

1982 October 19

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SOFOCLIS CHR. MICHAELOUDIS,

Applicant,

v.

THE EDUCATIONAL SERVICE COMMITTEE,

Respondent.

(Case No. 224/79).

5 *Educational Officers—Promotions—Assistant Headmaster Secondary Education—Merits—Qualifications—Applicant and one of the interested parties of equal merit and qualifications but two of the interested parties of slightly better merit and with higher qualifications—Seniority—Applicant and one of the interested parties of equal seniority but applicant senior by four years to one of the interested parties and by two years to the other—Seniority of applicant over interested parties could not by itself outweigh the better qualifications of the interested parties and their better merit—Applicant failed to establish any striking superiority over interested parties—Reasonably open to the respondent Committee to decide as it did on the totality of the circumstances before it.*

10
15 *Public Officers—Schemes of service—Qualifications—Open to an appointing authority to take into account any other qualification of a candidate which is of such a nature as to render him the most suitable candidate for appointment or promotion.*

20 The applicant in this recourse challenged the decision of the respondent Committee, which was taken on 22.2.1979, to promote to the post of Assistant Headmaster, Secondary Schools, the three interested parties in preference and instead of himself. The three interested parties were appointed to the above post by means of a decision of the Commission taken on 31.8.1973. This decision was annulled by the Supreme Court upon a recourse by the applicant on the ground that regulations 26, 28 and 29

of the Educational Officers Regulations 1972-1974, on the basis of which the said promotions were made, were ultra vires the Public Educational Service Law of 1969, section 35(2) and, therefore, the decision of the respondent Committee to promote the interested parties was declared null and void. On 22.2.1979 the Educational Service Committee met again to fill the vacancies created by the annulment by the Court of the previous promotions and at such meeting it decided to promote the same persons as on the previous occasion with retrospective effect as from 15.9.1973, but this time, it based its decision not on the Regulations which were declared as ultra vires, but on the law itself and in particular on section 35. In making the promotions the respondent Committee took into consideration the confidential reports, merits, qualifications and seniority of the candidates and the recommendations of the Inspector of Secondary Education, as it appears in the minutes of the meeting.

Regarding merits interested parties 1 and 3 had slightly higher gradings than the applicant, whereas interested party 2 had the same gradings as the applicant. Regarding qualifications interested parties 1 and 2 had higher qualifications than applicant who did not have higher qualifications than interested party 3. And regarding seniority applicant compared with interested party 1 was senior by four years and with interested party 2 was senior by two years but he had the same seniority with interested party 3.

Counsel for the applicant mainly contended:

- (a) That the respondent Committee misinterpreted and wrongly applied the Regulations which had been declared ultra vires.
- (b) That the sub judice decision was taken in violation to section 35(2) of Law 10/69, which provides that the claims of educational officers to promotion shall be considered on the basis of merit, qualifications and seniority.

Counsel submitted in this connection that the applicant should have been selected for promotion instead of the interested parties because in the case of the first two interested parties he was senior to

them and in the case of the third interested party he was better than him.

(c) That the applicant was ignored though, undoubtedly, he had better qualifications than the interested parties.

5 (d) That the sub judge decision was not duly reasoned.

Counsel submitted in this respect that as the seniority of the applicant was disregarded cogent reasons should have been given justifying such decision.

10 *Held*, (1) that it is clear from the minutes of the meeting at which the sub judge decision was taken that the respondent Committee in taking the sub judge decision bore in mind the decision in the previous recourse and relied on section 35 of the Public Educational Service Law of 1969 (Law 10/69) and not on the Regulations; that doing so, the Committee did not
15 act contrary to the decision of the Court that reliance could not be placed on regulations 26, 28 and 29 and it neither misinterpreted nor applied at all the said Regulations; accordingly contention (a) should fail.

20 (2) That the seniority of applicant over interested parties No. 1 and No. 2 cannot by itself outweigh the better qualifications of such parties and in the case of interested parties Nos. 1 and 3, their better merits, but on the contrary, such seniority is outweighed by the other elements pertaining to the candidates; that having regard to the totality of the circumstances that were
25 before the respondent Committee, the sub judge decision was reasonably open to it and that applicant has failed to establish any striking superiority over the interested parties; accordingly contention (b) should fail.

30 (3) That a scheme of service prescribes only the basic requirements for appointment or promotion to a particular post; that it is open, therefore, to an appointing authority to take into account any other qualification of a candidate which is of such nature as to render him the most suitable candidate for appointment or promotion; that there cannot be excluded
35 from the notion of "the most suitable" the essential consideration of how best will be served the interests of the specific branch of the public service in which a vacant post is to be filled; accordingly contention (c) should fail.

