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[TRIANTAFYLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

JACOVOS L. JACOVIDES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE
PUBLIC SERVICE COMMISSION.

Respondent.

(Case No. 142/63)

Public Officers—Promotions—Decision of Respondent not to promote Applicant to the post of Land Clerk, 1st Grade, Lands and Surveys Department—Relative decision completely contradicted by the material records—Annulled as being unconstitutional (viz. contrary to Article 28 of the Constitution) and in abuse and excess of powers—See, also, herebelow.

Public Service Commission—Discretion—Abuse and excess of powers—Commission's conclusion that, on the basis of the confidential reports, Applicant would "never" have been promoted to the post of Land Clerk 1st Grade, Lands and Surveys Department—Conclusion could not have reasonably been reached—Commission, therefore, has not exercised its discretion in a valid manner and has, consequently, acted in abuse and excess of powers—See, also, hereabove; and under the headings herebelow.

Administrative Law—Administrative decisions—Annulment of administrative acts or decisions—A case in which an administrative Court has to annul the sub judice administrative act or decision because the reasoning stated therein is shown to be erroneous, through being contradicted by the relevant administrative records—See, also, hereabove.

Constitutional Law—Principle of equality—Safeguarded by Article 28 of the Constitution—It is a principle of proper administration, enshrined also, in our Constitution (see Article 28) that equality of treatment should be accorded to persons who are in substantially equal position vis-avis the administration in one and the same matter—See, also, under Public Officers, above.

Proper administration—Principle of equal treatment—See under Constitutional Law above.

Equality—Principle of—Article 28 of the Constitution—It is also a principle of proper administration—See above under Constitutional Law.

Equal treatment—See above.

Unequal treatment—See above.

The applicant in this recourse complains against the decision of the respondent—Public Service Commission dated the 20th May, 1963, not to promote him to the post of Land Clerk, 1st Grade from the post of Land Clerk 2nd Grade. Applicant first applied for promotion on 30.5.61 and having not succeeded he wrote again on the 22nd March, 1963 and drew attention to the fact that he had qualified in the meantime for such promotion by passing the relevant examinations and that the matter was urgent as he was already on leave prior to retirement, which was due to take place on the 31st May, 1963. He also referred to the case of his ex-colleague Michael Angeli, who had been promoted to Land Clerk, 1st Grade, during leave prior to retirement.

The relevant decision of the Commission dated 20.5.63 challenged by this recourse reads as follows:-

“Application by Mr. J.L. Jacovides, Land Clerk, 2nd Grade, for promotion to the 1st Grade, prior to his retirement on 31.5.63.

The Commission examined the above application and Mr. Jacovides (sic) confidential reports and decided that the Commission would have never promoted him, even if the question of filling the vacancies in the post of Land Clerk, 1st Grade, was taken up by the Commission before the date of retirement of Mr. Jacovides. The Commission decided that in view of the confidential reports submitted on him, Mr. Jacovides should not be promoted”.

The reasoning which has been given in relation to this decision of the Respondent as found in the decision itself and repeated in the letter of the 10th June, 1963 was that on the strength of the confidential reports on him, applicant was not found fit to be promoted.

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To a letter dated the 6th June, 1963 from counsel acting on behalf of the applicant requesting to be furnished with the reasons of the above quoted decision the Chairman of the Commission replied on the 10th June, 1963 stating that ".....in spite of the fact that the general question of the filling of the vacancies in the post of Land Clerk, 1st Grade was not taken up by the Commission, Mr. Jacovides' application for promotion was carefully considered by the Commission. After a careful examination of the totality of circumstances pertaining to Mr. Jacovides, namely, merit, abilities, official qualifications and seniority as depicted in his confidential reports submitted on him by his Head of Department, the Public Service Commission decided that it would have never promoted him, even if the question of filling the vacancies in the post of Land Clerk, 1st Grade, was taken up by the Commission before the date of Mr. Jacovides' retirement". And to a further letter from the same Counsel dated the 12th July, 1963 requesting to know what were the reasons for which the Commission "would have never promoted" applicant, the Chairman of the Respondent Commission replied:-

