

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

CHRISTODOULOS
CHR. MARKOU
v.
REPUBLIC
(PUBLIC SERVICE
COMMISSION)

CHRISTODOULOS CHR. MARKOU

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION

Respondent.

(Case No. 64/67).

Public Officers—Promotions—Retrospective promotions and additional increments—Land Clerk 1st Grade—Discretion of the Public Service Commission properly exercised—Allegation of discrimination not upheld—See, also, herebelow.

Administrative and Constitutional Law—Recourse under Article 146 of the Constitution—Acts or decisions which can be made the subject-matter of such recourse—Article 146.1.—Confirmatory acts or decisions as distinct from the executory ones—A confirmatory act or decision cannot be the subject-matter of a recourse under Article 146—Only executory acts or decisions can be challenged thereby—What is a confirmatory act—A new decision, in the same matter, by the same organ, which is taken after examination of further legal considerations, but not after reconsideration in the light of new facts is still regarded in Administrative Law as confirmatory, and not executory.

Administrative and Constitutional Law—Recourse under Article 146 of the Constitution—Legitimate interest within Article 146.2—A person accepting without reservation an administrative act or decision no longer possesses an existing legitimate interest entitling him to make a recourse against such act or decision.

Recourse under Article 146 of the Constitution—Executory acts—Confirmatory acts—Legitimate interest—Article 146.1 and 2—See above.

Confirmatory Acts or Decisions—See above.

Executory Acts or Decisions—See above.

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Administrative Acts or Decisions—See above.

Promotions—See above.

By this recourse the Applicant, in effect, complains against the decision of the Respondent Public Service Commission not to make his promotion to the post of Land Clerk, 1st Grade, retrospective with effect from the 16th August, 1960.

On the 12th July, 1963, the Applicant who was then a Land Clerk, 2nd Grade, was offered promotion to the post of Land Clerk, 1st Grade, in the Department of Lands and Surveys, with effect from 1st August, 1963. The Applicant accepted this offer and by letter dated the 26th July, 1963, he was formally notified of his promotion as aforesaid. It appears that on the 27th July, 1963, the Applicant by letter requested that his promotion be made retrospective, at least, as from the 1st January, 1963,—as in the case of two other of his colleagues—because he had been performing the duties of Land Clerk, 1st Grade, as from the 1st January, 1959, requesting, also, that he should be given two increments in the salary scale of Land Clerk 1st Grade, in view of his having acted as Land Clerk, 1st Grade, for five years “without any increment whatsoever”.

On the 28th September, 1963, the Commission replied to the Applicant that it was not found possible to accede to his requests. The Applicant appears to have accepted the position at the time.

Three years later *viz.* on the 10th September, 1966 the Applicant, having been informed of the Judgment of this Court in the case *Kyprianides and The Republic*, (1965) 3 C.L.R. 519, wrote to the Commission requesting reconsideration of his case in the light of the aforesaid recent Judgment in the *Kyprianides* case. By letter dated the 20th January, 1967, the Respondent Commission informed the Applicant that, having considered his representations in the light of that Judgment, his request has been turned down “for the reason that there are several Land Clerks, 2nd Grade, in exactly the same position as yourself who undertook the duties of the higher post until the date of their promotion, as it is the normal practice for a 2nd Grade Officer to perform the duties of a 1st Grade Officer”.

Against this decision of the Commission the Applicant

filed the present recourse.

Dismissing the recourse, the Court:-

Held, (1). In my opinion this recourse has to fail, in the first place, because the Applicant was not entitled to make it, as not satisfying the requirement of possessing an existing legitimate interest, in the sense of Article 146.2 of the Constitution.

I take this view because on the 18th July, 1963, he accepted, without reservation at all, his promotion to Land Clerk, 1st Grade, with effect as from the 1st August, 1963. Even his letter of the 27th July, 1963, (*supra*)—which was in any case written after such acceptance—does not really amount to any reservation of his rights regarding the effective date of his promotion, but merely to a request for a reconsideration of such matter.

(2) It is well established principle of Administrative Law that if a person accepts an administrative act or decision he no longer possesses a legitimate interest entitling him to make a recourse against such act or decision (see Conclusions from the Jurisprudence of the Greek Council of State 1929-1959, p. 261).

(3)(a) Another difficulty in the way of the Applicant is the issue as to whether or not the *sub judice* decision of January, 1967, is confirmatory, only, of the previous decision of the Commission reached in 1963 (*supra*).

