

1969

June 27

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LEONIDAS

THEOCHAROUS

v.

REPUBLIC

(PUBLIC SERVICE  
COMMISSION)

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LEONIDAS THEOCHAROUS,

*Applicant,*

*and*

THE REPUBLIC OF CYPRUS, THROUGH  
THE PUBLIC SERVICE COMMISSION,

*Respondent.*

(Case No. 62/68).

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*Public Officers—Promotions—Basis on which claims of officers to promotion should be considered—The Public Service Law 1967 (Law No. 33 of 1967) section 44(1)—Merit—Qualifications—Seniority—Merit should always carry more weight than either seniority or qualifications—Cf. section 46(1) of the said Law—See, also, herebelow.*

*Public Officers—Promotions—Recourse against promotions to the post of Senior Customs Guard—Applicant better qualified than Interested Parties and senior to one of them—Interested Parties recommended for promotion by Head of Department—Respondent Public Service Commission in effecting said promotions relied mainly on the merits of the candidates—Sub judice promotions reasonably open to the Respondent Commission—Recourse dismissed—See, also, herebelow.*

*Public Officers—Promotions—Appointments—Abolition of post of Customs Preventive Man by operation of Law No. 45 of 1967—Holder thereof (the Applicant in the present case) appointed to the post of Customs Guard and Messenger—Recourse by the latter in the present case concerning the subsequent promotions to the post of Senior Customs Guard, supra—New appointment of the Applicant to the post of Customs Guard and Messenger as aforesaid attacked in the present recourse against the said promotions, on the ground that the new post of Customs Guard and Messenger amounts to degrading the holder of the abolished post of Customs Preventive Man (i.e. the Applicant)—No evidence that new post is an inferior post—In any case the Applicant is not entitled at this stage to complain as above in view of his failure*

to attack the said abolition of his earlier post and the acceptance by him of the new post without reservation—Article 146.2 of the Constitution.

*Promotions—Basis on which claims to promotion in the public service should be considered—Merit—Qualifications—Seniority—Merit should always carry more weight than seniority and qualifications—Section 44(1) of the Public Service Law, 1967 (Law 33 of 1967)—Cf. section 46(1) of that law—See, also, above.*

*Public Service—Promotions—See above.*

The facts sufficiently appear in the judgment of the Court dismissing the instant recourse.

### **Recourse.**

Recourse against the validity of a decision of the Public Service Commission by virtue of which the Interested Parties were promoted to the post of senior customs guard in preference and instead of the Applicant.

*L. Papaphilippou*, for the Applicant.

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

*Cur. adv. vult.*

The following judgment was delivered by:

HADJIANASTASSIOU, J.: In this case, under Article 146 of the Constitution, the Applicant seeks to challenge the validity of the decision of the Public Service Commission to promote the Interested Parties, Messrs. Anastassis Repanas, Fikri Hassan and Panayiotis Aristidou to the post of senior customs guard.

The Applicant has joined the public service as a temporary customs preventive man since November 1, 1955; and on September 1, 1956, he became permanent customs preventive man with a salary scale of £344x18–470x21–£512.

On December 5, 1967, after re-organisation of the Customs & Excise Service, and in view of the abolition of the *post* of customs preventive man by Law 45/67, he was appointed to the post of customs guard and messenger w.e.f. December 15, 1967, having been recommended by Mr. Philippides, the head

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of the department, with the same amount of salary, that is to say, the sum of £512 per annum.

The first Interested Party has joined the service on February 10, 1954 as a customs guard, and on July 1, 1956, he became a permanent customs preventive man; the second was appointed as a temporary customs preventive man on November 1, 1955, and on September 1, 1956, he also became a permanent customs preventive man. The third one was appointed to the post of permanent customs preventive man in June, 1961; and on December 5, 1967, the three Interested Parties were promoted to the post of Senior customs guard as from August 1, 1967, having been recommended by the representatives as well as by the Ministry of Finance. I propose quoting extracts from the minutes of the meeting of the Public Service Commission dated December 5, 1967, for the purpose of filling vacancies in the post of senior customs guard.

“The post of Senior Customs Guard is a Promotion Post and experience is required in all the duties of Customs Guard. Such experience, by a note to the scheme of service, includes experience in the Customs Preventive Service.

The Representatives stated that having regard to the merits, qualifications and experience of members of the Preventive Service and Customs Guards and Messengers they recommended, proportionately, that 7 vacancies should be allocated to members of the Preventive Service and 14 to Customs Guards and Messengers.

The Commission, after considering the merits, qualifications and experience of members of the Preventive Service as reflected in their Annual Confidential Reports and after hearing the representatives' views on each one of them and bearing in mind the Ministry's recommendations, decided unanimously that the following officers be promoted to the post of Senior Customs Guard w.e.f. 1.8.67. .... Anastassis Repanas, Fikri Hassan and Panayiotis Aristidou.”

The scheme of service of senior customs guard has an approved salary scale (approved by the Council of Ministers—Decision No. 7058 of 28.9.67).

On February 26, 1968, the Applicant, feeling aggrieved

because he was not promoted to the post of senior customs guard, applied to this Court for the following relief:-

- (a) Declaration by the Court that the decision or act of the Respondent to promote Anastassis Repanas, Fikri Hassan and Panayiotis Aristides to the post of senior customs guard and/or instead of the Applicant is *null* and *void* and of no effect whatsoever,
- (b) that the appointment of the Applicant to the post of customs guard and messenger amounts to degrading of the Applicant.

