

1966
June 10, 20, 22,
Dec. 24

[TRIANTAFYLIDIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

KYRIAKOS
KYRIAKOU
and
THE REPUBLIC
OF CYPRUS,
THROUGH
THE PUBLIC
SERVICE
COMMISSION

KYRIAKOS KYRIAKOU,

Applicant.

and

THE REPUBLIC OF CYPRUS THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 220/65).

Public Officers—Appointments—Appointment to the post of Tugboat Engineer—Person appointed in disregard of the recommendations of the Head of Department—Also, under a material misconception viz. That the person appointed (interested party) possessed "a certificate in marine engineering" within the meaning of the relevant scheme of service—Whereas the certificate in which the respondent Commission relied in appointing the said interested party—instead of the applicant—, was not such certificate as required by the scheme of service—Therefore, the decision complained of has to be annulled—As having been taken under a material misconception, with the inevitable result that the said decision is contrary to law and in excess and abuse of powers—See, also, under the headings which follow.

Administrative Law—Discretion—Discretion exercised under a material misconception—Therefore, the decision so taken is contrary to law (see conclusions from the jurisprudence of the Greek Council of State 1929-1959 p. 269)—And in excess and abuse of powers—See, also, under the heading Public Officers above; and under the headings which follow.

Scheme of Service—"Certificate in marine engineering would be an advantage"—Meaning—In the context, the said "Certificate" is a certificate of academic qualification—And not, as the certificate relied on in the present case, a mere certificate of experience—See, also, above under Public Officers, Administrative Law.

"Certificate in marine engineering"—Meaning of the phrase in

*the context of the relevant scheme of service in this case—
See under Scheme of Service above.*

*Discretion—Discretionary powers—Exercise of discretion under a
material misconception—See above under Administrative Law.*

*Abuse of powers—Excess of powers—See under Administrative
Law above.*

Excess of powers—See above.

*Decision—Decision contrary to law—See under Administrative law
above.*

*Decision—Decision taken under a material misconception—Is a
decision taken contrary to law and, also, in excess or abuse of
powers—See under Administrative Law, above.*

*Head of Department—Recommendations of a Head of Department
—Concerning appointments in the public service—Disregard
of such recommendations by the Public Service Commission
—See under Public Officers above.*

*Public Service Commission—Disregard by the Commission of a
recommendation of a Head of Department concerning appoint-
ments in the public service—See under Public Officers above.*

By this recourse the applicant challenges the validity of a decision of the respondent Commission dated 9th September, 1965, and appointing the Interested Party Andreas Antoniou to the post of Tugboat Engineer in the Department of Ports, a post requiring knowledge of a technical nature. The *sub judice* decision was taken contrary to the recommendations of the Head of Department and, also, on the erroneous view that the said Interested party possessed "a certificate in marine engineering" (which, under the relevant scheme of service, would have been an advantage), whereas the certificate relied on was held by this Court not to be "a certificate" within the meaning of the relevant scheme of service.

In annulling the decision of the respondent Commission, the Court:—

Held, (1) The relevant scheme of service provides that a "certificate in marine engineering would be an advantage". In my opinion the only proper interpretation of the word "certificate", in the context of the whole scheme of service, is "a certificate of academic qualification"; such "certificate"

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is provided for as an additional qualification to "several years' experience in marine engineering works and experience as engineer in charge of a watch at sea", and, therefore, it cannot be a mere certificate of experience.

(2) The respondent Commission has regarded the Panamanian certificate of First Engineer (Exhibit 6) as being a "certificate in marine engineering" in the sense of the scheme of service and, therefore, as "an additional advantage".

(3) In my opinion such a view was erroneous because there can be no doubt that exhibit 6 (supra) is not a certificate of academic qualification.

(4) Such misconception is of paramount consequence in this case, because we are concerned here with an instance in which the respondent Commission disregarded the recommendations of a Head of Department, and, particularly, with regard to a post requiring knowledge of a technical nature (see *Marcoullides and The Republic*, 3 R.S.C.C. 30, at p. 34).