(4) That the matters taken into consideration by the respondent Committee appear sufficiently in the minutes of the meeting at which the sub judice decision was taken, and, furthermore, the personal files of the applicant and the interested parties were before the respondent Committee and also were produced at the hearing and it is apparent from the contents of same that the respondent Committee found that the seniority of the applicant where it came into play was outweighed by the other elements pertaining to the candidates and in the light of the judicial pronouncements in this respect, it was not necessary for the respondent Committee to give cogent reasons for reaching its decision; accordingly contention (d) should fail.

Application dismissed.

Cases referred to:

- Michaeloudes v. The Republic* (1979) 3 C.L.R. 56; 15
Ioannides and Another v. The Republic (1979) 3 C.L.R. 628
 at p. 638;
Constantinou v. The Republic (1980) 3 C.L.R. 551 at pp. 558-
 561;
Andreou v. The Republic (1979) 3 C.L.R. 379. 20

Recourse.

Recourse against the decision of the respondent whereby the interested parties were promoted to the post of Assistant Headmaster in preference and instead of the applicant.

- A. Markides*, for the applicant. 25
A. S. Angelides, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant in this recourse challenges the decision of the Educational Service Committee whereby Christodoulos Kleopa, Andreas Malekkos and Andreas Manoli were promoted to the post of Assistant Headmaster instead of the applicant.

The applicant was firstly appointed on probation in 1959 as a schoolmaster, Grade A in the secondary education for a period of two years. His appointment became permanent after the expiration of the probationary period. In the year 1969 he was upgraded to Grade B12 and ever since he possesses all necessary qualifications for the promotion to the post of Assistant Head-

master. On 30.8.1973, after the existence of certain vacancies in the post of Assistant Headmaster, the Educational Service Committee proceeded in accordance with regulations 26, 28 and 29 to prepare the lists of those eligible for promotion. The prospective candidates were classified in two categories, A. and B. Such lists came up for consideration before the Educational Service Committee at its meeting of the 31st August, 1973 at which it was decided to promote to the post of Assistant Headmaster as from 1st September, 1973, amongst others, the three interested parties in the present recourse. Applicant was not included in either A. or B. list of the promotees. The applicant filed a recourse against those promotions under No. 530/73 which was tried by a member of this Court and judgment was delivered on 27.1.1979. (See *Michaeloudis and another v. The Republic* (1979) 3 C.L.R. 56). The Court by its decision annulled the promotions on the ground that regulations 26, 28 and 29 of the Educational Officers Regulations 1972 - 1974 on the basis of which the said promotions were made, were ultra vires the Public Educational Service Law of 1969, section 35(2) and, therefore, the decision of the respondent Committee to promote the interested parties was declared null and void. On 22.2.1979 the Educational Service Committee met again to fill the vacancies created by the annulment by the Court of the previous promotions and at such meeting it decided to promote the same persons as on the previous occasion with retrospective effect as from 15.9.1973, but this time, it based its decision not on the Regulations which were declared as ultra vires, but on the law itself and in particular on section 35. In making the promotions the respondent Committee took into consideration the confidential reports, merits, qualifications and seniority of the candidates and the recommendations of the Inspector of Secondary Education, as it appears in the minutes of the meeting of the 22nd February, 1979, copy of which is attached to the Opposition, as Annex 'A'.

The applicant, as a result filed the present recourse, whereby he seeks the following remedies:

(1) Declaration of the Court that the refusal and/or omission of the respondent Authority to promote the applicant in the post of Assistant Headmaster retrospectively as from 15.9.1973, or at all, is void and of no legal effect.

(2) A declaration that the act and/or decision of the respondent Authority published in the official Gazette of the Republic dated 30.3.1979 at page 235 whereby the respondent Committee promoted retrospectively as from 15.9.1975 Christodoulos Kleopa, Andreas Malekkos and Andreas Manolis and/or either of them in the post of Assistant Headmaster instead of the applicant, is null and void and of no legal effect. 5

The legal grounds on which this recourse is based as set out therein, are as follows:

“All and each one of the said administrative acts and/or decisions and/or omissions are null and void and of no legal effect for the following reasons: 10

(1) They are illegal, and/or were taken in excess and/or abuse of power particularly in that —

(a) whereas in accordance with section 35(2) of Law 10/69 ‘the claims of educational officers for promotion are decided in accordance with their merits, qualifications and seniority’ and whereas in the case of the applicant all the requirements under section 35(1) were satisfied, the Respondent Committee ignored and/or failed to take into consideration the merits, and/or qualifications and/or seniority of the applicant. 15 20

