

1966
May 12,
June 30

[ZEKIA, P. VASSILIADES, TRIANTAFYLIDIS, JOSEPHIDES, J.J.]

CHARILAOS FRANGOULIDES (No. 2),

Appellant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(*Revisional Jurisdiction Appeal No. 10.*)

CHARILAOS
FRANGOULIDES
(No. 2)
and
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CYPRUS,
THROUGH
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Public Service—Public Officers—Promotions—Annual confidential reports—A minister cannot make such reports—Appeal from dismissal of appellant's-applicant's recourse against respondent's decision to promote four persons to the post of Senior Welfare Officer in preference to or exclusion of the applicant—Decision of the respondent Commission (the Public Service Commission) materially affected by observations, adverse to applicant, of the Minister of Labour and Social Insurance contained in the last annual confidential report made by him, and not by the Head of the Welfare Department of the Ministry of Labour and Social Insurance—Decision complained of annulled as having been taken under a misconception of the legal position of the Minister regarding Annual Confidential Reports in the Public Service—And, also, as having been taken without considering the proper confidential reports containing the views of the Head of Department or the officer duly acting for him—Constitution of the Republic, Article 59, paragraph 2, and Article 41—The Service Regulations (General Orders 1955) Chapters 11|2, 11|2.3, 11|2.9 and 11|2.11—See, also, herebelow.

Constitutional and Administrative Law—Ministers—Public Service—Promotions—Annual confidential reports on Public Officers on Form Gen. 90—A minister cannot assume the duties and responsibilities of the Head of Department in the Public Service for the purposes of such reports concerning officers serving in such department under his Ministry—The reasons for that view are to be found in Article 59, paragraph 2, and Article 41 of the Constitution (supra)—And in the Service Regulations (supra)—And, also, in the structure of the Public Service Commission in our Constitution (see Articles 122 to 125 inclusive)—Which structure is to keep apart the political office of a Minister and the office of profit in the public service as per Article 59, paragraph 2, and Article 41 of the Consti-

tution (supra)—*And, moreover, to keep all matters pertaining to the competence of the Public Service Commission (such as appointments, promotions, transfers, etc.) outside the influence of the political government, of which the Minister is an important part.*

Public Service Commission—Its structure under Articles 122 to 125 inclusive of the Constitution—Is to keep apart the political office of a Minister and that of an office in the public service—And, moreover, to keep the competence of the said Commission viz. appointments, transfers, promotions etc. in the public service outside the influence of the political government.

Minister—Public Officer in the public service—Incompatibility between the two offices—Practical reasons of such incompatibility—See (supra).

Government—Public Service Commission—Latter's competence is outside the influence of the political government—See (supra).

Confidential Reports—Annual Confidential reports regarding public officers—See (supra).

Excess of zeal—Minister's excess of zeal deprecated.

The appellant-applicant, as well as the "interested parties" in these proceedings were at the material times holding the post of Welfare Officer in the Welfare Department of the Public Service, which came under the Ministry of Labour and Social Insurance. The respondent Commission (the Public Service Commission) decided on January 24, 1963 to fill all the existing vacancies in the post of Senior Welfare Officer, and promoted to that post the persons referred to as "interested parties", to the exclusion of and in preference to the appellant-applicant. This is the decision challenged by the recourse whereby the respondent-applicant claimed relief in the form of a declaration that the said decision of the respondent-Commission to promote four other Welfare Officers (the "interested parties") to the post of Senior Welfare Officer, in preference to and instead of, the appellant-applicant is *null and void* and of no effect whatsoever. After a long litigation the appellant's recourse was dismissed for the reasons given by the learned trial Judge, who dealt with the matter at first instance, in his decision reported in this Part at p. 20 *ante*. The applicant now appeals against that decision. It is common ground in this case that the decision of the respondent Commission, subject matter of

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the recourse, was materially affected by the contents of a confidential report on government Form Gen. 90, particularly the adverse observations of the Minister in his assumed capacity of countersigning officer as Head of the Department. This appeal falls to be determined on the short question of whether a confidential report as aforesaid, which obviously decided the fate of the appellant's-applicant's promotion, could, or could not have been made by the Minister, acting in the capacity of Head of the Welfare Department, which (capacity) the Minister had assumed and had actually performed for about a year prior to the report in question.

