not, however, the decisive factor ; I have to find out not what was asked of the Commission but what in fact the Commission did. The Commission cannot be presumed to have acted wrongly merely because it has dealt with a great number of matters concerning CYTA simultaneously. I am satisfied that, though there is no doubt that the Public Service Commission has dealt with the promotions then required to fill vacancies in CYTA in a relatively *en masse* manner, it has had the opportunity to reach a decision of its own in relation thereto and it actually did so. Thus the duty cast upon it under Article 125 of the constitution was sufficiently discharged.

(4) Counsel for applicant has complained that the interposing of a Selection and Promotion Board of CYTA between the applications for promotions of applicant and the Interested Party and the examination thereof by the Public Service Commission was an unlawful interference with the duties of the Commission. In my opinion the functioning of the said Board is not inconsistent with the duties of the Commission under Article 125 of the Constitution. It is a method of ensuring that the recommendations of the Management, to which, especially in cases of technical staff of commercial undertakings such as CYTA, due weight must indeed be given (*vide* in this respect *Marcoullides and the Republic*, 3 R.S.C.C. 30), are decided upon or at least considered and discussed, with the possibility of an opposing view being recorded, by the said Board. It offers a safeguard to applicants rather than a handicap. It is moreover a necessary element of the operation of the exception to the Scheme of Service for the benefit of the employees with long service.

(5) The substantive qualifications of the Interested Party were before the Commission and it is not for the court to decide whether a person appointed was qualified in a case such as the present one where it was reasonably open to the Public Service Commission to find that he was so qualified (see in this respect *Josephides and the Republic*, 2 R.S.C.C. 72 and *Koukoullis and the Republic* 3 R.S.C.C. 134).

(6) (*a*) The applicant has failed to discharge the onus of proving that the appointment of the Interested Party should be annulled. Such onus was on him in accordance with decisions of the Supreme Constitutional Court in *Koukoullis* and *The Republic*, 3 R.S.C.C. 134 *Uludag* and *The Republic*, 3 R.S.C.C. 131, and *Saruhan* and *The Republic*, 2 R.S.C.C. 33.

(*b*) On the contrary had applicant, who was one grade below the Interested Party at the time, been promoted instead of the Interested Party, to a post to which the Interested Party was normally due to be promoted whereas the applicant had to pass through the post held by the Interested Party before he could be promoted further, a great burden would have been cast upon anybody seeking to justify such a course of action.

Per curiam : Public authorities are expected to take maximum care of all records connected with their actions, so that their actions may be subject to proper control in the public interest.

Recourse dismissed.

Cases referred to :

Chrysostomides and the Greek Communal Chamber, reported in this volume, p. 397 post ;

Decision 1338 *of* 1950 *of the Greek Council of State ;* (vol. 1950A, p. 1079).

Decision 1433 *of* 1956 *of the Greek Council of State ;* (vol. 1956, p. 35 at p. 36) ;

Decision 1823 *of* 1956 *of the Greek Council of State ;* (vol. 1956, p. 547 at p. 549) ;

Uludag and The Republic, 3 R.S.C.C. 131 at p. 133 ;

Philippou and The Republic, 4 R.S.C.C. 139 at p. 140-141 ;

Papapetrou and The Republic, 2 R.S.C.C. 61 ; 115

Petsas and The Republic, 3 R.S.C.C. 60 at p. 63 ;

Kalisperas and The Republic, 3 R.S.C.C. 146 ;

Marcoullides and The Republic, 3 R.S.C.C. 30 ;

Josephides and The Republic, 2 R.S.C.C. 72 :

Koukoullis and The Republic, 3 R.S.C.C. 134 ;

Saruhan and The Republic, 2 R.S.C.C. 33.

Recourse.

Recourse against the decision of the Public Service Commission dated 30.3.62, to promote a certain Michalakis Televantos, in preference and instead of the applicant to the post of Inspector (Underground) in the Cyprus Telecommunications Authority CYTA.

L. N. Clerides, for the applicant.

L. G. Loucaides, Counsel of the Republic, for the respondent.

C. Phanos, for the Interested Party.

Cur. adv. vult.