The opposition was filed on May 3, 1968, and was based on the following grounds of law:-

- (a) The relief claimed under paragraph (B) of the application cannot be the subject of a recourse under Article 146 of the Constitution. In any case, Applicant does not qualify under paragraph (2) of the said Article in respect of the appointment complained of having unreservedly accepted the said appointment;
- (b) the decision complained of under paragraph (A) of the application was properly and lawfully taken after all relevant facts and circumstances were taken into consideration.

Counsel for the Applicant has contended that the Respondent, in effecting the promotions of the Interested Parties, have disregarded the seniority and merits of the Applicant, and thus have acted in excess or abuse of their powers. Counsel further argued that the post of customs guard and messenger is inferior to that held by the Applicant prior to his appointment and had no prospects for promotion.

Counsel for the Respondent, on the contrary, has contended (a) that the post of customs preventive man held by the Applicant has been abolished by Law 45/67, and as he has failed to attack by a recourse that decision, he cannot now complain under paragraph 2 of Article 146, having accepted without reservation the post of customs guard and messenger. Counsel further argued that from the material before the Public Service Commission it was reasonably open to them to promote the Interested Parties, taking into consideration the merits and the confidential reports, which were much better than those of the Applicant.

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I find it convenient to deal firstly with the first submission of counsel for the Applicant.

Section 44(1) of the Public Service Law (1967) is in these terms with regard to promotions:—

“ No officer shall be promoted to another office unless —

- (a) .....
  - (b) he possesses the qualifications laid down in the schemes of service for that office;
  - (c) he has not been reported upon in the last two annual confidential reports as unsuitable for promotion;
  - (d) he has not been punished during the preceding two years for any disciplinary offence of a serious nature.
- (2) The claims of officers to promotion shall be considered on the basis of merit, qualifications and seniority.
  - (3) In making a promotion, the Commission shall have due regard to the annual confidential reports on the candidates and to the recommendations made in this respect by the Head of the Department in which the vacancy exists.”

Section 46(1) reads:—

“ Seniority between officers holding the same office shall be determined by the effective date of appointment or promotion to the particular office or grade.”

It would be observed by looking at the comparative table, that the Applicant is only senior to the Interested Party Panayiotis Aristidou by a period of more than 4 1/2 years; and that his qualifications were better than the Interested Parties.

*I would like, to repeat once again, that the object of paragraph 1 of Article 125, includes not only the safeguarding of the efficiency and proper functioning of the Public Service, but also the protection of the legitimate interest of the public officers. It has to be remembered, therefore, that the paramount duty of the Commission in effecting appointments*

or promotions, is to select the most suitable candidate for the particular post, having regard to the totality of circumstances pertaining to each one of the qualified candidates, including length of service, which though always a factor to be considered, is not always the exclusive vital criterion for such appointment or promotion; quite rightly so, because the functions of a public office should be performed in the general interest of the public by the public officer best suited to perform such duties, particularly because of his merits, as reflected by the confidential reports and the recommendations of the head of the department or of a senior officer.

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In the light of all the material before me, and after going through the last two annual confidential reports of the parties, and in view of the fact that the Public Service Commission, in effecting the promotion of the Interested Parties, has relied mainly on the merits of the parties, as required by s. 44 of the Public Service Law, and this being a matter of the exercise of their discretion, I have reached the conclusion that from the totality of all the circumstances before them, it was reasonably proper and open to them to reach the conclusion to promote the Interested Parties in preference and instead of the Applicant, even though the Applicant was more senior to Aristidou.

I would, therefore, reach the conclusion that the Applicant has failed to show to this Court that the Public Service Commission has exercised their discretion in disregard of the law or in excess or abuse of power. For these reasons, I have decided not to interfere with the decision of the Public Service Commission because, I repeat, it was reasonably open to them from the totality of the circumstances of this case to promote the Interested Parties, relying mainly on the merit of each Applicant, which in my view, should always carry more weight than seniority and qualifications.

With regard to the second argument of counsel for the Applicant, having heard no evidence to the effect that the post which the Applicant is now holding is an inferior post, I would be inclined to be in agreement with counsel for the Respondent, that the Applicant, having accepted without reservation the new post, and having failed to attack the abolition of his earlier post, in my view, he is now too late to complain under the provisions of paragraph 2 of Article 146.

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With regard to the argument that the Applicant had better prospects for promotion, I would like to state, quoting from the well-known textbook of Kyriakopoulos on the Greek Administrative Law, 4th ed. vol. 'A' at p. 95:—

“ One cannot claim that he has a vested right to promotion simply because he has a simple expectation.”

But, even assuming for a moment that that would have been the position of the Applicant, I would like to stress once again, that this argument can no longer carry his case any further, once he had accepted the post of customs guard and messenger without any reservation as to his rights, and in view of the fact that his earlier post was abolished by law.

For the reasons I have endeavoured to explain, and in view of the fact that the Interested Parties were also recommended for promotion by the head of the department, I would, therefore, dismiss this application. In the particular circumstances of this case, I am not proposing to make an order for costs.

*Application dismissed;  
no order as to costs.*