(b) The Regulations by virtue whereof the Respondent Committee acted in order to reach the sub judge decision are null and void as being ultra vires. 25

(c) The Respondent Committee did not take properly or at all into consideration that the previous promotion of the same interested parties which was published in the official Gazette of the Republic of the 28th September, 1973 (page 820) was annulled by the Supreme Court in a recourse which was filed by the applicant in Case No. 530/73 and/or that the Respondent Committee completely misinterpreted and/or failed to take into consideration the legal result of the said annulling decision and/or acted in contravention thereto and/or of the general principles of Administrative Law and/or 30 35

5 Article 146 of the Constitution and that the Respondent Committee did not act on the basis of the legal and factual position as it existed on the 28th September, 1973 in the light of the annulling decision and/or that it took into consideration facts which it was not entitled to take.

(d) The Respondent Committee misinterpreted and/or wrongly applied the Regulations which it applied.

10 (2) The sub judice acts and/or decisions were taken in abuse of powers and/or contrary to the general principles of Administrative Law and, in particular, in that —

(a) they are not reasoned and/or not properly or sufficiently reasoned.

15 (b) Facts were taken into consideration which they should not have been taken.

(c) Facts which should have been taken into consideration were not taken into consideration.

(d) There was a misconception of facts.

(e) Proper investigation was not made.

20 (f) The applicant was ignored though, undoubtedly, he had better qualifications than the interested parties.”

The application was opposed and the legal ground adduced in support of the opposition was that the sub judice decision was lawful and the result of a due inquiry in the case.

25 I shall deal first with legal ground (1) and paragraphs (a), (b), (c) and (d) thereto. It is the contention of the applicant under paragraphs (b) and (d) that the respondent Authority misinterpreted and wrongly applied the regulations which had been declared ultra vires. In the case of *Sofoclis Michaeloudes v.*
 30 *The Educational Service Committee* (supra) the said Regulations were found to be ultra vires section 35 of Law 10/69 and as a result the decision based on such Regulations was annulled. In the present case, however, it is clear from the minutes of the meeting at which the sub judice decision was taken (Annex ‘A’
 35 to the Opposition), that the respondent Committee in taking the sub judice decision bore in mind the decision in *Michaeloudes*

case (supra) and relied on section 35 of the Public Educational Service Law of 1969 (Law 10/69) and not on the Regulations. By doing so, the Committee did not act contrary to the decision of the Court that reliance could not be placed on Regulations 26, 28 and 29 and it neither misinterpreted nor applied at all the said regulations. In the result, ground 1(b) and 1(d) have no legal foundation whatsoever. 5

As regards ground 1(c) the Court in *Michaeloudes* case did not consider the merits of the applicants, but disposed of the recourse on the ground of invalidity of a decision which was based on regulations which were found by the Court as ultra vires. Therefore, ground 1(c) also fails. 10

By ground 1(a) it is alleged that the sub judice decision was taken in violation of section 35(2) of Law 10/69. Counsel for applicant contended that the applicant, compared with the interested parties, was the best candidate for promotion under section 35(2) of Law 10/69, which provides that the merits, qualifications and seniority are the criteria to be taken into consideration in making a promotion. 15

The respondent Committee in taking the sub judice decision, as it appears from the minutes attached to the Opposition, dealt first with the decision of the Supreme Court in Recourses No. 530/73 (the previous recourse of the applicant) and No. 539/73 (of one Evdokia Evangelidou) which were tried together and proceeded as follows: 20

“The Committee having studied the material in the personal files and the confidential reports of the aforesaid schoolmasters as well as the two applicants, as they appear on the date on which the decision was annulled was taken (31.8.73), and having taken into consideration what is specified by section 35 of Law 10/69, that is merit, qualifications and seniority, as well as the confidential reports of the candidates and the recommendations of the Inspector of Secondary Education, has come to the conclusion that the aforesaid schoolmasters (Christodoulos Kleopas, Andreas Malekkos, Andreas Manoli, A. Panayi, A. Georghiou, A. Papanastassiou and E. Handriotis) satisfied those criteria better than the applicant”. 25 30 35

The respondent Committee having reached the above con-

clusion promoted the said persons in preference to the applicant, retrospectively as from 15.9.1973 when the vacancies existed.