(b) It is not in dispute that a confirmatory decision, not being an executory one, cannot be made the subject-matter of a recourse for annulment (see Conclusions etc. *supra*, p. 241; *Papanicolaou (No. 1) and The Republic* (reported in this Part at p. 225 *ante*).

(c) I am inclined to agree with the submission of counsel for the Respondent that the decision complained of is merely confirmatory of the previous one. It is clear from the letter of the Applicant to the Commission of the 10th September 1966, (*supra*) that he was, essentially, relying on the same factual material which he placed before the Commission for the same purpose in 1963; his claim for reconsideration arose out of the decision of this Court in the *Kyprianides* case (*supra*), where the Court held that the Public Service Commission could, on promoting

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an officer, consider the question of granting to him increments in respect of past acting service in the said post.

(d) The Commission, therefore, when it was requested by the Applicant to reconsider his case was not called upon to examine new facts, but to reconsider the already—in 1963—known facts in the light of what was put forward as relevant case law, namely the *Kyprianides* case (*supra*). But a new decision, in the same matter, by the same organ, which is taken after examination of further legal considerations, and not after reconsideration in the light of new facts, is regarded, in Administrative Law, as confirmatory, and not executory, and, therefore, it cannot be made the subject-matter of a recourse (see Conclusions etc., *supra*, p. 241). Thus this recourse fails for this reason too.

(4) But, even if I were inclined to take a view contrary to the above, I would still find that this recourse should fail on the merits:-

(a) On the material before me I regard the decision of the Commission taken in January, 1967, as being reasonably open to it on the basis of all relevant considerations, and I cannot, therefore, disturb the exercise of its discretion.

(b) I find, also, that the Commission, quite rightly placed due weight on the fact that the Applicant was not in a class of his own, by himself, but that there were other Land Clerks, 2nd Grade, in the same position as he was.

(c) On the other hand, I can find no substance in the contention of the Applicant that he has been discriminated against.

(5) For all the foregoing reasons the recourse fails and has to be dismissed accordingly; but without any order as to costs, because it is clear that the Applicant's promotion to a post for which he was qualified was delayed considerably for causes for which the Applicant was not to blame.

*Application dismissed. No
order as to costs.*

Cases referred to:

Kyprianides and the Republic, (1965) 3 C.L.R. 519;

Papanicolaou (No. 1) and the Republic (reported in this Part at p. 225 *ante*).

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Recourse.

Recourse against the decision of the Respondent Public Service Commission not to make Applicant's promotion to the post of Land Clerk, 1st Grade, retrospective as from the 16th August, 1960, or at any rate, to grant him additional increments in the salary scale of Land Clerk 1st Grade in respect of his "acting" service as Land Clerk 1st Grade, for a number of years prior to such promotion.

L. Clerides, for the Applicant.

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

Cur. adv. vult.

The following Judgment was delivered by:-

TRIANTAFYLLIDES, J.: By this recourse the Applicant complains, in effect, against the decision of the Respondent Public Service Commission not to make his promotion to the post of Land Clerk, 1st Grade, retrospective as from the 16th August, 1960, or at any rate, to grant to him additional increments in the salary scale of Land Clerk, 1st Grade, in respect of his "acting" service as Land Clerk, 1st Grade, for a number of years prior to such promotion; these two complaints of the Applicant are, in substance, alternative to each other.

The salient facts of the matter are as follows:

On the 12th July, 1963, the Applicant who was a Land Clerk, 2nd Grade, was offered promotion to the post of Land Clerk, 1st Grade, in the Department of Lands and Surveys, with effect from the 1st August, 1963, his salary to be at the rate of £642 per annum, in the salary scale of £642 × 24—690 × 30—810 (see *exhibit 2*).

On the 18th July, 1963, the Applicant accepted this offer (see *exhibit 10*); and by letter dated the 26th July, 1963, he was notified formally of his promotion to the post concerned, with effect from the 1st August, 1963 (see *exhibit 3*).

On the 27th July, 1963, the Applicant wrote a letter to the

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Commission stating that he had been performing, as from the 1st January, 1959, and until his promotion, the duties of Land Clerk, 1st Grade, and that he had been qualified for promotion to Land Clerk, 1st Grade, since 1958. He requested, therefore, that his promotion be made retrospective, at least, as from the 1st January, 1963 — as in the cases of two other of his colleagues — and that he should be given two increments in the salary scale of Land Clerk, 1st Grade, in view of his having acted as Land Clerk, 1st Grade, for five years “without any increment whatsoever” (see *exhibit 4*).