The following judgment was read by :

TRIANTAFYLLIDES, J.: In this case the Applicant complains, by recourse under Article 146 of the Constitution, against the promotion by the Public Service Commission of

a certain Mr. Michalakis Televantos, in preference and instead of the applicant to the post of Inspector (Underground) in the Cyprus Telecommunications Authority, CYTA. The said decision was taken on the 30th March, 1962, and communicated to CYTA by letter of the 9th April, 1962 (*exhibit* 16).

A Presentation has taken place before a Rapporteur. The said Mr. Televantos, being an Interested Party and having been duly notified, under existing practice, of this recourse and informed that he was entitled to intervene for the protection of his interests, filed an Opposition and appeared, through counsel, at the Presentation; he was allowed to take part as required for the protection of his interests and the same course was followed at the hearing before this Court.

It is not necessary to go at great length into the factual aspect of the matter. It may be summarized as follows :—

After the establishment of the Republic, existing vacancies in the establishment of CYTA were advertised among its staff by Staff Circular No. 46 (*exhibit* 13).

One of such vacancies existed in the post of Inspector (Underground), in the Engineering Department, and both the Interested Party and the Applicant applied for promotion to this post. At the time, the Interested Party was Technical Assistant, Grade I, and the applicant was Technical Assistant, Grade II.

It appears that soon after the coming into existence of the Republic the matter of filling vacancies in CYTA was taken up with the Public Service Commission. There was quite a protracted correspondence between CYTA and the Commission and eventually on the 23rd February, 1961, a letter was addressed to the Commission (*exhibit* 7 and *exhibit* 14—it has been put in evidence twice—) by which were forwarded, *inter alia*, to the Commission all applications for promotion received from the staff in answer to exhibit 13, above, a copy of the minutes of the Selection and Promotion Board of CYTA and a list of the candidates recommended by the Management of CYTA. On the 27th April, 1961, by letter (*exhibit* 15) a list of the candidates recommended by the Management was again forwarded to the Commission as Appendix B to the said letter. As far, at any rate, as the post in question is concerned, such list corresponded fully with the one forwarded on the 23rd February, 1961. The Interested Party was recommended for promotion to Inspector (Underground).

The matter of the making of the promotions concerned by the Public Service Commission was taking some time and it was thought in CYTA that such delay was detrimental to the interests of the Authority. So on the 25th May, 1961, the Chairman of CYTA addressed a letter (see bundle of correspondence *exhibit* 8) to the Chairman of the Commission, informing him that it had been decided by the Board of the Authority to go ahead and fill itself any existing vacancies in view of " the interest of the public and the pressing exigencies of the service ". On the 16th June, 1961, a further letter (see again *exhibit* 5) transmitted lists " of new appointments and promotions which have been done in order to ensure uninterrupted functioning of the various services of the Authority " and requesting " covering approval ".

One of the said promotions had been that of the Interested Party to the post in question, effected by means of a letter addressed to him on the 26th May, 1961 (*exhibit* 11).

The said appointment was made on probation and was confirmed by the Management by letter of the 29th December, 1961 (*exhibit* 12).

As a result of this the applicant on the 5th February, 1962, filed a recourse in the Supreme Constitutional Court No. 36/62 (*exhibit* 20) alleging that the Management had no competence to make such appointment and that it was a matter for the Public Service Commission.

That Case, having gone through various interlocutory stages, was withdrawn on the 2nd October, 1962, after counsel for CYTA had stated to Court that the Interested Party had been promoted to the post in question by the Public Service Commission. This course was taken by counsel for applicant without prejudice to the right to file a new recourse against the Public Service Commission in respect of such promotion, a thing which was done on the 7th December, 1962, when the present proceedings were instituted.

As a matter of fact on the 30th March, 1962, the Public Service Commission decided on the promotion of the Interested Party to the post of Inspector (Underground), as well as on the other promotions recommended as per the letter of the 27th April, 1961. The relevant minutes of the Commission are exhibit 6 in this Case. At two meetings in May, 1961, the Commission had examined the aforesaid promotions, including the filling of the vacancy in the post

of Inspector (Underground). Mr. Kokkinides who was not present at the meeting of the 30th March, 1962, attended the said two previous meetings and supplied any additional explanations that were required, as the Personnel Officer of CYTA.