Section 35 of the Public Educational Service Law (Law 10/69) on which the sub judice decision was based, read in 1973, which was the material time when the filling of the vacancies came up for consideration in the first instance, as follows:

“35.—(1) No educational officer shall be promoted to another office, unless—

- (a) a vacancy exists in that office;
- 10 (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;
- 15 (d) he has not been punished during the preceding two years for any disciplinary offence of a serious nature;
- (2) The claims of educational officers to promotion shall be considered on the basis of merit, qualifications and seniority.
- 20 (3) In making a promotion the Committee shall have due regard to the confidential reports of the candidates and to the recommendations made in this respect by the respective inspector.

(4)..... (5)..... (6).....”.

Since the gist of the argument of counsel for applicant is that the applicant should have been selected for promotion instead of the interested parties because in the case of the first two interested parties he is senior to them and in the case of the third interested party he is better than him, I shall proceed to consider the various factors concerning the applicant and the interested parties and find out whether the contention of the applicant that he was the best candidate for promotion, is founded.

Both applicant and interested parties have the qualifications required by the schemes of service for promotion to the post of Assistant Headmaster - Secondary Education (attached to the written address of counsel for respondents) and they possessed

them both at the time the sub judge decision was taken (22.2.79) and at the time when it takes effect (retrospectively) which is the 15.9.1973.

The requirements of the schemes of service are:

1. At least three years' service on the salary scale B.12. 5
2. At least successful service on the basis of the last two confidential reports.
3. A good knowledge of one of the prevailing European languages.
4. Post graduate education abroad or an additional educational degree, preferably in Paedagogics or subjects concerned with the administration of schools, is considered as an additional qualification. 10.

The applicant Sofoclis Michaeloudis: Appointed in 1959.

Grading (merits): 1968—1969—20 1/2 15
 1969—1970—20 1/2
 1970—1971—21 1/2

Qualifications: Philologist—He has also a certificate of the Ministry of Education for interdepartmental education obtained in 1972, to the effect that he had successfully attended and passed the examinations in a course for post-graduate education, organised by the Ministry of Education in co-operation with the Fulbright Institute, which lasted for one academic year, on the subject of Instruction and Vocational Guidance. *Service:* (In 1973) 14 years. 20

Interested party No. 1: Christodoulos Kleopa: Appointed in 1963. 25

Grading (merits): 1968—1969—22 1/2
 1972—1973—21 1/2

Qualifications: Philologist—Post graduate education in the American University of Beirut. *Service:* (In 1973) 10 years. 30

Interested party No. 2: Andreas Malekkos: Appointed in 1961.

Grading (merits): 1968—1969—20 1/2
 1972—1973—21 1/2

Qualifications: Philologist—Post graduate education in the 35

Institute of Education of the University of London. *Service*: (In 1973) 12 years.

Interested party No. 3: Andreas Manoli. Appointed in 1959.

5 *Grading (merits)*: 1968—1969—21 1969—1970—21 1/2
1970-1971—22 1971—1972—22

Qualifications. Philologist. No post graduate education. In 1972 (confidential report) there is a recommendation for his promotion by the Inspector. *Service*: (In 1973) 14 years.

10 Comparing the applicant with the three interested parties the following are to be observed:

15 *Merits*: Interested parties No. 1 and No. 3 have slightly higher gradings than the applicant, whereas interested party No. 2 has the same gradings as the applicant. Therefore, on merits, interested parties 1 and 3 have better merits. Regarding interested party No. 2 in the confidential report (1972—1973) of the Head of secondary education concerning him (exhibit 'D' attached to the written address of counsel for applicant), there is a note that in view of his specialised duties in the Ministry of Education as compared to these of the Assistant Head-
20 master, this interested party cannot be recommended for promotion. This statement, however, or opinion of the Head of Secondary Education cannot be considered as having the meaning of "unsuitable" for promotion as required by section 35(1)(c) of the Law. The grading of this party in the same
25 report for the same period is given in the annual report as 21 1/2.

30 The contention of counsel for applicant that when the first promotions in 1973 which were annulled, were made, interested party No. 3 was put on list 'B' which means that he was not one of the best candidates, is not material in the present case. The grading of candidates in those lists was made under the provisions of regulations 26, 28 and 29 and such Regulations were declared null and void as ultra vires the law and any of the provisions contained therein are ineffective and inapplicable in the present case. Even if we consider this as an indication
35 that interested party No. 3 was not considered at that time to be one of the best candidates and was included in list 'B' instead of list 'A', applicant in any case was not placed at all on either of those lists.