On the 28th September, 1963, the Commission replied to the Applicant that, after careful consideration of his requests, it was not found possible to accede to them (see *exhibit 5*).

The Applicant appears to have accepted the position at the time; he did not make any recourse against the decision in question of the Commission.

It is convenient at this stage to examine what was the nature of the service of the Applicant, between 1959 and 1963, which he alleges amounts to acting as a Land Clerk, 1st Grade: It is quite clear, on the material before me, that the Applicant was never given a formal acting appointment as a Land Clerk, 1st Grade; no such appointment was ever published in the Official Gazette, as it had to be published, if made; but, there is no doubt, on the other hand, that the Applicant, being qualified for promotion to Land Clerk, 1st Grade, was assigned, from 1959 onwards, duties of a Land Clerk, 1st Grade, by means of an interdepartmental arrangement.

On the 10th September, 1966, the Applicant having been informed of the judgment of this Court in *Kyprianides and The Republic*, (1965) 3 C.L.R. 519, wrote to the Commission requesting reconsideration of his case (see *exhibit 6*); his letter reads as follows:-

“I have the honour to refer to my letter dated the 27th July, 1963 on the subject of the offer made to me for promotion to the post of Land Clerk 1st Grade in the Department of Lands & Surveys with effect from 1.8.1963, and request to kindly reconsider my claims, in the light of the judgment of the Supreme Court in case No. 132/63 (*Pantelakis Kyprianides v. the Republic of Cyprus*, through the Public Service Commission) reported in the *monthly publication of the judgments of the Supreme*

Court of Cyprus part 10 (October 1965), page 1104, that is to say:-

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- (a) that my promotion should have been made with effect as from 24.8.1959 the date when I was appointed by the Director of the Department of Lands & Surveys to perform the duties of Land Clerk 1st Grade, because in my view an injustice was done to me, as *inter alia*, I have been discriminated against by not being given a sufficiently retrospective promotion as has been done in other cases, and
- (b) that I may be granted all increments I am entitled to having regard to my acting service for almost five consecutive years in the post of Land Clerk 1st Grade”.

On this occasion he asked for his promotion to be made retrospective as from the 24th August, 1959; the reason, apparently, being that on the said date the then Acting Director of Lands and Surveys, in the exercise of his powers under section 2 of the Immovable Property (Tenure, Registration and Valuation) Law (then Cap. 231, now Cap. 224) appointed the Applicant to carry out certain duties on his behalf, which were delegated to Land Clerks, 1st Grade (see *exhibit 1*).

This letter of the Applicant, dated 10th September, 1966, was forwarded to the Commission under a covering letter of his Head of Department, dated 20th September, 1966 (see *exhibit 7*) which reads as follows:

“In forwarding the attached petition by Land Clerk 1st Grade Mr. Christodoulos Markou I have the following comments to make:-

- (a) A similar request was submitted to you through me by Mr. Markou on 13.8.63, immediately after his promotion to the post of Land Clerk 1st Grade. Your letter to him N.P. 3446 of 28.9.63 is relevant.
- (b) It is true that Mr. Markou, being then a 2nd Grade Clerk who had fully qualified for promotion to the 1st Grade, was asked early in 1959 to perform 1st Grade duties. However that was a

departmental arrangement and no acting appointment was made. He continued to perform 1st Grade duties up to the date of his promotion on 1.8.63.

- (c) As known, there was a ban on all promotions between the date of the signing of the Zurich agreements in February 1959, and the date of the establishment of the Cyprus Republic on 16.8.60.
- (d) There are several other Land Clerks 1st Grade who were exactly in the same position as Mr. Markou, as set out in (b) above".

It may be added, at this stage, that in support of what was stated in paragraph (d), above, a table containing particulars of other Land Clerks, 1st Grade, who were in the same position as the Applicant, was produced by counsel for Respondent during the hearing of this Case (see *exhibit 11*).

The Commission met and considered the case of the Applicant on the 13th January, 1967, and its relevant minutes read as follows (see *exhibit 9*):

"Date of promotion and salary of Chr. Markou, Land Clerk, 1st Grade, and P. D. Karavokyris, Land Officer.

In the light of the Supreme Court judgment in case No. 132/63 (Pantelakis Kyprianides v. the Republic), the officers named above applied:-

- (a) for the date of their promotion to be back-dated and
- (b) for the grant to them of additional increments.

