

1965
Jan. 7
May 14, 29

GEORGHIOS M.
EVANGELOU
and
THE REPUBLIC
OF CYPRUS,
THROUGH THE
PUBLIC SERVICE
COMMISSION

[TRIANTAFYLIDIS, J.]

GEORGHIOS M. EVANGELOU,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 106/63).

Public Officers—Promotions to the post of Staff Nurse by the Public Service Commission—Challenge by Applicant of the validity of the promotions made in preference and instead of him—A previous call of Applicant for interview with a view to promotion to the post of Staff Nurse did not create any vested right in him for promotion as soon as a vacancy would have occurred, inasmuch as Applicant did not establish that he had been found suitable for promotion and that he would have been promoted but for the existence of vacancies.

Public Officers—Promotions—Recommendation of the Head of Department, seniority and suitability of Applicant for promotion to the post of Staff Nurse vis-a-vis the persons promoted to such post—Discretion of Public Service Commission properly exercised—No abuse or excess of powers—No proper grounds for Court's interference with promotions.

Administrative Law—A settled principle of administrative law that mere superiority not being of a striking nature, is not sufficient to lead to the conclusion that the appointing authority has acted in excess or abuse of powers.

Applicant, an Assistant Nurse in the public service, challenges the validity of the promotions of five other persons the Interested Parties—to the post of Staff Nurse.

The grounds of Applicant's complaint are:-

(a) That Applicant ought to have been promoted because he had been an unsuccessful candidate for promotion to the same post in 1961, whereas none of the Interested Parties was a candidate then; so Applicant ought to have been the first one to be promoted when a vacancy occurred in 1963.

(b) That the promotions of the Interested Parties were

contrary to the recommendations of the Head of the Department concerned.

- (c) That Applicant was more senior and more suitable for promotion than the Interested Parties.

Held, I. On ground (a):

Applicant, having failed in 1961, was again considered for promotion when vacancies occurred, in 1963, together with others who were also candidates for promotion at the time. Once he has been so duly considered for promotion and his merits were weighed together with the merits of the other candidates, it cannot be held that he had superior claims to promotion, independently of merit, merely on the ground that he had already been a candidate before. The administrative decision for the filling of the new vacancies in 1963 had to be based on the relevant facts as existing at the time when it was taken and not on past situations.

II. On grounds (b) and (c).

- (i) It has not been established that there was any specific recommendation by his Head of Department for the promotion of Applicant to the post of Staff Nurse.
- (ii) In Applicant's confidential report there is a specific observation by the countersigning officer, to the effect that he is a very good nurse. In the confidential report on Interested Party Marinis neither the reporting officer nor the countersigning officer had anything to add by way of specific observations; on the other hand Interested Party Ellinides was described by the reporting officer as energetic and reliable with good intellectual powers and commendable abilities, but argumentative at times, resentful of criticism and boastful.
- (iii) Had there been a recommendation by the Head of the Department concerned in relation to the filling in 1963 of the vacancies in question and had in such report a comparison been made between the Applicant and Interested Parties Marinis and Ellinides and had Applicant been described therein as *more fit for promotion* than those other two candidates, the Commission would normally have been expected to either follow it or give reasons for not doing so (see *Theodos-*

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siou and The Republic, 2 R.S.C.C. p. 48).

III. *As to costs, I have decided to make no order in the matter.*

The Order: I hereby dismiss this recourse and confirm the promotions of all Interested Parties.

Order in terms.

Cases referred to:

Theodossiou and The Republic, (2 R.S.C.C. p. 48);

Neophytou and The Republic, (1964 C.L.R. 280);

Papapetrou and The Republic, (2 R.S.C.C. p. 61 at p. 64);

Decision 1406/954 of the Council of State in Greece (Reports 1954 at p. 1737).

Recourse.

Recourse against the decision of the Respondent to promote the five interested Parties to the post of Staff Nurse in the Health Department.

L.N. Clerides, for the Applicant.

L. Loucaides, Counsel for the Republic, for the Respondent.

The following judgment was delivered by:—

TRIANTAFYLLIDES, J.: In this Case the Applicant, an Assistant Nurse since the 1st January, 1957, challenges the validity of the promotions of five other persons—to be referred to hereinafter as Interested Parties—who were promoted to the post of Staff Nurse, by the Public Service Commission, in preference and instead of Applicant, on the 20th February, 1963, all being at the time Assistant Nurses.

The said promotions were published on the 4th April, 1963, and as this recourse was filed on the 15th June, 1963, it is within time, under the relevant provisions in Article 146.

The substantial grounds of complaint of Applicant are in effect only three (Applicant's counsel having not pressed a fourth ground to the effect that the Interested Parties did not possess the necessary qualifications). The said three grounds are:

- (a) That Applicant ought to have been promoted because he had been an unsuccessful candidate for promotion to the same post in 1961, whereas none of the Interested Parties was a candidate then; so Applicant ought to have been the first one to be promoted when a vacancy occurred in 1963;
- (b) That the promotions of the Interested Parties were contrary to the recommendations of the Head of Department concerned;
- (c) That Applicant was more senior and more suitable for promotion than the Interested Parties.