"...the reason why Mr. Jacovides could not be promoted to the post of Land Clerk, 1st Grade, even if promotions to that post were made before he retired, is that there were other Land Clerks, 2nd Grade, who were considered by the Commission as having, on the whole, stronger claims for promotion to the existing vacancies in the 1st Grade. As the number of the Land Clerks, 2nd Grade, who had stronger claims than Mr. Jacovides was greater than the number of existing vacancies, it was clearly impossible to promote Mr. Jacovides".

Evidence was given by respondent to the effect *inter alia* that the Commission examined the qualifications and abilities of applicant, in relation to those of other persons whom the Commission had in mind as eligible for promotion to Land Clerk, 1st Grade, and the Commission reached the conclusion that applicant was not entitled to be promoted. Moreover the confidential reports on applicant starting from 1955 and going up to 1962 were produced as exhibits.

In granting the application and annulling the *sub judice* decision, the Court:-

Held, (1) on the face of the most recent of the confidential reports and in the absence of any valid explanation or reason to the contrary—which does not exist on the material before me—I, with due respect to the Commission, really fail to see how it could have reasonably reached the conclusion that, on the basis of the *confidential reports*, applicant would “never” have been promoted. It has not, therefore, exercised its descretion in a valid manner and has, consequently acted in abuse and excess of powers.

(2) This is indeed one of those cases in which an administrative Court has to annul the sub judice administrative act or decision because the reasoning stated therein is shown to be erroneous through being contradicted by the relevant administrative records (*vide* Conclusions from the *Jurisprudence of the Council of State in Greece 1929-1959* p. 188); and indeed the reasoning in *exhibit 18*, the decision of the commission, is completely contradicted by the material records in *exhibit 19*, i.e. the recent confidential reports of Applicant.

(3) I am satisfied that his case and that of Angeli were, more or less, on an equal footing; and, yet, he has been refused promotion whereas Angeli has been promoted.

(4) It is a principle of proper administration, enshrined also in our Constitution (see Article 28), that equality of treatment should be accorded to persons who are in substantially equal positions vis-a-vis the administration in one and the same matter.

(5) Bearing in mind that Angeli was promoted to the 1st Grade while being on leave prior to retirement—as Applicant was on the 20th May, 1963—that, according to the evidence of Mr. Protestos, Angeli was not in any way a brilliant officer and that his case was similar to that of the Applicant, that he had been recommended for promotion prior to retirement, like Applicant had been (see the confidential report on Applicant in respect of 1962), and that it has not been suggested that the course followed in Angeli’s case was a wrong one from any point of view, I find that Applicant has been deprived of equal treatment by being told that he could not be likewise promoted.

*Decision complained of
declared null and void.*

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Cases referred to:-

Kyprianides and the Republic
(1965) 3 C.I..R. 519.

Recourse.

Recourse against the decision of the Respondent not to promote applicant to the post of Land Clerk, 1st Grade. from the post of Land Clerk, 2nd Grade.

Applicant in person.

Mr. Spanos, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following judgment was delivered by:—

TRIANAFYLLIDES, J.: In this recourse the Applicant complains, in effect, against the decision of the Respondent Commission not to promote him to the post of Land Clerk, 1st Grade, from the post of Land Clerk, 2nd Grade.

Such decision is dated the 20th May, 1963, and it is *exhibit 18*. It reads as follows:—

“Application by Mr. J. L. Jacovides, Land Clerk, 2nd Grade, for promotion to the 1st Grade, prior to his retirement on 31.5.63.

The Commission examined the above application and Mr. Jacovides (sic) confidential reports and decided that the Commission would have never promoted him, even if the question of filling the vacancies in the post of Land Clerk, 1st Grade, was taken up by the Commission before the date of retirement of Mr. Jacovides. The Commission decided that in view of the confidential reports submitted on him, Mr. Jacovides should not be promoted”.