In this case, there have been raised two preliminary objections :—

(*a*) That this recourse is out of time, *i.e.* it has not been made within the seventy-five days' period prescribed under Article 146.3

(*b*) That no legitimate interest of the applicant has been affected in the sense of Article 146.2, so as to entitle him to file this recourse.

Objection (*a*) is based on the fact that this recourse was filed on the 7th December, 1962, *i.e.* more than eight months after the relevant decision of the Public Service Commission. As such decision was first communicated to CYTA by letter of the 9th April, 1962, it could not have come to the knowledge of applicant earlier than that. The question is whether it came to the knowledge of applicant at any time after the 9th April, 1962, and earlier than seventy-five days before the 7th December, 1962. Under Article 146.3, it is provided that a recourse shall be made against an act or decision within 75 days of the date when such act or decision was published, or if not published, within 75 days after it came to the knowldge of the person making the recourse.

It is common ground that the promotion of the Interested Party was never published, after it was made by the Public Service Commission, and it is, therefore, necessary to decide when it came to the knowledge of applicant.

It has been argued that applicant must have had knowledge of the decision in question as far back as May or June, 1962.

As proof of such knowledge it is alleged that the applicant being a member of the secretariat of his trade union was, on the 17th May, 1962, present at a meeting thereof and the minutes (see bundle of minutes, *exhibit* 8) show that, at such meeting, discussion took place on the minutes of the meeting of the Joint Consultative Committee of CYTA of the 4th May, 1962, (*exhibit* 3) ; at this meeting of this Committee, which is a joint Management and staff committee, the question of the promotions in the establishment of the Authority

by the Public Service Commission was raised and the answer was given that the approval of the Commission for such promotions was given on the 9th April, 1962.

It further appears that on the 7th June, 1962, another meeting was held of the secretariat of his trade union, at which applicant was again present, (see bundle of minutes, *exhibit* 8) and there discussion took place on the minutes of the meeting of the Joint Consultative Committee of the 2nd June, 1962, (*exhibit* 4), at which it was confirmed that promotions which were communicated to the Public Service Commission on the 16th June, 1961, had been approved as previously stated.

Though applicant himself is not a member of the Joint Consultative Committee, it was submitted that the discussion of the relevant minutes of such Committee by the secretariat of his trade union on two occasions at which he was present ought to have furnished him with knowledge that the promotion of the Interested Party to the post for which he was interested had been also decided upon by the Public Service Commission.

The applicant has given evidence on oath at the Presentation and he has also been recalled at the hearing by the Court, for the purpose, and he insists that he came to know of the promotion of the Interested Party by the Public Service Commission when this was disclosed by counsel for CYTA in proceedings in Case 36/62. This was on the 28th September, 1962, as it appears from the record of that case and it also appears that on the 2nd October, 1962, the recourse was withdrawn for that reason.

A provision such as Article 146.3 exists in relation to the similar competence of the Council of State in Greece ; this is section 49 (1) of Law 3713/1928. The principle in force there is that if it is not possible to prove publication, communication or knowledge of the act being challenged or if there is any doubt as to the point of time when the relevant period began to run, then the recourse is deemed to be in time, because it is the administration which has the onus to establish knowledge. (See Kyriakopoulos on Greek Administrative Law, 4th edition, volume 3, p. 132).

I consider that the principle adopted in Greece, and which is the result of a long jurisprudence of the Council of State, in which I need not go in detail in this case, is a principle correctly applicable to the interpretation of our own Article 146.3 not only because of the close similarity between

the provisions under Article 146 and the analogous provisions under Law 3713/1928 in Greece, but also because provisions such as paragraph (3) of Article 146, which limit the right of access to court, should be restrictively interpreted and applied and, in case of doubt, should be applied in favour of, and not against, a citizen.