Qualifications: Interested parties No. 1 and No. 2 have higher qualifications than the applicant. They both have post graduate education abroad, interested party No. 1 in the American University of Beirut and interested party No. 2 in the Institute of Education of the University of London, whereas the applicant has only a certificate of post graduate course in Cyprus which under para. 4 of the schemes of service cannot be considered as additional qualification, as *only* post graduate education *abroad* could be considered as an additional qualification. Therefore, once the applicant does not possess a higher qualification as recognised under the schemes of service, he cannot be treated as having higher qualifications than interested party No. 3 who did not have a post-graduate course.

Counsel for applicant contended that the fact that at the time that interested party No. 2 was granted leave for post-graduate studies it was pointed out to him that this will not give him a right to promotion. It is true that such a right does not exist. But the fact remains that he possessed an additional qualification within the provisions of the schemes of service and this could not be disregarded by the E.S.C. when making the promotions.

Seniority: Applicant compared with interested party No. 1 is senior by four years and to interested party No. 2 is senior by two years. He has the same seniority with interested party No. 3.

The seniority, however, of applicant over interested parties No. 1 and No. 2 cannot by itself outweigh the better qualifications of such parties and in the case of interested parties Nos. 1 and 3, their better merits, but on the contrary, such seniority is outweighed by the other elements pertaining to the candidates.

In the case of *Ioannides and another v. The Republic* (1979) 3 C.L.R. 628 the seniority of the applicant over the interested parties by 14 months was found as not outweighing the better qualifications of those interested parties. The Court had this to say in its judgment (at p. 638, per A. Loizou, J.):

“Bearing in mind the totality of circumstances that were before the respondent Commission, I have come to the conclusion that the sub judice decision was reasonably open

to it. The exercise of its discretion in the circumstances was neither contrary to law, nor arrived under any misconception of fact and/or in abuse or excess of power. Applicant Ioannides has failed to establish any striking superiority over the two interested parties and his fourteen months seniority could not have been a decisive factor once not all relevant circumstances were equal.”

See, also, the decision in the case of *Constantinou v. The Republic* (1980) 3 C.L.R. 551 pp. 558—561, where it was decided that a seniority of three years and 10 months of the applicant over one of the interested parties and six years over the other was, obviously outweighed by the other elements pertaining to the candidates.

Applicant and interested party No. 3 are both equal with regard to seniority and qualifications (as already pointed out none of these two candidates possessed any special qualifications as set out in term 4 of the schemes of service), but interested party No. 3 is slightly better with regard to merits.

With the above in mind, and having regard to the totality of circumstances that were before the respondent Committee, I have come to the conclusion that the sub judice decision was reasonably open to it and that applicant has failed to establish any striking superiority over the interested parties.

Before concluding on the matter of comparison, I should like also to refer to the case of *Andreou v. The Republic* (1979) 3 C.L.R. 379 as to the discretion of the appointing organ in which Triantafyllides, P. had this to say at p. 388:

“In my opinion a scheme of service prescribes only the basic requirements for appointment or promotion to a particular post. It is open, therefore, to an appointing authority to take into account any other qualification of a candidate which is of such nature as to render him the most suitable candidate for appointment or promotion; and there cannot be excluded from the notion of ‘the most suitable’ the essential consideration of how best will be served the interests of the specific branch of the public service in which a vacant post is to be filled.”

This disposes, also, of ground 2(f).

Coming to ground 2(a) advanced by counsel for applicant concerning due reasoning, it has been argued by him that as the seniority of applicant was disregarded in this case, cogent reasons should have been given in the decision concerned justifying such decision. I find myself unable to agree with such contention. The matters taken into consideration appear sufficiently in the minutes of the meeting at which the sub justice decision was taken, and, furthermore, the personal files of the applicant and the interested parties were before the respondent Committee and also were produced at this hearing and it is apparent from the contents of same that the respondent Committee found that the seniority of the applicant where it came into play was outweighed by the other elements pertaining to the candidates and in the light of the judicial pronouncements in this respect, it was not necessary for the respondent Committee to give cogent reasons for reaching its decision.

With regard to the contentions in the remaining grounds 2(b), (c)(d) and (e), I find that such contentions cannot succeed. As I have already found on the totality of the material before the respondent Committee, and before me, the sub justice decision was reasonably open to the respondent Committee which has exercised properly its discretionary powers. The respondent Committee in arriving at its decision has acted neither under a misconception of law, nor of fact, nor in abuse or excess of power and it had taken into consideration all matters relevant to the candidates and the issue before it after a due and proper inquiry into the matter.

For all the above reasons, this recourse fails and is hereby dismissed, but in the circumstances of the case, I make no order as to costs.

*Recourse dismissed. No order
as to costs.*