Mr. Chr. Markou was promoted to the post of Land Clerk, 1st Grade, w.e.f. 1.8.63. In 1959 whilst being a Land Clerk, 2nd Grade, undertook the duties of the higher post until the date of his promotion.

Mr. P. D. Karavokyris was promoted to the post of Land Officer, w.e.f. 1.1.63. On 1.7.57, whilst being a Land Clerk, 1st Grade, was transferred from Larnaca to Kyrenia for duty as District Lands Officer and w.e.f. 1.1.59 he was appointed to act in that post. His acting appointment continued until the date of his promotion on 1.1.63.

The Commission considered carefully the officers' representations in the light of the judgment referred to above, and decided that,

- (a) Mr. Markou's request be turned down for the reason that there are several Land Clerks, 2nd Grade, in exactly the same position, as it is normal practice for a 2nd Grade Officer to perform the duties of a 1st Grade Officer, and
- (b) on promotion w.e.f. 1.1.63 Mr. Karavokyris be treated in the same way as Mr. Kyprianides i.e. he should be granted one increment above the initial salary of the scale attaching to the post of Land Officer, subject to the agreement of the Minister of Finance".

The Applicant was informed by letter, dated the 20th January, 1967, that his request had been turned down (see *exhibit 8*); this letter reads as follows:-

"I am directed to refer to your letter No. P.P. 10/47 of the 10th September, 1966, requesting that your promotion to the post of Land Clerk, 1st Grade, may be back-dated to the 24th August, 1959, and that you may be granted additional increments, and to inform you that the Public Service Commission has considered carefully your representations in the light of the Supreme Court's judgment in Case No. 132/63 and has decided that your requests be turned down for the reason that there are several Land Clerks, 2nd Grade, in exactly the same position as yourself who undertook the duties of the higher post until the date of their promotion, as it is the normal practice for a 2nd Grade Officer to perform the duties of a 1st Grade Officer".

Against this decision of the Commission the Applicant filed the present recourse.

In my opinion this recourse has to fail, in the first place, because the Applicant was not entitled to make it, as not satisfying the requirement of possessing an existing legitimate interest, in the sense of Article 146.2 of the Constitution.

I take this view because on the 18th July, 1963, he accepted (see *exhibit 10*), without reservation at all, his promotion to Land Clerk, 1st Grade, *with effect as from the 1st August*,

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1963. Even his letter of the 27th July, 1963, (*exhibit 4*) — which was, in any case, written after such acceptance — does not, really, amount to any reservation of the rights of the Applicant regarding the effective date of his promotion, but merely to a request for a reconsideration of such matter; just in case something would come out of it; and, consistently with such an attitude on the point, the Applicant made no recourse against the negative reply of the Commission (*exhibit 3*).

It is well established in Administrative Law that if a person accepts an administrative act or decision he no longer possesses a legitimate interest entitling him to make a recourse against it (see Conclusions from the Jurisprudence of the Greek Council of State 1929-1959, p. 261).

Another difficulty, in the way of the Applicant, has been the issue as to whether or not the *sub judice* decision, of the 13th January, 1967 (*exhibit 9*), is confirmatory, only, of the previous decision of the Commission reached, as aforesaid, in 1963; it is not in dispute that a confirmatory decision, not being an executory one, cannot be the subject-matter of a recourse for annulment (see Conclusions etc., *supra*, p. 241; also, *Papanicolaou (No. 1) and The Republic*, 1/68, not reported yet.*

Counsel for Applicant has submitted that on the 13th January, 1967, the matter of the date of taking effect of the promotion of the Applicant to Land Clerk, 1st Grade, was reconsidered afresh, and a new decision, not merely confirmatory of the previous one, was reached thereon by the Commission. On the other hand, counsel for Respondent has submitted that the decision of the Commission was, in substance, of a confirmatory nature only.

I am inclined to agree that counsel for Respondent is right in his submission, because it is clear from the letter of the Applicant to the Commission, dated the 10th September, 1966 (*exhibit 6*) — as a result of which the *sub judice* decision of the 13th January, 1967, was taken by the Commission — that he was, essentially, relying on the same factual material which he placed before the Commission, for the same purpose, in 1963; his claim for reconsideration arose out of the decision of this Court in *Kyprianides and The Republic (supra)*, where the Court held that the Public Service Commission

*Note: Now reported in this Vol. at p. 225 *ante*.

could, on promoting an officer, consider the question of granting to him increments in respect of past acting service in the said post.