(5) In a case such as the present, where the erroneous view as aforesaid may well have tipped the scales in favour of the Interested Party, I cannot but hold that the relevant discretion of the Commission has been exercised under a most material misconception with the inevitable result that the *sub judice* decision is contrary to law (see Conclusions from the Jurisprudence of the Greek Council of State 1929-1959 p. 269) and in excess and abuse of powers.

(6) The Commission will have to reconsider the matter afresh in the light of the correct situation.

Sub judice decision annulled.

Cases referred to:

Marcoullides and The Republic, 3 R.S.C.C. 30, at p. 34.

Recourse.

Recourse against the decision of the Respondent to appoint the Interested Party to the post of Tugboat Engineer in the Department of Ports.

A. Triantafyllides for Applicant.

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

L. Clerides, for the Interested Party.

Cur. adv. vult.

The following judgment was delivered by:-

TRIANTAFYLLIDES, J.: By this recourse the Applicant challenges the validity of a decision of the Respondent Public Service Commission dated 9th September, 1965 and appointing the Interested Party Adreas Antoniou to the post of Tugboat Engineer in the Department of Ports (see *exhibit 2*).

The salient facts in this Case are as follows:-

On the 15th June, 1965, the Commission decided (see its minutes, *exhibit 8*) to advertise a vacancy in the post in question.

The relevant scheme of service is *exhibit 1*; the qualifications laid down therein are:- "Several years' experience in marine engineering works and also experience as engineer in charge of a watch at sea. A certificate in marine engineering would be an advantage".

The vacancy was advertised in the official Gazette on the 1st July, 1965. Three candidates applied, including the Applicant and the Interested Party.

The application of the Applicant for appointment is *exhibit 9* in these proceedings. It appears therefrom that he has no academic qualifications in marine engineering.

Since 1957 Applicant has held the post of Tug Fireman, in the public service, and has been serving on board the tug "Desdemona". The Applicant was the only candidate for the post of Tugboat Engineer who was, at the material time, in the public service. The other two candidates i.e. the Interested Party and a certain Chr. Papastylianou were outsiders to the public service.

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The then Ag. Director of the Department of Ports, and Applicant's Head of Department, Mr. A. Kantounas, forwarded the application of the Applicant to the Commission on the 12th July, 1965. In a covering letter of the same date, recommending Applicant for appointment (see *exhibit 3*), he stated that the Applicant had, since 1957, been acting, also, as Tugboat Engineer, though he was only substantively appointed as Tug Fireman; he explained that the Applicant had been acting as Tugboat Engineer, while the person holding such post, a certain Mr. A. Molozi-an, was absent on leave, or through illness, and that, also, he had been alternating, with the said Mr. Molozi-an, in doing duty as the Engineer of the tug, because it was humanly impossible for Mr. Molozi-an to be on duty all the time from 6 a.m. to midnight every day; this arrangement appears to have been anticipated when the Applicant was appointed in 1957 (see the letter of the Comptroller of Customs and Excise dated 25th January, 1957. *exhibit 7*).

The application of the Interested Party is *exhibit 10* in these proceedings; in the space intended for the statement of his qualifications the Interested Party wrote that he was the holder of a British Ministry of Transport Certificate for service on s/s "Empire Roach", as Chief Engineer from 1951 to 1961 (see *exhibit 5*) and that he was, also, the holder of a Panamanian certificate of First Engineer No. 42449 (see *exhibit 6*).

The "Empire Roach" is a small ship (716 tons gross) belonging to the British Ministry of Transport.

At the time of his application the Interested Party was working as the Chief Engineer on a tug, the "Ventura". As it appears from the evidence given in these proceedings he served as the Chief Engineer of this tug on its trip from the United Kingdom to Cyprus.

On the 23rd July, 1965, the Commission met to consider the candidates before it and decided to call all three of them to an interview on the 9th September, 1965. (see the minutes, *exhibit 11*).

On the 9th September, 1965, the candidates were interviewed by the Commission in the presence of Mr. Kantounas and it was decided to appoint the Interested Party.

It is common ground that at the meeting of the 9th Septem-

ber, 1965, Mr. Kantounas insisted on his recommendation in favour of the Applicant.