This decision was communicated to Applicant by letter of the 23rd May, 1963, (*exhibit 2*), in which it was stated that the Commission had carefully considered his request but it was regretted “that it has not been found possible to accede to it”.

The short history of events prior to the said decision of the Commission is as follows:—

On the 30th May, 1961, Applicant applied to the Commission, asking that he should be promoted to Clerk, 1st Grade, (*exhibit 7*). He set out in his application the whole history of his public service till then, stressing, *inter alia*, that he had served for forty years in the Department of Lands and Surveys, that he had been posted as Section Leader of the Declarations Branch since 1949 and that he was one of the most senior Land Clerks, 2nd Grade, in the Department.

This application of Applicant was forwarded to the Commission, by Applicant's Head of Department (through whom it had been made) only on the 22nd November, 1961. In his covering letter (*exhibit 17*) the then Ag. Chief Lands and Surveys Officer, did not recommend Applicant for promotion to 1st Grade, pointing out that Applicant was lacking in some necessary qualifications.

On the 27th November, 1961, the Commission wrote to Applicant (*exhibit 16*) that the matter was under examination.

On the 22nd March, 1963, Applicant wrote again, to his Head of Department and to the Commission, in the matter of his promotion to 1st Grade (*exhibits 1 and 9*). He drew attention to the fact that he had qualified in the meantime for such promotion by passing the relevant examinations and that the matter was urgent as he was already on leave prior to retirement, which was due to take place on the 31st May, 1963. He also referred to the case of his ex-colleague Michael Angeli, who had been promoted to Land Clerk, 1st Grade, during leave prior to retirement.

On the 18th April, 1963, Applicant, having not heard anything in the matter yet, sent a reminder to the Commission (*exhibit 11*).

Applicant, on or about the 15th May, 1963, called, also, at the office of the Commission where he saw some of the members of the Commission and explained his case to them.

On the 16th May, 1963, he wrote another letter to the Commission (*exhibit 12*), requesting urgent consideration of his case, as he was about to retire shortly at the end of that month.

Then the Commission met on the 20th May, 1963, and reached its decision (*exhibit 18*) which has been quoted in full earlier in this judgment and, as already stated, on the 23rd May, 1963, a letter (*exhibit 2*) was addressed to Appli-

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cant, informing him of such decision.

The material events thereafter are as follows:—

On the 24th May, 1963, Applicant went again to the office of the Commission—having not received yet *exhibit 2*—and on being informed orally of the rejection of his application for promotion, he asked for an interview with the Chairman of the Commission. It was granted there and then, but it appears that the interview was not very cordial, because on the same day Applicant protested about it to the President of the Republic, to the Vice-President of the Republic and to the Commission itself, (*exhibit 14*).

On the 6th June, 1963, counsel acting for Applicant at the time, Mr. K. Saveriades of Famagusta, wrote to the Commission (*exhibit 3*) asking to be furnished with the reasons of the decision against Applicant and relying, for the purpose, on Article 29 of the Constitution.

The Chairman of the Commission replied on the 10th June, 1963, (*exhibit 4*) stating that: “. in spite of the fact that the general question of the filling of the vacancies in the post of Land Clerk, 1st Grade was not taken up by the Commission, Mr. Jacovides’ application for promotion was carefully considered by the Commission. After a careful examination of the totality of circumstances pertaining to Mr. Jacovides, namely, merit, abilities, official qualifications and seniority as depicted in his confidential reports submitted on him by his Head of Department, the Public Service Commission decided that it would have never promoted him, even if the question of filling the vacancies in the post of Land Clerk, 1st Grade was taken up by the Commission before the date of Mr. Jacovides’ retirement”.

Counsel for Applicant wrote back on the 12th July, 1963, (*exhibit 5*) requesting to know what were the reasons for which the Commission “would have never promoted” Applicant.