The Commission, therefore, when it was requested by the Applicant to reconsider his case was not called upon to examine new facts, but to reconsider the already — in 1963 — known facts in the light of what was put forward as relevant case law, namely the *Kyprianides* case.

A new decision, in the same matter, by the same organ, which is taken after examination of further legal considerations, and not after reconsideration in the light of new facts, is regarded, in Administrative Law, as confirmatory, and not executory, and, therefore, it cannot be made the subject-matter of a recourse (see Conclusions, *supra*, p. 241). Thus, the Applicant's recourse fails for this reason, too.

But, even if I were inclined to take a view contrary to the above, I would still find that the Applicant's recourse should fail on the merits:-

On the material before me I regard the decision of the Commission, taken on the 13th January, 1967, as being reasonably open to it on the basis of all relevant considerations, and I cannot, therefore, disturb the exercise of its discretion.

In particular, I cannot accept the contention of the Applicant that the Commission did not pay due regard to the fact that the Applicant had been acting as a Land Clerk, 1st Grade, since 1959.

As already pointed out, the Applicant was not given an acting appointment; had such an appointment been made it would have been published, at the time, in the Official Gazette; and it was not; the Applicant was merely assigned duties pertaining to a Land Clerk, 1st Grade. The nature of his relevant duties, during the period 1959 to 1963, was fully placed before the Commission by the Applicant in his letter of the 27th July, 1963 (*exhibit 4*); and to this letter the Applicant referred in his letter to the Commission of the 10th September, 1966 (*exhibit 6*); the Commission in its minutes for the 13th January, 1967 (*exhibit 9*) refers expressly to the duties performed by the Applicant from 1959 until his promotion, in 1963; so I fail to see how it can be said that the Commission did not pay due regard to this aspect of the matter.

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In this connection the facts of this Case are entirely different from the facts of the *Kyprianides* case, which was relied upon by the Applicant, because in the said case an acting appointment had been made and duly gazetted in 1958, long before the substantive promotion, to the post concerned, of Mr. Kyprianides, in 1963.

Likewise, the Commission, for the same reason, properly differentiated between the case of the Applicant and the case of a Land Officer, Mr. Karavokyris, when considering together their claims to increments on the 13th January, 1967 (see its minutes *exhibit 9*).

I find, also, that the Commission quite rightly placed due weight on the fact that the Applicant was not in a class of his own, by himself, but that there were other Land Clerks, 2nd Grade, in the same position as he was. In adopting such an attitude the Commission relied on what it was stated in the letter, dated the 20th September, 1966, of the Head of Department of the Applicant (see paragraph *(d)* of *exhibit 7*), as it was perfectly entitled to do; and the correctness of this information is fully borne out by the particulars given, for the purpose, at the hearing of this Case (*exhibit 11*).

On the other hand, I can find no substance in the contention of the Applicant that he has been discriminated against by not being given a retrospective promotion or commensurate increments; and that the Commission has failed to examine duly his complaint regarding such discrimination.

In his letter of the 10th September, 1966, (see *exhibit 6*) the Applicant failed to give any particulars whatsoever of his complaint for discrimination; neither has he done so at the hearing before this Court. So neither the Commission could examine, at all, his said complaint, nor can he succeed in relation thereto in this Case.

A previous complaint of the Applicant for discrimination, in that he was not appointed retrospectively as from the 1st January, 1963, was made by his letter of the 27th July, 1963 (*exhibit 4*); it does not appear to have been upheld at the time and the Applicant did nothing more about it. It is to be noted that, by his letter of the 10th September, 1966 (*exhibit 6*), the Applicant was not complaining of the same matter, because he sought retrospective appointment as from the

24th August, 1959, and not merely as from the 1st January, 1963.

For all the foregoing reasons I find that this recourse fails and has to be dismissed accordingly; but without any order as to costs, because it is clear that for causes for which Applicant was not to blame, his promotion, to a post for which he was qualified, and duties of which he had been performing for a long time, was delayed considerably.

I would like to conclude by saying that the Applicant has lost this recourse but this does not mean that due regard may not be paid, in case of future promotions to a post higher than that of Land Clerk, 1st Grade, to his long experience in carrying out duties of Land Clerk, 1st Grade, since 1959, though he was substantially promoted thereto in 1963.

*Application dismissed.
No order as to costs.*

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