Though, in this case, the evidence available points most strongly to knowledge by applicant of the decision in question as early as May or June 1962, or at least to knowledge of circumstances which ought to have led him to acquire knowledge of such decision—(and on this point see Tsatsos on " The Recourse for Annulment before the Council of State ", 2nd edition, p. 58)—nevertheless, a doubt has arisen in my mind as to whether applicant had the requisite knowledge before he was formally informed of the decision in question on the 28th September, 1962, in the proceedings in recourse 36/62. It must be borne in mind that he had a recourse already pending in the matter and there were at least two occasions when interlocutory proceedings took place in such recourse, after the 9th April, 1962, *viz.* on the 5th May and 5th June, 1962, and yet counsel for CYTA did not disclose that the promotion in question had already been made by the Public Service Commission ; and the matter was communicated to CYTA in April, 1962. So the applicant may have been led to believe that, for some reason or other, the question of this particular promotion, which was the subject-matter of a recourse, was still open, even if all other promotions had been made as disclosed in the aforementioned minute of the Joint Consultative Committee which had come to his knowledge not later than June, 1962. In giving evidence before me applicant appeared to be himself in difficulty to recollect exactly the reasons for his course of action, at the time, and I believe that his difficulty was genuine, as quite some time had passed since then.

For this reason I find that the recourse is within time, in view of the fact that the period between the 28th September, 1962, and the 7th December, 1962, is less than 75 days and in view of the fact that there exists doubt and uncertainty about knowledge by applicant before such date of the subject-matter of this case.

I have reached this decision with difficulty, but, as already stated, any doubt ought to be resolved in favour, rather than against, a citizen who comes to this Court seeking redress, especially in the case of a citizen such as the applicant who complains against a decision which nobody took the trouble

of bringing it formally to his notice, though he had applied himself in writing for promotion to the post in question and had filed, as well, a recourse in relation to such matter. I think applicant was entitled to expect, in the course of proper administration, some communication about the fate of his claim for promotion before he heard of it in proceedings in recourse 36/62.

The next matter for consideration is the objection that the recourse is not maintainable in view of the absence of the requisite legitimate interest, under Article 146.2.

The qualifications for appointment to the post of Inspector (Underground) are to be found in the scheme of service which has been filed with the Opposition of the Interested Party and also in *exhibit* 25 : They are the Intermediate Certificate for " C " and " G " or equivalent qualifications, plus five years wide experience in telecommunications and ability to run one or more of the following, or ten years of actual and applied experience and practice in the following, *viz.* External Plant General Construction, External Plant General Maintenance, Development and Planning General.

It is common ground that neither the Interested Party nor applicant possess the academic qualifications required as above.

It has been submitted by counsel for the Interested Party and for the respondent that applicant had no right under Article 146.2 to file this recourse, because he did not have any of the qualifications, academic or practical, necessary for promotion to the post of Inspector (Underground). It is not disputed that applicant joined CYTA in 1953 and that his experience dates since then only; *i.e.* when he applied for promotion, when the relevant decision was taken and even when the recourse was filed it was less than ten years.

Counsel for applicant has submitted that the Schemes of service of CYTA had not been strictly adhered to in the past and that, in any case, provision exists for deviation therefrom, as is contained in *exhibit* 2, for the benefit of employees with continuous service prior to the 1st January, 1955, one of whom is applicant. He submitted further that the requisite legitimate interest existed at the time of the hearing of the administrative recourse.

The relevant paragraph (2) of Article 146 requires that the person making a recourse shall be a person whose any existing legitimate interest is adversely and directly affected by the decision or act in question.

As explained in the Ruling given on the 10th October, 1964, in case 8/63 (*Chrysostomides and The Greek Communal Chamber*), * this is an inevitable consequence of the nature of an administrative recourse. It was, moreover, stated in that Ruling that the position in Cyprus under Article 146.2 is analogous to that in Greece under section 48 of Law 3713/1928 and much guidance can be derived from the relevant jurisprudence and textbooks there.