Article 59, paragraph 2, of the Constitution provides :

“ 2. The office of a Minister shall be incompatible with that of..... or with a public or municipal office or..... For the purposes of this paragraph ‘public office’ has the same meaning as in Article 41.”

And Article 41, paragraph 1, of the Constitution provides :

“1. The office of.....
.....

For the purposes of this Article ‘public office’ means any office of profit in the public service of the Republic or of.....the emoluments of which are under the control either of the Republic or of....., and includes any office in any public corporation or public utility body”.

On the other hand as far as Service Regulations (usually referred to as General Orders) are concerned, the position is equally clear. In chapter 11/2 of the 1955 issue of the general orders, under the heading : Annual Confidential Reports, one may see the machinery, the importance, and the effect of these reports, in the Public Service.

“ All promotions, transfers, granting of scholarships, etc., depend on the contents of the confidential reports of the officer concerned”, the Regulations expressly provide (General Orders II/2.3). Furthermore, they provide that “ confidential reports on all staff will be completed between the 1st April and 30th June of each year ” (General Orders II/2.11) ; and that “ reports not prepared by the Head of Department will be countersigned by him if he knows the officer concerned well enough to have formed an opinion of his capabilities and conduct. If not—and particularly in larger departments which are

dispersed over the island—the Head of Department will delegate countersigning authority to a responsible senior officer who knows the officer concerned well enough to perform this function usefully and with competence”. (General Orders II/2.9).

The Supreme Court in allowing the appeal :—

Held (1). The learned trial Judge decided the case upon the wrong view that there was nothing improper in the Minister himself acting as the counter-signing officer on a confidential report concerning an officer coming under his Ministry particularly where, as in this case, the post of the Head of Department in question was vacant at the time.

While it may well be that in certain circumstances a Minister could, perhaps, place his views regarding the candidates for a post in a Department of the Ministry in his charge, before the Public Service Commission, (which we do not purport to decide in these proceedings), there is no doubt in our mind that he cannot do so in substitution of the views of the Head of Department, (or the officer acting for him) as reflected in the annual confidential reports concerning a subordinate officer. The difference between the nature of the officer in the permanent public service, who is the Head of a Department of a Ministry, is so clear under the relative provisions of the Constitution ; under the Service Regulations : and in actual practice, that we find it unnecessary to elaborate at length on the point. See Articles 59, paragraph 2, and Article 41 of the Constitution, *supra*. See, also, the Service Regulations, usually referred to as General Orders *supra*.

(2) The practical reasons of such incompatibility between the office of Minister and the office of profit in the public service (v. Article 59, paragraph 2, and Article 41, of the Constitution, *supra*) are quite obvious. The one is an office of a political nature ; the other is the office of a specially qualified and well experienced permanent officers in the public service, in this case the office of the principal Welfare Officer, who is the Head of the Welfare Department, Ministry of Labour and Social Insurance. The very structure of the Public Service Commission in our Constitution (see Articles 122 to 125 inclusive) is to keep the two offices apart, and independent of each other. To keep moreover

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all matters pertaining to the competence of the said Commission (*viz.* appointments, promotions, transfers, etc.) outside the influence of the political government of which the Minister is an important part.

(3) On the other hand, we are clearly of opinion that the duties regarding "confidential reports" prescribed by the Service Regulations usually referred to as General Orders (*v. supra*), cannot be assumed in the present framework of the Republic of Cyprus, by a Minister.

(4) Thus, the position is quite clear both under the Constitution and under the Service Regulations (General Orders). We are unanimously of opinion that a Minister cannot assume the duties and responsibilities of the Head of Department in the Public Service, for the purposes of the annual confidential reports on Form Gen. 90 of the Service Regulations (*supra*) concerning officers serving in such departments.

(5) In the personal file of the appellant-applicant, there must have been not less than ten confidential reports, containing the evaluation of his personality and progress in the service, by different officers and different countersigning officers. His promotion should depend on these.

And yet none of these confidential reports was considered by the respondent Commission when dealing with his case in these promotions ; none, except for this "*ad hoc*" report, completed by a rival candidate for the same vacancy who signed as reporting officer, prepared well out of the time prescribed by the Service Regulations (*v.* General Orders II/2.11, *supra*).