The Chairman of the Commission replied on the 18th July, 1963, (*exhibit 6*) stating that:— “. . . the reason why Mr. Jacovides could not be promoted to the post of Land Clerk, 1st Grade, even if promotions to that post were made before he retired, is that there were other Land Clerks, 2nd Grade, who were considered by the Commission as having, on the whole, stronger claims for promotion to the existing vacan-

cies in the 1st Grade. As the number of the Land Clerks, 2nd Grade, who had stronger claims than Mr. Jacovides was greater than the number of existing vacancies, it was clearly impossible to promote Mr. Jacovides”.

This recourse was filed by Applicant, in person, on the 31st July, 1963, and he has continued appearing in person in the proceedings, all through.

Both the Applicant and Mr. Demetrios Protestos, a member of the Public Service Commission, have given evidence during the proceedings.

Applicant has confirmed on oath what he has stated to me in opening his Case in person, at the hearing; to the extent this is relevant for the purposes of this judgment, I should say that I have found Applicant to be a generally reliable person.

A particular point made by Applicant—which has not been contradicted by anything put forward on behalf of Respondent—is that at the time of his retirement, the existing vacancies in the post of Land Clerk, 1st Grade, were more than those qualified for promotion thereto, and that some of those promoted in July, 1963, to such post, qualified for the purpose only by sitting for examinations on the 30th May, 1963, i.e. one day prior to Applicant's retirement.

Mr. Protestos has done, indeed, his best to assist the Court. He has stated, *inter alia*, that the application for promotion of Applicant was considered only on the 20th May, 1963, as soon as the previously existing ban on promotions in the Department concerned had been lifted; so, at the time, it was, indeed, possible for the Commission to promote Applicant, if he were to be found fit for promotion. He also added that there existed then many vacancies in the post of Land Clerk, 1st Grade.

He said that the Commission examined the qualifications and abilities of Applicant, in relation to those of other persons whom the Commission had in mind as eligible for promotion to Land Clerk, 1st Grade, and the Commission reached the conclusion that Applicant was not entitled to be promoted.

In relation to the promotion of Michael Angeli, which had been referred to by Applicant in correspondence with the

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Commission, Mr. Proestos confirmed that the said Angeli was promoted to Land Clerk, 1st Grade, on the 30th May, 1961, with effect from the 1st January, 1961, (*vide* minutes *exhibit 21*) shortly before his retirement on the 1st July, 1961. He stated that he was not suggesting that Angeli was himself a brilliant officer and he agreed that the case of Angeli was similar to that of the Applicant. But he said that, at the time, the Commission had before it a specific recommendation for the promotion of Angeli, by his superiors (*exhibit 20*).

The Court has to decide in this recourse whether or not, in the circumstances of this Case, it should interfere with the decision of the Commission dated 20th May, 1963, (*exhibit 18*), not to promote Applicant.

It has been often propounded in similar cases—and it is hardly necessary to repeat it—that this Court will not interfere with a decision of the Commission by substituting its own discretion for that of the Commission, and so long as a decision of the Commission was reasonably open to it on the material before it, the Court will confirm such decision, even if in exercising its own discretion on the merits it could have reached a different conclusion.

But, on the other hand, this Court should interfere with a decision of the Commission, such as *exhibit 18*, if, *inter alia*, it was not reasonably open to it on the material before the Commission or if it is the product of the exercise of the discretion of the Commission in a defective manner or if the Commission in reaching its decision has acted contrary to the Constitution or the law, including well-settled principles of Administrative Law.

In determining the validity of an administrative decision it is always useful to examine the reasoning which has been given in relation thereto.

In this Case, this reasoning is, first, to be found set out in the decision itself (*exhibit 18*); the same reasoning has been repeated by the Chairman of the Commission in his letter to counsel for Applicant of the 10th June, 1963, (*exhibit 4*); it is, namely, that, on the strength of the confidential reports on him, Applicant was not found fit to be promoted.