In the "Conclusions from the Jurisprudence of the Council of State" in Greece (1929–1959) it is stated at p. 260 «Ἡ πρὸς τὴν πρᾶξιν σχέσις τοῦ αἰτοῦντος, ἐξ' ἧς πηγάζει τὸ συμφέρον του, δέον νὰ ὑφίσταται ἤδη κατὰ τὸν χρόνον τῆς προσβολῆς αὐτῆς, ἡ δὲ βλάβη αὐτοῦ δέον νὰ ἔχῃ ἤδη ἐπέλθει ἢ νὰ ἐμφανίζηται ὡς λογικῶς ἀναπόφευκτος. Οὕτω τὸ ἔννομον συμφέρον δέον νὰ εἶναι ἐνεστὼς» ("The applicant's relationship to the act, from which relationship his interest flows, has to exist already when the act has been challenged, and his injury must have already taken place or appear reasonably unavoidable. Thus, the legitimate interest must be existing"). In support of this statement are cited certain decisions of the Greek Council of State some of which are referred to hereinbelow :—

In Decision 1338/1950 (vol. 1950 A p. 1079) it is stated «... τὴν ἀκύρωσιν διοικητικῆς τινος πράξεως δικαιοῦται νὰ ζητήσῃ ἐκεῖνος, ὅστις βλάπτεται ἐκ τῆς πράξεως καθ' ἣν στιγμὴν αὕτη ἄρχεται ἰσχύουσα ...» ("...the annulment of an administrative act is entitled to seek he who is injured by such act when it comes into operation ...").

In Decision 1433/1956 (vol. 1956Γ p. 35 at p. 36) it was held that the legitimate interest required must exist at both the time of the making of an act and at the time when its validity is challenged and in Decision 1823/1956 (vol. 1956Γ p. 547 at p. 549) it was held that the legitimate interest must arise out of a legal relationship of an applicant which is already in existence when the act concerned is challenged.

Both when the promotion of the Interested Party took place on the 30th March, 1962, and when this recourse was filed on the 7th December, 1962, the applicant had not yet completed ten years' service with CYTA—and consequently, having not been similarly employed elsewhere before, had not acquired ten years' experience—as required

* Reported in this vol. at p. 397 post.

by the relevant Scheme of service. So not being entitled to promotion no legitimate interest of his existed at all.

The view most favourable to the case of applicant, concerning the time of the existence of the legitimate interest, is to be found in Tsatsos " On the recourse for Annulment before the Council of State " 2nd ed. p. 42 where it is stated. «Ἀλλὰ καὶ ἂν τὸ ἔννομον συμφέρον προκύψῃ μεταγενεστέρως, ἤτοι μετὰ τὴν ὑποβολὴν τῆς αἰτήσεως, δὲν εἶναι, κατ' ἐπιεικῆ κρίσιν, ἀπορριπτέα ἡ αἴτησις ἀκυρώσεως, ἐφ' ὅσον ἔχει προκύψει πρὸ τῆς συζητήσεως, ἐκτὸς ἐὰν προέκυψε μετὰ τὴν ἐκπνοὴν τῆς ἐξηκονθημέρου προθεσμίας τοῦ ἄρθρου 49 τοῦ N. 3713 . . . » (" But even if the legitimate interest arises subsequently, that is after the filing of the application, on equitable view, the recourse is not to be dismissed, so long as it has arisen before the hearing, unless it has arisen after the expiry of the sixty-days' limit under section 49 of Law 3713 . . . "). The time limit corresponding to the sixty days of section 49 of Law 3713, is the one of seventy-five days provided by article 146.3. As the applicant did not complete 10 years' service until November, 1963, long after the expiry of the time limit of seventy-five days after he came to know of the act in question, on the 28th September, 1962, the above view of Tsatsos, even if it were to be adopted as validly applicable to this case, would not help him in any way.