No other confidential reports relating to the appellant-applicant were made available, or considered by the Commission ; and no explanation whatever for their absence appears on the record. As already stated, the Minister acted as countersigning officer in section III of the report, in his assumed responsibilities as Head of the Welfare Department of the Ministry in his charge and his adverse observations in his aforesaid assumed capacity affected materially the decision subject matter of the recourse.

(6) Therefore, the said decision of the respondent Public Service Commission was taken under a misconception of the legal position of the Minister regarding Annual Confi-

dential Reports in the Public Service ; and was taken without considering the proper confidential reports containing the views of the Head of Department in the Ministry : or the officer duly acting for him.

(7) In the circumstances, the appellant is entitled to the declaration sought. In the result, this appeal must be allowed ; and judgment in the recourse be entered for the applicant with a declaration accordingly.

*Appeal allowed. Each party
to bear his own costs.*

Per curiam: We do not feel any doubt regarding the genuineness of the Minister's plausible interest in the Welfare Department; and his zeal in its progress and efficiency. This case is still one more example of how easily excess of zeal can lead into illegality, and to the consequences following therefrom.

Appeal.

Appeal from the judgment of a Judge of the Supreme Court of Cyprus (Munir J.) given on the 7th January 1966, (Case No. 75/63) whereby Appellant's recourse against the decision of the Respondent Commission not to promote him to the post of Senior Welfare Officer was dismissed.

A. Triantafyllides for the Appellant.

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

Cur. adv. vult.

The Judgment of the Court was delivered by:-

VASSILIADES, J.: The President of the Court has asked me to explain his absence from the Bench to-day; and to say that having fully discussed the case with the other members of the Court he agrees with the substance of the Judgment which I am about to deliver as the Judgment of the Court.

This is an appeal under Section 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964, (No. 33/64) from the decision* of one of the Judges of this Court, dismissing Appellant's recourse under Article 146, against the Public Service Commission for relief, in the form of a declaration

*Note: Decision reported in this Part at p. 20 *ante*.

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that the decision of the Respondent-Commission to promote four other Welfare Officers named in the recourse, "or any one of them", to the post of Senior Welfare Officer, in preference and instead of Appellant, is "null and void and of no effect whatsoever". There is a further prayer in the recourse—apparently to supplement the principal prayer—for a declaration that the decision of the Respondent-Commission not to promote the Applicant to the post in question, is likewise null and void.

The recourse was based on seven different grounds which for the purposes of this Judgment may be classified in two categories: (a) grounds going to the legality of the decision; and (b) grounds founding the contention that the decision in question, was taken in excess or abuse of power.

After a long and strongly contested litigation over a period of more than two and a half years (May, 1963 to January, 1966) Appellant's recourse was dismissed for the reasons given in the careful and well considered decision of the learned trial Judge who dealt with the matter at first instance. The facts are fully stated in the Judgment and show that the Respondent-Commission having agreed at their meeting of September 14, 1962, to consider the filling of vacancies in the post of Senior Welfare Officer in the Public Service of the Republic, decided to call 14 candidates, including the Appellant, for interview. (vide page 102 H-1 of the record). Eventually by their decision of January 24, 1963, (Exhibit 28) the Commission "decided to fill all the existing vacancies" in the post of Senior Welfare Officer, and promoted to that post the persons referred to as "interested parties" in the Judgment appealed from, to the exclusion of the Applicant. This is the decision challenged by the recourse.

The Applicant, as well as the "interested parties" in these proceedings, were at the material time holding the post of Welfare Officer in the Welfare Department of the Public Service, which came under the Ministry of Labour and Social Insurance.

We find it unnecessary for the purposes of this Judgment, to go into detail regarding Appellant's merits, and his service, as compared to that of the officers selected for promotion in preference to him, which (details) appear fully in the decision of the trial Judge, as we take the view that this appeal

falls to be determined on the short question of whether a confidential report on Government Form Gen. 90, which obviously decided the fate of Appellant's promotion, could, or could not have been made by the Minister, acting in the capacity of Head of the Welfare Department which (capacity) the Minister had assumed and had actually performed for about a year prior to the report in question.