Such reports have been produced as *exhibit 19*; they start from 1955 and they go up to 1962.

Having perused such reports, I quite agree that the confidential reports for the years 1955, 1956, 1957 and 1958 are not such as would entitle Applicant to promotion.

But from 1959 onwards, there appears a marked change in such reports, which culminate in Applicant being *expressly* recommended for promotion, in 1962.

The confidential report for 1959, describes Applicant as follows: "This clerk is not so bad as he was stated to be. He has quite a lot of experience in his Section and he can run it quite smoothly and satisfactorily".

The confidential report for 1960 states in respect of Applicant: "He is doing his best, but his devotion to duty is exemplary".

The confidential report for 1961 describes Applicant as follows: "He is really good. He tries his best to satisfy the public and his superiors. He is devoted to his duty. As Section Leader, Declarations, he is giving satisfaction in all respects".

The confidential report for 1962 has this to say about Applicant: "Very conscientious and hard working. He carries out the work of the Declaration Section (as Section Leader) successfully, almost single handed. He deserves promotion. He retires in 1963".

In the face of the above-quoted most recent of the confidential reports in *exhibit 19*, and in the absence of any valid explanation or reason to the contrary—which does not exist on the material before me—I, with due respect to the Commission, really fail to see how it could have reasonably reached the conclusion that, *on the basis of the confidential reports*, Applicant would "never" have been promoted. It has not, therefore, exercised its discretion in a valid manner and has, consequently, acted in abuse and excess of powers.

This is indeed one of those cases in which an administrative Court has to annul the sub judice administrative act or decision because the reasoning stated therein is shown to be erroneous through being contradicted by the relevant administrative records (*vide* Conclusions from the Jurisprudence of the Council of State in Greece 1929-1959 p. 188); and indeed the reasoning in *exhibit 18*, the decision of the Commission, is completely contradicted by the material records

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in *exhibit 19*, i.e. the recent confidential reports on Applicant.

As I am certainly not prepared to presume that the Commission in acting as it did has acted simply capriciously, I have sought to find what in *exhibit 19* could have led the Commission to adopt the course it has taken in this matter. The only possible explanation I could think of is that the Commission attributed to the old unfavourable reports existing in *exhibit 19*—in relation to years prior to 1959—undue weight, and it did not give due weight to the reports in *exhibit 19* relating to more recent years.

Such approach constitutes, in my opinion, a grave error of principle rendering the manner of the exercise of the discretion of the Commission in the relevant matter defective and leading to the annulment of its decision.

It would be, of course, correct to say that the whole series of confidential reports on a public officer is useful because it presents a picture of his entire service. But there can be no doubt, either, that a public officer is to be promoted or not on the basis of his merit at the material time and cannot be deprived of promotion, to which he would be entitled on the basis of the merit then possessed, because of lack of such merit four years earlier, as in this Case.

Even if the expression “confidential reports” in the relevant minutes of the Commission (*exhibit 18*) were to be stretched so as to include in it, in this particular Case, the letter of the 22nd November, 1961, (*exhibit 17*), in which the Acting Chief Lands and Surveys Officer did not appear to recommend the promotion of Applicant, then again I would not have reached a different conclusion about the propriety of the Commission’s sub judice decision, because this letter only related to the situation as existing at the time it was written, when Applicant had not yet completed passing the relevant Departmental examinations—a thing which he did subsequently; and, in any case, little weight could be attributed to the absence of recommendation for promotion in the said letter, in view of the express recommendation to that effect contained in the subsequent confidential report for 1962.

The Chairman of the Public Service Commission, in his letter of the 18th July, 1963, (*exhibit 6*) gave another collateral reason why Applicant was not promoted. He stated that

Applicant was not entitled to promotion because there were others who were eligible to be promoted and who had, in the opinion of the Commission, stronger claims to promotion than Applicant, and in view of the fact that their number was greater than the existing vacancies in the post of Land Clerk, 1st Grade, it was "clearly impossible" to promote Applicant. This reason is echoed in the evidence of Mr. Proestos, too.