That a person is entitled to challenge the promotion of another, if he himself was entitled to be considered for promotion, is well settled in Cyprus (vide *Uludag and The Republic*, 3 R.S.C.C. p. 131 at p. 133 and *Philippou and The Republic*, 4 R.S.C.C. p. 139 at p. 140–141). In my opinion the converse is also true *viz.* that if he is not entitled to be considered for promotion then he would not be entitled to challenge the promotion to the post in question of another. It cannot be held that a person, who is not entitled to be promoted, not being qualified under the Scheme of service, has a legitimate interest himself in the outcome of the administrative action concerning the promotion in question. Had his promotion been made without his being qualified, such promotion would have been illegal, (vide *Papapetrou and The Republic*, 2 R.S.C.C. p. 61). Therefore, he could not have a legitimate interest to be promoted through a contravention of the law applicable to the matter. His said interest would not be legitimate.

As a matter of fact it has been held by the Supreme Constitutional Court, in deciding the said case of *Papapetrou and The Republic*, that " once it is a fact that the Applicant

had applied to the Public Service Commission for the appointment to the post in question and that somebody else has been appointed instead to such post, it follows from this fact alone that an existing legitimate interest of his was adversely and directly affected by his not being appointed ".

That was a case, however, in which the Court did not have to decide whether applicant was entitled to be appointed as possessing the necessary qualifications under the Scheme of service. This became only an issue in a later recourse by the same applicant in respect of his non-appointment to the post in question (*vide Papapetrou and The Republic* (2) 2 R.S.C.C. p. 115).

Moreover, the post in issue in the Papapetrou cases, above, was also a first entry post, in respect of which outsiders could have applied for appointment, whereas, it is clear that the post of Inspector (Underground) in CYTA is and has been treated as a promotion post in the service (see *exhibits* 16, 6, 24, 23, 14, 15, 13, 21 and the evidence of Mr. S. Kokkinides). It was advertized only within the Authority in accordance with existing arrangements (see *exhibit* 23).

In any case my view expressed above, concerning the need for entitlement to promotion (on the basis of qualifications) as a necessary ingredient of legitimate interest in the matter, would hold good also in cases of first entry posts or first entry and promotion posts and *Papapetrou and The Republic* (2 R.S.C.C. p. 61) would have to be read and applied in this light ; in the same way as no promotion may be made of a person who does not have the necessary qualifications, similarly no person can be legitimately appointed who does not possess the necessary qualifications under the Scheme of service.

The argument of counsel for applicant that the schemes of service had been deviated from in the past by the Authority is not a valid ground for treating the applicant as possessing a legitimate interest in the matter at the material time. Such deviations occurred before the establishment of the Republic (see evidence of S. Kokkinides at p. 23 of the Statement of the case). After the assumption of authority by the Public Service Commission appointments made in contravention of the Scheme of service concerned would be considered to be illegal, as held in the aforesaid case of *Papapetrou and The Republic* no question of a legitimate interest of applicant could arise in expectation of such illegal deviation.

The only possible lawful departure from the Schemes of service is the one contained in *exhibit* 2 (and reproduced in *exhibit* 7)—amounting to an amendment of such Schemes—but applicant did not satisfy the requirements of such amendment, in that he had not been unanimously recommended by the Selection and Promotion Board for appointment, as it appears from the relevant minutes of the Selection and Promotion Board (*exhibit* 24).

For all the above reasons I have come to the conclusion that applicant was not entitled to file this recourse, under Article 146.2, because neither when the Interested Party was promoted nor when he filed his recourse did he possess the qualifications entitling him to be promoted to the post of Inspector (Underground) and he did not come under the beneficial exception of the amendment to the relevant scheme of service contained in *exhibit* 2. His recourse, therefore, has to be dismissed on this ground.

As the recourse has been heard on the substance also, I thought fit to proceed and decide the other issues as well, so as to save costs in case, for any reason, were it be found at later proceedings before the Supreme Court that applicant was, contrary to my opinion, entitled under article 146.2 to make this recourse.

It has been submitted that no list of candidates for promotion was available before the Public Service Commission and, therefore, it could not have selected the most suitable candidate. This submission is not borne out by the correct facts, because it is in evidence by Mr. Kokkinides and by Mr. Protestos, a member of the Commission, that all applications for promotion were forwarded to the Public Service Commission and were before it at the time. Also it is clear from the minutes of the Selection and Promotion Board (*exhibit* 24), which were forwarded to the Public Service Commission with *exhibit* 7, that applicant's name was specifically brought to its attention, as a candidate, in addition to his application being before the Commission also.

