

1987 October 31

(DEMETRIADES J)

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS XEROS

Applicant,

v

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent

(Case No 466/82)

Public Officers — Promotions — Confidential reports — Circular 491/79 containing the regulations for the preparation of confidential reports — Put into effect as from 1 1 80 — Applicability of, in respect of reports for the year 1979 which were made by the reporting officer at some time during 1980

Executory act — Intermediate act — Cannot be challenged by itself, but if the final act is relied upon an invalid intermediate act, then such final act is also invalid — Confidential report for public officer invalid — Final act of promotion, also invalid 5

Public Officers — Promotions — Confidential reports — Circular 491/79 containing the regulations for the preparation of confidential reports — Reg 11 — Breach of — Tantamounts to illegality 10

Constitutional Law — Equality — Constitution, Art 28 — Circular 491/79 containing the regulations for the preparation of confidential reports — Reg 11 — Breach of — Tantamounts to violation of Art 28

By means of this recourse the applicant challenges the validity of the promotion of the interested party to the post of Senior Specialist, Medical and Public Health Services 15

The applicant is senior to the interested party and was recommended for promotion by the Head of the Department. The respondent Commission, however, decided to promote the interested party because of the great difference in merit between the two officers «as it appears from their confidential reports for the last three years» (1979, 1980, 1981) 20

It must be noted that in two of the items the applicant was rated in the report of 1979 as «mediocre». The applicant, however, was not informed of such rating

5 Counsel for the applicant argued that the confidential report for 1979 was prepared in contravention of Regulation 11* of Circular 491/79, whilst counsel for the interested party submitted that as Circular 491 was put into effect as from 1.1.80, Regulation 11 was not applicable to the confidential report of 1979.

10 Held, *annulling the sub judice decision*: (1) As the confidential report in question was prepared by the reporting officer on 21.8.80, the provisions of the new regulations (Circular 491) were applicable to it.

(2) There is no doubt that the reporting officer did not comply in respect of the confidential report for 1979 with the requirements of Regulation 11(a)

15 (3) Confidential reports, being intermediate acts, cannot be challenged on their own, but when they are invalid and a final administrative act is relied on them, such final act is, also invalid.

(4) The provisions of the regulations concerning preparation of confidential reports have to be strictly complied with and any deviation is tantamount to illegality and violates Article 28 of the Constitution.

20 *Sub judice decision annulled.*
Costs in favour of applicant

Cases referred to:

Republic v. Argyndes (1987) 3 C.L.R. 1092.

Papamichael v. Republic (1987) 3 C.L.R. 1113.

Stylianides v. Republic (1987) 3 C.L.R. 1123.

25 **Recourse.**

Recourse against the decision of the respondent to promote the interested party to the post of Senior Specialist in the Medical and Public Health Services in preference and instead of the applicant.

K. Talarides, for the applicant.

30 *A. Papasavvas*, Senior Counsel of the Republic, for the respondent.

Quoted at pp 1328-1329 post

A S Angelides, for the interested party

Cur adv vult

DEMETRIADES J read the following judgment By means of the present recourse the applicant challenges, in effect, the promotion, instead of him, of N Angelides, to the post of Senior Specialist, Medical and Public Health Services 5

The recourse originally was aimed also against the annulment of the promotion to the same post of interested party A Papanastassiou, but as it was withdrawn by the applicant against this interested party, it is to be treated as having been dismissed accordingly The post of Senior Specialist is a promotion post 10

When twelve vacancies of this post were created, the Ministry of Health requested their filling As a result, a Departmental Committee was set up in accordance with the provisions of section 36 of the Public Service Laws 1967-1981, which recommended for promotion 22 out of the 30 candidates whose names were included in the list submitted to it Two of the candidates so recommended by the Committee were the applicant and the interested party 15

It is to be noted that the twelve vacancies were not for one but for a number of specializations, one of them for surgery, for which there were vacant two posts 20

At its meeting of the 17th July, 1982, the Public Service Commission considered the matter of the filling of the twelve vacancies and having taken into account the number of posts vacant for each specialization, the material contained in the personal and confidential report files of the candidates, the conclusions of the Departmental Committee and the views and recommendations of the Director of Medical Services and Public Health Services, decided to promote to the two posts of Senior Specialist (Surgery), as from the 1st August, 1982, Dr A Papanastassiou and interested party Dr N Angelides The relevant part of the minutes of the Public Service Commission reads as follows. 25 30

«Η Επιτροπή, αφού εξήτασε τα ουσιώδη στοιχεία από τους Προσωπικούς Φακέλους και τας Εμπιστευτικές Εκθέσεις των υποψηφίων και έλαβεν υπ' όψιν τα πορίσματα της Τμηματικής Επιτροπής και τας κρίσεις και συστάσεις του Διευθυντού Ιατρικών Υπηρεσιών και Υπηρεσιών Δημοσίας Υγείας, υιοθέτησε 35 40

5 τας συστάσεις του Διευθυντού, εκτός εις την περίπτωση του κ. Ανδρέου Ξερού διά μίαν εκ των δύο θέσεων του Κλάδου Χειρουργικής. Αντί αυτού η Επιτροπή επέλεξε τον κ. Νίκον Αγγελίδη, τον οποίον έκρινεν ως καταλληλότερον.