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It is correct that in 1961 Applicant was one of the candidates called for interview with a view to promotion to the post of Staff Nurse; he was unsuccessful.

In my opinion this event did not create any vested right in Applicant to be promoted as soon as a vacancy would have occurred. It has not, indeed, been established by Applicant that he was told at the time anything to the effect that he had been found suitable for promotion but that there were no sufficient vacancies.

Applicant, having failed in 1961, was again considered for promotion when vacancies occurred, in 1963, together with others who were also candidates for promotion at the time. Once he has been so duly considered for promotion and his merits were weighed together with the merits of the other candidates, it cannot be held that he had superior claims to promotion, independently of merit, merely on the ground that he had already been a candidate before. The administrative decision for the filling of the new vacancies in 1963 had to be based on the relevant facts as existing at the time when it was taken and not on past situations.

In my opinion, therefore, ground (a) of Applicant cannot succeed.

It is proper, due to their nature, to deal with grounds (b) and (c) together, as they both refer to the composite picture of each candidate's merits. I shall start with the question of the recommendations of the Head of Department.

It has not been established that there was any specific recommendation by his Head of Department for the promo-

tion of Applicant to the post of Staff Nurse.

Counsel for Applicant, as a matter of fact, has alleged that Miss Aziz, who attended the interviews before the Commission on behalf of the Department, had pressed for the promotion of Applicant. This allegation has not, however, been substantiated; counsel for Applicant took eventually the view that it was not feasible to secure the attendance of Miss Aziz as a witness and did not summon her to give evidence at the hearing.

As it appears clearly from the minutes of the Public Service Commission, of the 20th February, 1965, (which have been filed together with the Opposition) the Public Service Commission had before it the confidential reports on candidates and such confidential reports were given due weight. This was quite a proper course as such reports represented the official and considered view of the Department in the matter of the merits of each candidate.

The said confidential reports, in view of their nature, were not, by consent of both counsel, put actually in evidence, but their relevant contents, after inspection by the Court, were incorporated into the record of this Case.

It appears, therefrom, that Interested Party Mouyias had a "special" confidential report—in addition to the usual confidential report—which entitled him to particular consideration for promotion; he was in a class by himself; all the others had only usual confidential reports.

Interested Parties Tsouris and Pantjiaris had specific observations of such a nature in their reports which entitled them, to say the least, to be considered for promotion equally with the Applicant.

So, quite rightly counsel for Applicant, in his final address, restricted his submissions, relating to the comparison of the confidential reports, to the cases of Interested Parties Ellinides and Marinos only.

In Applicant's confidential report there is a specific observation by the countersigning officer, to the effect that he is a very good nurse. In the confidential report on Interested Party Marinos neither the reporting officer nor the countersigning officer had anything to add by way of specific observations; on the other hand Interested Party Ellinides was

described by the reporting officer as energetic and reliable with good intellectual powers and commendable abilities, but argumentative at times, resentful of criticism and boastful.

It has been argued, therefore, by counsel for Applicant that Applicant had definitely a better confidential report than Interested Party Marinis and that the specific observations set out in the confidential report on Interested Party Ellinides contained elements against him, a thing which entitled Applicant, who has been expressly described as a very good nurse, to be preferred for promotion.

Had there been made a recommendation by the Head of the Department concerned in relation to the filling in 1963 of the vacancies in question and had in such report a comparison been made between the Applicant and Interested Parties Marinis and Ellinides and had Applicant been described therein as *more fit for promotion* than those other two candidates, the Commission would normally have been expected to either follow it or give reasons for not doing so (see *Theodossiou and The Republic*, 2 R.S.C.C. p. 48). But as the confidential reports on the candidates were prepared in the usual course of things and they were not prepared with a view to comparing the respective merits of the candidates for particular vacancies, I think that they should not be treated as constituting recommendations for the filling of the particular vacancies and they must be regarded only as constituting part of the overall picture of the merits of each candidate which the Commission had to weigh as a whole.

Such confidential reports cannot, thus, be considered by themselves; so the fact that Applicant may have a better confidential report than Interested Party Marinis and the fact that there are some critical remarks in the confidential report on Interested Party Ellinides cannot be taken in isolation, in considering the validity of the promotions made by the Commission; they are matters to be examined in conjunction with all other matters relating to the candidates, including their relative seniority.

Likewise, seniority by itself is not, necessarily, the determining factor (see *Theodossiou and The Republic*, *supra*). It is part of the overall picture of each candidate.

According to the practice in force (General Orders II/1. 33-36) seniority is normally determined by the date of

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appointment to the particular class or grade.

Applicant and all Interested Parties, except Ellinides, had equal seniority in the post of Assistant Nurse, having been appointed thereto on the 1st January, 1957.