I have, however, to pause here and observe that it is most unfortunate that the relevant applications could not be produced to this Court, having not been traced. Public authorities are expected to take maximum care of all records connected with their actions, so that their actions may be subject to proper control in the public interest.

The second submission of counsel for applicant has been that the relevant scheme of service was not before the Public

Service Commission. This is also not borne out by the evidence adduced. It is clear that the contrary is correct—see the evidence of Mr. Protestos. Some confusion does exist in this evidence as to whether the amendment contained in *exhibit* 2 was before the Public Service Commission ; even if it was not before the Commission, this could have not affected the outcome of the matter, because applicant could not have benefited under such amendment as not meeting its conditions. In any case, such amendment was quoted in full in the letter addressed to the Commission on the 23rd February, 1961 (*exhibit* 7) and, therefore, it must be taken that it has in fact been before the Commission and that any evidence to the contrary by Mr. Protestos is mistaken.

The third submission of counsel for applicant has been that the appointment of the Interested Party was not made properly as no interviews of persons eligible for promotion were made and that the qualifications of applicant were not before the Public Service Commission.

In *Petsas and the Republic* (3 R.S.C.C. p. 60 at p. 63) it was held that " the mere fact that the Commission did not call the candidates for an interview does not involve a wrong exercise of discretion. In a matter like this it is not improper for the Commission to base its decision on the application form and other relevant documents ". In the present case, too, the applications of candidates were before the Commission, as it has been found earlier in this judgment, as well as relevant information.

Regarding the question of applicant's qualifications being before the Commission the matter is not so clear-cut. The relevant evidence does not appear to be sufficiently satisfactory. On the other hand, though it has not been possible to trace applicant's application for promotion, which was before the Commission, it may be reasonably assumed that he has stated therein his qualifications. In any case his candidature was before the Commission both through his application and the minutes of the Selection and Promotion Board. Mr. Kokkinides, the Personnel and Welfare Officer of CYTA, was there to give any additional information, if required. And, in any case, even if his qualifications were not in actual fact before the Commission this could not have influenced the outcome because, as found in this judgment, on the face of such qualifications—absence of academic studies, lack of requisite length of experience—he was not entitled to claim the promotion in question.

The fourth submission of applicant is that no representative of CYTA was present at the selection of the candidates. It is correct that Mr. Kokkinides was not present, according to the relevant minutes and the evidence, on the 30th March, 1962, when the decisions on promotions were taken. In my opinion, it might not have been very correct for him to be present at such meeting as he could not take part in the actual taking of decisions. His presence was only required and proper when the evaluation of candidates took place ; he could then assist, as he did in fact, by giving necessary information. It is clear from the evidence of Mr. Protestos that he was present at the meetings when the candidatures for promotion were gone into.

The fifth submission is that the decision to appoint the Interested Party, together with a great number of other decisions concerning promotions, were taken *en masse* and, therefore, it was not a proper discharge of the duty of the Public Service Commission under Article 125. There is no doubt that a considerable number of proposals for filling of vacancies were put together to the Public Service Commission and it is correct that in *exhibit* 5 what is sought from the Commission is " covering approval ". This is not, however, the decisive factor ; I have to find out not what was asked of the Commission but what in fact the Commission did. The Commission cannot be presumed to have acted wrongly merely because it has dealt with a great number of matters concerning CYTA simultaneously. I am satisfied that, though there is no doubt that the Public Service Commission has dealt with the promotions then required to fill vacancies in CYTA in a relatively *en masse* manner, it has had the opportunity to reach a decision of its own in relation thereto and it actually did so. Thus, the duty cast upon it under Article 125 was sufficiently discharged. This is clear from the fact that it devoted two of its meetings, at which Mr. Kokkinides was present, to examine the applications in question and also Mr. Kokkinides was requested, in certain cases, to supply additional information, which he did. It has also taken over a year to decide actually on the list of promotions submitted to it and this could not have been the matter with a case of covering approval. This indeed seems to be a case where the same conclusion is warranted on this point as in *Kalisperas and the Republic* (3 R.S.C.C. p. 146).