After hearing able argument on the point, from both sides, the position appears to us sufficiently clear at this stage, both under the provisions of the Constitution, and under the Service Regulations. We are unanimously of opinion that a Minister cannot assume the duties and responsibilities of the Head of Department in the Public Service, for the purposes of the annual confidential reports on form Gen. 90 of the Service Regulations, concerning officers serving in such Department. We are only concerned with such a report in this case; we are not concerned here with other functions of the Head of Department; or of the Minister in charge of the Ministry where the Department belongs.

The learned trial Judge on the other hand, decided the case upon the view that "there was nothing improper in the Minister himself acting as the counter-signing officer on a confidential report concerning an officer coming under his Ministry particularly where, as in this case, according to the evidence, the post of the Head of Department in question was vacant at the time". (Vide page 107 H-I of the record).

While it may well be that in certain circumstances a Minister could, perhaps, place his views regarding the candidates for a post in a Department of the Ministry in his charge, before the Public Service Commission, (which we do not purport to decide in these proceedings) there is no doubt in our mind that he cannot do so in substitution of the views of the Head of Department. (or the Officer acting for him) as reflected in the annual confidential reports concerning a subordinate officer. The difference between the nature of the office of a Minister and that of a superior officer in the permanent public service, who is the Head of a Department, is so clear under the relative provisions of the Constitution; under the Service Regulations; and in actual practice, that we find it unnecessary to elaborate at length on the point.

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Article 59(2) of the Constitution expressly provides that "the office of a Minister shall be incompatible with a public... office..."; which (public office) for the purposes of this Article, has the same meaning as in Article 41, where it means "any office of profit in the public service of the Republic the emoluments of which are under the control . . . of the Republic. . . ." In the Greek text of the Constitution, the position is even clearer. "Τὸ ἀξίωμα τοῦ ὑπουργοῦ εἶναι ἀσυμβίβαστον πρὸς τὸ . . . ἢ πρὸς πᾶν ἕτερον δημόσιον . . . ἀξίωμα ἢ θέσιν . . ." "Ὁ ὅρος δὲ "δημόσιον ἀξίωμα ἢ θέσις" εἰς τὰ ἄρθρα 59(2) καὶ 41 "περιλαμβάνει οἰονδήποτε ἀξίωμα ἢ θέσιν ἐπ' ἀμοιβῆς ἐν τῇ δημοσίᾳ ὑπηρεσίᾳ τῆς Δημοκρατίας . . . ἢ ἀμοιβῆ τοῦ ὁποίου ἐλέγχεται . . . ὑπὸ τῆς Δημοκρατίας . . ."

It has not even been suggested in this case, that the principal Welfare Officer who is the Head of the Welfare Department, whatever his style may be, is not the holder of an "office of profit in the public service of the Republic".

The practical reasons of such incompatibility between the two public offices in question, are obvious. The one is an office of a political nature; the other is the office of a specially qualified and well experienced permanent officer in the public service. The very structure of the Public Service Commission in our Constitution (Articles 122–125 inclusive) is to keep the two apart, and independent of each other. To keep moreover, all matters pertaining to the competence of the Commission (appointment, promotion, transfer etc.) outside the influence of the political Government, of which the Minister is an important part.

And as far as Service Regulations (usually referred to as the General Orders) are concerned, the position is equally clear. In Chapter 11/2 of the 1955 issue of the General Orders, under the heading: Annual Confidential Reports, one may see the machinery, the importance, and the effect of these reports, in the Public Service. "All promotions, transfers, granting of scholarships, etc., depend on the contents of the confidential reports of the officer concerned", the Regulations expressly provide (G.O. 11/2.3). Furthermore, they provide that "confidential reports on all staff will be completed between the 1st April and 30th June of each year" (G.O.11/2.11); and that "reports not prepared by the head of department will be countersigned by him if he knows the officer concerned well enough to have formed an opinion of his capabilities and conduct. If not—particularly in larger departments which are dispersed over the island—

the head of department will delegate countersigning authority to a responsible senior officer who knows the officer concerned well enough to perform this function usefully and with competence". (G.O. II/2.9). We are clearly of opinion that these duties cannot be assumed in the present framework of the Republic of Cyprus, by a Minister.