Ellinides was appointed in 1956 to such post and, at the time of the promotions in question, was also holding the temporary post of Staff Nurse. He was senior, thus, to all other candidates concerned in these proceedings.

As regards length of service of the others in public service the one with the most lengthy service is Interested Party Marinos who entered the public service in 1942; then follows Interested Party Mouyias, who entered it in 1945, and then follows Applicant, who entered it in 1952. The remaining two Interested Parties Tsouris and Pantjiaris entered the public service in 1954.

It has also been stated in evidence by Dr. Panos, the Director of Medical Services, that Applicant passed certain examinations, which were at the time necessary for the post of male orderly, in 1954, whereas the Interested Parties who had equal seniority with Applicant passed them in 1956, except Interested Party Marinos who passed them in 1952.

It has not been alleged that such examinations constituted necessary qualifications for the post of Staff Nurse, but it appears that the matter has been brought up by counsel for Applicant as relevant to the overall picture of the merits of each candidate.

We come now to examining the promotion of each Interested Party and to deciding whether in the circumstances it should be annulled as having been made in abuse or excess of powers.

It is well settled that the onus of establishing abuse or excess of powers rests with Applicant in a recourse of this nature. (see *Neophytou and The Republic*, 1964 C.L.R. 280).

As regards Interested Party Ellinides, taking into account that he had greater seniority in the post of Assistant Nurse than Applicant and also that he was serving as a temporary Staff Nurse at the material time, and, furthermore, that he had very good specific observations in his confidential report (in addition to the two or three critical ones, stressed by counsel for Applicant) I am of the opinion that it was reason-

ably open to the Public Service Commission to prefer him for appointment instead of Applicant and that Applicant has failed to satisfy me that the relevant discretion of the Commission has been improperly or wrongly exercised and that its decision should be set aside as having been taken in abuse or excess of powers. Had I, in the circumstances, reached any other decision it would amount to substituting my own discretion for that of the Commission, a course which is not open to me. (see *Papapetrou and The Republic*, 2 R.S.C.C. p.61 at p.64).

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As regards Interested Party Marinos, though he had no specific observations, either for or against him, in his confidential report, and though Applicant, on the contrary, was specifically described as a very good nurse, in his own confidential report, nevertheless, taking into account the fact that he had equal seniority with Applicant in the post of Assistant Nurse, but had entered the service 10 years prior to Applicant, my decision is the same, and based on the same principles, as that reached in the case of Interested Party Ellinides and I am not, therefore, prepared to annul the promotion of this Interested Party either.

Concerning Interested Party Mouyias, taking into account that he had equal seniority as Applicant in the post of Assistant Nurse, but had entered the public service seven years before Applicant and he had a "special" confidential report, which Applicant did not have, my decision is the same, and based on the same principles, as that reached in the cases of the two Interested Parties already dealt with and I am not, therefore, prepared to annul his promotion either.

Concerning Interested Parties Tsouris and Pantjiaris, the margin, as regards comparative merit, between Applicant and these two Interested Parties, is very close indeed, if not in favour of Applicant. They had all equal seniority in the post of Assistant Nurse, but they entered the public service about two years after Applicant. In his confidential report Tsouris is specifically described as a good assistant nurse and an efficient worker and Pantjiaris is likewise described as a good assistant nurse in the orthopaedic theatre, reliable and efficient. Applicant, as already stated, is described as a very good nurse.

In my opinion, however, any margin that might be found to exist in favour of Applicant, over the two Interested Parties

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concerned, could only be described as mere superiority and it could never come anywhere near to being considered as striking superiority; and it is a settled principle of administrative law that mere superiority, not being of a striking nature, is not sufficient to lead to the conclusion that the appointing authority has acted in excess or abuse of powers. (see Conclusions from the Council of State in Greece 1929-1959 p. 268 and Decision 1406/1954 of the same organ (Reports 1954Γ p. 1737).

In the circumstances I have reached the conclusion, on the basis of the above principle and on the basis of the principles already referred to in the case of other Interested Parties, that no proper grounds exist for me to interfere with the promotions of Interested Parties Tsouris and Pantjariis.

In dealing with the case of each Interested Party I have not referred to the question of the passing, in the past, of the examinations which were required for the post of male orderly. In my opinion the question of such examinations is not a matter which should, in the context of all relevant circumstances, affect my decisions, as already reached in this judgment.

For the reasons given, above, I hereby dismiss this recourse and confirm the promotions of all Interested Parties.

As regards costs I have decided to make no order in the matter. In my opinion, the merits of Applicant, though not sufficient to lead to a favourable for him outcome of this recourse, were such that could possibly have led the Commission to promoting him. The Commission has exercised its discretion against him in a manner with which I found no reason to interfere but on the other hand I do not think that Applicant should be penalized for putting his grievance before the Court, in a Case of this nature.

*Application dismissed. No
order as to costs.*