10 Η Επιτροπή παρετήρησεν εν προκειμένω ότι ο κ. Αγγελίδης έχει γενικώς υψηλότερας Εμπιστευτικές Εκθέσεις του κ. Ξερού. Ενδεικτικώς αναφέρεται κατωτέρω η βαθμολογία αμφοτέρων κατά τα τρία τελευταία έτη:

Νίκος Αγγελίδης:

15 1979: Γενικώς ως 'Εξάίρετος' ('Εξάίρετος' και εις τας 12 παραγράφους της επί μέρους βαθμολογίας).
1980: Ως και διά το 1979.
1981: Ως και διά τα δύο προηγούμενα έτη.

Ανδρέας Ξερός:

20 1979: Γενικώς ως 'Καλός' ('Εξάίρετος» εις 2 παραγράφους της επί μέρους βαθμολογίας, 'Λίαν Καλός' εις 4, 'Καλός' εις 3 και 'Μέτριος' εις 2. Εις μίαν παράγραφον δεν εβαθμολογήθη).
1980: Γενικώς ως 'Λίαν Καλός' ('Εξάίρετος' εις 4 παραγράφους της επί μέρους βαθμολογίας και 'Λίαν Καλός' εις 8).
25 1981: Γενικώς ως 'Λίαν Καλός' ('Εξάίρετος' εις 6 παραγράφους της επί μέρους βαθμολογίας και 'Λίαν Καλός' εις 6).

Η Επιτροπή δεν δύναται εν προκειμένω να παραβλέψη την μετρίαν αξιολόγησιν του κ. Ξερού εις δυο παραγράφους της βαθμολογίας του κατά το 1979.

30 Η Επιτροπή απέδωσεν ωσαύτως την δέουσαν βαρύτητα εις τα αντίστοιχα προσόντα των δύο υποψηφίων και έλαβεν εν προκειμένω υπ' όψιν όλα τα πιστοποιητικά και τα άλλα στοιχεία, τα αφορώντα εις την ακαδημαϊκήν κατάρτισιν και την πείραν τούτων. Η
35 Επιτροπή έλαβε περαιτέρω υπ' όψιν το γεγονός ότι ο κ. Ξερός προηγείται εις αρχαιότητα του κ. Αγγελίδη, προαχθείς εις την θέσιν Ειδικού Ιατρού (Χειρουργικής) από 1.6.71, έναντι 1.3.77 του κ. Αγγελίδη.

Η Επιτροπή, υπό το φως των εν γένει περιστατικών και εν όψει κυρίως της μεγάλης διαφοράς εις την αξίαν των δύο υπαλλήλων, ως προκύπτει εκ των Εμπιστευτικών Εκθέσεων των κατά τα τρία τελευταία έτη, έκρινεν επί τη βάσει του συνόλου των καθιερωμένων κριτηρίων τον κ. Αγγελίδην ως υπέρτερον και καταλληλότερον του κ. Ξερού διά την πλήρωσιν της δευτέρας θέσεως Ανωτέρου Ειδικού Ιατρού εις τον Κλάδον Χειρουργικής.» 5

(«The Commission, having examined the essential material from the Personal Files and the Confidential Reports of the candidates and having considered the conclusions of the Departmental Committee and the views and recommendations of the Director of Medical Services and Public Health Services, adopted the recommendations of the Director, except in the case of Mr. Andreas Xeros for one of the two posts of the Surgery Branch. Instead of him the Commission chose Mr. Nicos Angelides whom it considered as more suitable. 10 15

The Commission observed in this respect that Mr. Angelides has generally better Confidential Reports than Mr. Xeros. There is stated indicatively further on the rating of both during the last three years: 20

Nicos Angelides:

- 1979: Generally as 'Excellent' ('Excellent' in all 12 paragraphs). 25
 1980: As in 1979.
 1981: As in both previous years.

Andreas Xeros:

- 1979: Generally as 'Good' ('Excellent' in 2 individual items, 'Very Good' in 4, 'Good' in 3 and 'Mediocre' in 2. In one paragraph he was not rated). 30
 1980: Generally as 'Very Good' ('Excellent' in 4 individual items and 'Very Good' in 8).
 1981: Generally as 'Very Good' ('Excellent' in 6 individual items and 'Very Good' in 6). 35

The Commission cannot, in this respect, overlook the mediocre assessment of Mr. Xeros in two paragraphs of his rating in 1979.

The Commission attributed also the proper weight to the respective qualifications of the two candidates and took in this respect into account all the certificates and all other material relating to their academic qualifications and their experience.

5 The Commission took further into account the fact that Mr. Xeros precedes in seniority Mr. Angelides, having been promoted to the post of Specialist (Surgery) as from 1.6.71, as against 1.3.77 of Mr. Angelides.