In this case, the Appellant was an officer in the public service since October 8, 1951; and held his present post of Welfare Officer since May 1, 1955, (vide Judgment at p. 102, B of the record). He worked as officer in charge of the District Welfare Office, Kyrenia, for four years (p.107, E); and was posted as District Welfare Officer, Famagusta, from August 22, 1960, to May 1, 1962 (p.33; and p.107, D). In April, 1958, a Departmental Selection Board recommended the Appellant for appointment to the post of Temporary Senior Welfare Officer (Emergency) and, in fact, he was seconded to that post with effect from the 1st January, 1958, and served until the 31st December, 1958, when the secondment was terminated as the post was not revoted in the 1959 Estimates. As was stated in the letter, dated 16th April, 1958 (exhibit 30), of the Director of Social Development to the then Establishment Secretary, recommending the promotion of the Appellant, "This will not mean any addition to our staff, and of course when the need for this temporary post is over, Mr. Frangoulides would revert to Welfare Officer unless by then there is a vacancy in the permanent establishment". This very material fact was never placed before, or considered by, the Public Service Commission when they were considering the filling of the vacancies in the post of Senior Welfare Officer between September, 1962 and January, 1963.

During the whole of his service the Appellant regularly filled in section I of form Gen. 90 and duly handed such form to his reporting officer for the next step in the process (p.93, E); the last Chief Welfare Officer who would normally be the countersigning officer to fill in and sign section II of the form, went off-duty in October, 1961, and resigned as from January, 1962 (p. 94, A); so in the personal file of this officer, there must have been not less than ten confidential reports, containing the evaluation of his personality and progress in the service, by different reporting officers, and different countersigning officers. His promotion should depend on these (G.O. II/2.3).

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And yet none of these confidential reports was considered by the Commission when dealing with his case in these promotions (p. 69, C-D); none, except for this "ad hoc" report, completed by a rival candidate (Chr. Michael) for the same vacancy, who signed as reporting officer, as described by the learned trial Judge (p. 106, A), prepared well out of the time prescribed by the Service Regulations (G.O. II/2.11), apparently for the purposes of the proceedings following the decision of the Commission "on the 14th September, 1962, to consider on the 20th September, the filling of vacancies in the post of Senior Welfare Officer and to call 14 candidates for interview, including the Appellant" (p. 102, H-I). No other confidential reports relating to the Applicant were made available, or considered by the Commission (p. 73, F); and no explanation whatever for their absence appears on the record.

We have already said that for the purposes of this Judgment, we find it unnecessary to enter into the contents of the report in question (*exhibit 21*); or into matters other than those arising from the fact that the Minister acted as countersigning officer in section III of the report, in his assumed responsibilities as Head of the Welfare Department of the Ministry in his charge which we have already dealt with.

It is common ground in this case, that the decision of the Commission, which is the subject matter of the recourse, was materially affected by the contents of the confidential report in question; particularly the observations of the Minister in his assumed capacity of countersigning officer as Head of the Department. The Commission's decision was, therefore, taken under a misconception of the legal position of the Minister regarding Annual Confidential Reports in the Public Service; and was taken without considering the proper confidential reports containing the views of the Head of Department; or the officer duly acting for him. "There seems to be no doubt (the learned trial Judge says in his Judgment at p. 107, F) that what has ultimately weighed with the Commission in deciding to promote the Interested Parties in preference to the Applicant, were the contents of the Applicant's confidential report (*exhibit 21*), in section III of which the Minister of Labour and Social Insurance has personally made certain observations concerning the Applicant, and which need not, in view of their nature

and in fairness to the Applicant, be set out in this Judgment”.

Indeed there can be no doubt that this is so. And in the circumstances we think that this is sufficient to vitiate the Commission’s decision in question. The Appellant is therefore entitled to the declaration sought.

Before concluding this case, however, we should like to add that in arriving at our conclusion we do not feel any doubt regarding the genuineness of the Minister’s plausible interest in the Welfare Department; and his zeal in its progress and efficiency. This case is still one more example of how easily excess of zeal can lead into illegality, and to the consequences following therefrom.

In the result, this appeal must be allowed; and Judgment in the recourse be entered for the Applicant with a declaration accordingly. Each party to bear own costs.

Appeal allowed.

Each party to bear own costs.

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