On the 15th September, 1965, Mr. Kantounas addressed a letter (see *exhibit 4*) to the Director-General of the Ministry of Communications and Works—(under which comes the Department of Ports)—suggesting that the Commission be asked to reconsider the matter, because in his opinion its decision to prefer the Interested Party, instead of the Applicant, was erroneous, for the reasons set out in such letter. It seems that, as a result, the Ministry did raise the matter, but the Commission did not alter its, already taken, decision in favour of the Interested Party.

During the proceedings in this Case a number of issues relating to the validity of the said decision of the Commission have been raised. It is not necessary to determine all of them, because on the material before the Court I have reached the conclusion that the sub jusice decision of the Commission, appointing the Interested Party to the Post of Tugboat Engineer, has to be annulled, in any case, in view of the fact that, as submitted by Applicant's side, it has been based on a material misconception. I am of this view for the following reasons:—

As it has been mentioned already in this Judgment, the relevant scheme of service (*exhibit 1*) provides that a "certificate in marine engineering would be an advantage". In my opinion the only proper interpretation of the word "certificate", in the context of the whole scheme of service, is "a certificate of academic qualification"; such "certificate" is provided for as an additional qualification to "several years' experience in marine engineering works and experience as engineer in charge of a watch at sea" and, therefore, it cannot be a mere certificate of experience.

It appears from the evidence of Mr. Demetrios Protestos, a member of the Commission, that the Commission has regarded the aforementioned Panamanian certificate of First Engineer, *exhibit 6*, as being a "certificate in marine engineering", in the sense of the scheme of service, and, therefore, as "an additional advantage"—in the words of Mr. Protestos.

In my opinion such a view was erroneous because there can be no doubt that *exhibit 6* is not a certificate of academic qualification. The Interested Party himself has told the

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Court that it has been issued by a consul of Panama on the basis of "certificates of discharge", i.e. certificates of previous work, which constitute *exhibit* 5. Also Mr. Kantounas, whom I regard as a person in a position—by virtue of his office—to express an opinion in the matter, has told the Court that *exhibit* 6 is not a certificate of competency, but an identity card; and this seems to me to be quite obvious, too, on a mere inspection of the document concerned. It is clear, therefore, that the Commission has been labouring on this point under a misconception regarding the true nature of *exhibit* 6.

Mr. Protestos has gone on to say in his evidence that even if *exhibit* 6 did not exist he would still regard the Interested Party as definitely superior to the Applicant. But this is only his own personal view, of course. Once it has been established that the Commission has erroneously regarded *exhibit* 6 as an advantage in the sense of the scheme of service, this Court cannot speculate as to whether or not a majority of the members of the Commission would have taken the same view as Mr. Protestos, in case *exhibit* 6 did not exist at all, and so, if they would have taken such a view, treat the misconception regarding the true nature of *exhibit* 6 as immaterial.

Such misconception is of paramount consequence in this Case, because we are concerned here with an instance on which the Commission has disregarded the recommendations of a Head of Department, and, particularly, with regard to a post requiring knowledge of a technical nature (see *Marcoulides and The Republic*, 3 R.S.C.C. p. 30 at p. 34); and although it is correct that it is only Applicant who was, at the material time, employed in the relevant Department, under Mr. Kantounas, it is clear, both from the evidence of Mr. Kantounas and from his letter of the 15th September, 1965, (*exhibit* 4), that he had also knowledge of the merits of the Interested Party. In a Case, such as the present, where the erroneous view, that the Interested Party possessed an additional academic qualification, may well have tipped the scales in his favour, contrary to the recommendations of the responsible Head of Department, I cannot but hold that the relevant discretion of the Commission has been exercised under a most material misconception, with the inevitable result that the sub judice decision is contrary to law (see Conclusions from the Jurisprudence of the Greek Council of State 1929–

1959 p. 269) and in excess and abuse of powers. It is, therefore, declared to be null and void and of no effect whatsoever.

The Commission has to reconsider the matter afresh in the light of the correct situation.

Regarding costs I have decided to award Applicant, against Respondent, £15.- towards costs.

*Sub judice decision annulled.
Order for costs as aforesaid.*

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