I regret to say that I find, also, this reasoning not to be well-founded, in view of the fact that Applicant was retiring on the 31st May, 1963, and so in case he were to be promoted, this could not affect the promotion of any other eligible Land Clerk, 2nd Grade, after such date. In this connection it is to be borne in mind that, from the material before the Court, it appears that the qualifying examinations for promotion to the post of Land Clerk, 1st Grade were, at the time of the sub judge decision, already fixed for the 30th May, 1963, i.e. the day previous to the retirement of Applicant—who had already passed such examinations earlier—and so nobody qualifying for promotion at the said examinations would have been a candidate for promotion together with Applicant, who would have retired already.

As stated already, earlier on, in this judgment, at the time when the Commission decided to refuse to promote Applicant, i.e. on the 20th May, 1963, the existing vacancies in the post of Land Clerk, 1st Grade, were *more* than those qualified for appointment thereto; thus, no question of the candidates being more than the vacancies could arise at the time when the sub judge decision (*exhibit 18*) was taken. Later on, however, after Applicant's retirement, the ratio of vacancies to candidates was apparently reversed due to the results of the qualifying examinations which were held on the 30th May, 1963; actually the list of qualified candidates was forwarded by the Lands Department to the Commission in June, 1963, i.e. after the retirement of Applicant, and the existing vacancies were filled on the 9th July, 1963.

It seems that on the 20th May, 1963, when Applicant's promotion was refused, those about to sit for their examinations on the 30th May, 1963, were wrongly treated by the Commission as eligible candidates, though they were not yet so; otherwise, it cannot be explained how the Chairman of the Commission spoke on the 18th July, 1963 (*exhibit 6*) of the existence at the material time of more candidates than the

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available vacancies, when this was not in fact so in May, 1963.

In my opinion it was not proper for the Commission in reaching its decision *exhibit 18* to base itself on the situation as it was anticipated to develop, after Applicant's retirement, by regarding as eligible and comparable candidates those who had yet to qualify by passing the examinations of the 30th May, 1963.

There is, yet, a further reason why Applicant is entitled to succeed:— I am satisfied that his case and that of Angeli were, more or less, on an equal footing; and, yet, he has been refused promotion whereas Angeli has been promoted.

It is a principle of proper administration, enshrined also in our Constitution (see Article 28), that equality of treatment should be accorded to persons who are in substantially equal positions *vis-a-vis* the administration in one and the same matter.

Bearing in mind that Angeli was promoted to the 1st Grade while being on leave prior to retirement—as Applicant was on the 20th May, 1963—that, according to the evidence of Mr. Protestos, Angeli was not in any way a brilliant officer and that his case was similar to that of the Applicant, that he had been recommended for promotion prior to retirement, like Applicant had been (see the confidential report on Applicant in respect of 1962), and that it has not been suggested that the course followed in Angeli's case was a wrong one from any point of view, I find that Applicant has been deprived of equal treatment by being told that he could not be likewise promoted.

For all the above reasons I find that the sub judice decision is unconstitutional and in abuse and excess of powers and I hereby declare it to be *null* and *void* and of no effect whatsoever.

The Commission has now to re-examine the matter, in the light of this judgment. The fact that Applicant has retired in the meantime is no obstacle to such a course, (see *Kyprianides and The Republic*, (1965) 3 C.L.R. 519). The Commission is not bound to promote Applicant but if it decides not to do so it has to give valid reasons therefor, other than those held invalid in this judgment.

Regarding costs I find that Applicant, who appeared in person, is entitled to all his out-of-pocket costs incurred for the purpose of these proceedings,—by way of court fees, travelling expenses, day-wages etc.

Decision complained of declared null and void. Order for costs as aforesaid.

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