The sixth submission was that the Public Service Commission did not hold a proper enquiry in each case. Such submission was stated to be based on the outcome of the previous five submissions and it, therefore, fails also.

But in this connection there is a further matter to be dealt with. Counsel for applicant has complained that the interposing of a Selection and Promotion Board of CYTA between the applications for promotions of applicant and the Interested Party and the examination thereof by the Commission was an unlawful interference with the duties of the Commission.

The aforesaid Selection and Promotion Board is the product of an agreement between the Management of CYTA and the staff, concerning recruitment and promotion of personnel, and has only consultative capacities. It existed before the coming into operation of the Constitution. It consists of representatives of the Management and of the three trade unions of CYTA employees. Its purpose was clearly stated to CYTA in letter *exhibit* 23. It met on the 7th February, 1961, in order to consider promotions to the engineering posts of the establishment, including that of Inspector (Underground) ; as explained at the said meeting by the Chairman, and recorded in the minutes (*exhibit* 24), the purpose in hand was to make recommendations which would be submitted to the Public Service Commission along with other particulars. As already stated it appears in the said minutes that in respect of the post of Inspector (Underground) the Interested Party was recommended by the Management and one trade union, whereas the applicant was recommended by his own trade union. It may be noted that the representative of his trade union at the said meeting was the applicant himself .

The functioning of the said Board is not in my opinion inconsistent with the duties of the Commission under Article 125. It is a method of ensuring that the recommendations of the Management, to which, especially in cases of technical staff of commercial undertakings such as CYTA, due weight must indeed be given (*vide* in this respect *Marcoullides and The Republic*, 3 R.S.C.C. p. 30), are decided upon or at least considered and discussed, with the possibility of an opposing view being recorded, by this said Board. It offers a safeguard to applicants rather than a handicap. It is moreover a necessary element of the operation of the exception to the schemes of service, for the benefit of employees with long service, as contained in *exhibit* 2.

In all the circumstances of this case I am satisfied that the Public Service Commission was not prevented from doing its duty by means of the functioning of this Promotion and Selection Board. The former's discretion was not substituted by the latter's.

The last submission of applicant is that the Interested Party did not possess the necessary qualifications for promotion. It is not disputed that he possessed the necessary length of experience. There is evidence by Mr. Kokkinides, who was in a position to know, that he possessed the quality of experience required under the scheme of service. He was also recommended for promotion by the Management. His qualifications were before the Commission and it is not for the court to decide whether a person appointed was qualified in a case where it was reasonably open to the Commission to find that he was so qualified. (See in this respect, *Josephides and The Republic*, 2 R.S.C.C., p. 72, as well as *Koukoullis and The Republic*, 3 R.S.C.C., p. 134). Therefore, this submission also fails because I have reached the conclusion that it was reasonably open to the Commission on the material before it to find that the Interested Party was duly qualified.

The applicant has failed to discharge the onus of proving that the appointment of the Interested Party should be annulled. Such onus was on him in accordance with decisions of the Supreme Constitutional Court in *Koukoullis and The Republic*, above, *Uludag and The Republic*, above, *Saruhan and The Republic*, (2 R.S.C.C. p. 33).

On the contrary had applicant, who was one grade below the Interested Party at the time, been promoted instead of the Interested Party, to a post to which the Interested Party was normally due to be promoted whereas the applicant had to pass through the post held by the Interested Party before he could be promoted further, a great burden would have been cast upon anybody seeking to justify such a course of action.

On the question of costs, I have reached the conclusion that no order of costs should be made as far as Respondent is concerned, mainly because applicant has not been treated in the manner in which he deserved to be treated in not being informed in time of the position concerning his claim of promotion, even though it was unfounded.

The interested Party has chosen of his own volition to take part in these proceedings ; he was not made a party by applicant. So he has to bear his own costs, especially as the applicant was reasonably entitled, in all the complicated circumstances involved, to seek to test the validity of the decision challenged by him in these proceedings.

Recourse fails and is dismissed accordingly. Order for costs as aforesaid.