10 The Commission, in the light of all the circumstances and in view especially of the great difference in merit of the two officers, as it appears from their Confidential Reports during the last three years, considered on the basis of the established criteria as a whole Mr. Angelides as superior and more suitable to Mr. Xeros for the filling of the second post of Senior Specialist in the Surgery Branch. »)

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Counsel for the applicant submitted that the confidential report in respect of the applicant for the year 1979, was prepared in contravention of the provisions of regulation 11 of the relevant Regulations for the preparation and submission of confidential reports, approved by the Council of Ministers and embodied in Circular 491 of the 26th March, 1979, by means of which the General Orders previously in force were repealed and that the Commission failed to go through the personal file of the applicant and carry out an inquiry as to whether the applicant was aware that in two individual items of the confidential report for 1979 he was rated as «Mediocre».

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On the other hand, counsel for the interested party submitted that as the said Regulations were put into force on the 1st January, 1980, regulation 11 was not applicable for the confidential report of 1979 and that as the applicant knew about the adverse report and had failed to challenge it, it became final.

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Before proceeding with the arguments advanced on behalf of the applicant, it has to be stated that having considered the first leg of the argument of counsel for the interested party, I am of the opinion that as the confidential report concerned was prepared by

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the reporting officer on the 21st August 1980, the provisions of the new Regulations were applicable in respect of it. In any case, the reporting officer had filled in the new form of confidential reports and on the 11th December, 1981, the Chairman of the Public Service Commission, in a letter addressed to the Director of Medical Services and Public Health Services, observed that as there was not communicated to the applicant in writing his adverse rating, directions ought to be given to the reporting officer to act in accordance with the provisions of regulation 11 of the relevant Regulations

From a letter of the Director of Medical Services and Public Health Services dated the 25th January, 1982, which he addressed to the Chairman of the Public Service Commission, it appears that the non communication to the applicant of the adverse assessment of him was due to a misunderstanding of his (the Director's) part and that in his opinion no purpose could be served by communicating to the applicant, at that time, his adverse rating in view of the fact that the applicant had, in the meantime, shown considerable improvement

From the above it is clear that the applicant was not at any time, before the filing of his present recourse, aware of the opinion the Director expressed (adverse assessment) in the confidential report for 1979

Confidential reports being intermediate acts cannot be challenged on their own but when they are invalid and an administrative act is relied upon them, such act, being the final one, is also invalid and an applicant challenging that act is, in my view, entitled to invoke the invalidity in the preparation of the confidential report

Regulation 11(a) to which I have earlier referred reads

«11.(α) Εάν ο Αξιολογών Λειτουργός αξιολογήσει οιονδήποτε υπάλληλον 'Μετριον' ή 'Ανεπαρκή' υποχρεούται όπως γνωστοποιήσει τουτο εγγράφως εις τον υπάλληλον ένα τουλαχιστον μηνια προ της υποβολης της εκθέσεως εις την Επιτροπήν. Η σχετική γνωστοποιήσις δέον να παραθέτη περιπτώσεις και συγκεκριμένα στοιχεία επί των οποίων βασίζεται η τοιαύτη αξιολόγησις, το γεγονός δε της τοιαύτης γνωστοποιήσεως δέον να αναφέρεται εις το Μέρος IV της εκθέσεως.»

5 «11.(a) If the Reporting Officer assesses any officer 'Mediocre' or 'Inadequate' he is obliged to communicate this in writing to the officer at least one month before the submission of the report to the Commission. The relevant communication must cite instances and concrete material on which such assessment is based, and the fact of such communication must be referred in Part IV of the report».)

10 From the particular circumstances of the present case there is no doubt that the Reporting Officer has not complied with the provisions of regulation 11(a) above in preparing the confidential report in respect of the applicant for the year 1979.

15 In recent case-law of this Court such as *The Republic v. Argyrides*, (R.A. 678, delivered on the 11th June, 1987, and not yet reported*), *Papamichael v. The Republic*, (Case No. 807/85, delivered on the 29th July, 1987, and not yet reported**) and *Stylianides v. The Republic*, (Case No. 626/85, delivered on the 25th August, 1987, not yet reported***), the view was taken that the provisions of the regulations have to be strictly complied with and that any deviation from their express provisions is tantamount to an illegality and violates Article 28 of the Constitution in that the procedure for the preparation of confidential reports contemplated by the Regulations should be strictly adhered to in all cases without any differentiation.

25 I fully endorse the above approach for the purpose of this case too and conclude that as the sub judice decision was taken on the basis, amongst others, of the invalid confidential report for the year 1979, such decision is in law defective and has to be annulled.

In view of the foregoing there is no need to embark into the examination of any other ground raised in the present case.

30 In the result, the present recourse succeeds and the sub judice decision is annulled with costs.

Costs to be assessed by the Registrar.

*Sub judice decision
annulled with costs.*

* Reported in (1987) 3 C.L.R. 1092

** Reported in (1987) 3 C.L.R. 1113.

*** Reported in (1987) 3 C.L.R. 1123