

1983 February 28

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOS SMYRNIOS,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 447/80).

Public Officers—Appointments and promotions—First entry and promotion post—Qualifications—Holder of post in the immediately lower grade lacking qualifications for promotion but possessing qualifications for first entry—Whether he could be “promoted” to the immediately higher post—Section 30(1)(b) of the Public Service Law, 1967 and section 28 (definition of “appointment” and “promotion”). 5

Public Officers—Appointments and promotions—Judicial review—Principles applicable—Principles on which respondent Commission should act in making a selection from amongst candidates already in the service, or on contract, and outsiders. 10

Public officers—Appointments and promotions—Seniority—Not the decisive factor which governs promotions and it only prevails if all other factors are equal—Interested parties superior to applicant in merit and qualifications—His seniority alone could not tip the scales in his favour—Interview of candidates—Weight. 15

The applicant, an Accounting Officer 3rd Grade, was a candidate for promotion to the vacant post of Accounting Officer, 2nd Grade, a first entry and promotion post. The Public Service Commission by its decision dated 6th June, 1980, decided to fill the vacancies by promoting the five interested parties who were holding the post of Accounting Officer, 2nd 20

Grade and by appointing another interested party who was an outsider to the service. Hence this recourse by the applicant.

Counsel for the applicant mainly contended:

5 (a) that one of the interested parties, ("Kontopoulos") was not possessed of the qualifications prescribed in the scheme of service, and, therefore, he was not eligible.

10 (b) That the Commission disregarded and/or failed to give due consideration to applicant's striking seniority, as the other five interested parties had approximately equal merits with him.

Interested party Kontopoulos who has been in the service for many years, as a permanent Accounting Officer, 3rd Grade, 15 lacked the qualifications for promotion but possessed the qualifications for first entry. The confidential reports on the interested parties were better than those of the applicant and their qualifications were higher than those of the applicant. In the report of the Departmental Board the 20 applicant was hardly recommended for promotion whereas the interested parties were strongly recommended. Furthermore, the applicant was disfavoured by the opinion and recommendations of the Head of Department who was present at the interview.

25 *Held, (after dealing with the principles governing judicial review of appointments and promotions in the public service and the principles on which the respondent Commission should act in making a selection from amongst candidates already in the service, or on contract, and outsiders (vide pp. 129-130 post):*

30 *Held, (1) that though interested party Kontopoulos lacked the qualifications for promotion he had the required qualifications for first entry; and that, therefore, there is no fault in the description of "promotion" in the sub judge decision with regard to this interested party (see section 30(1)(b) of the Public Service Law, 1967 (Law 33/67) and section 28 (definition of 35 "appointment" and "promotion").*

(2) That seniority is not the decisive factor which governs promotions but one that should be duly taken into consideration

and it should only prevail if all other things were more or less equal; that since it is clear that the interested parties were superior to the applicant in merit and qualifications his seniority alone could not tip the scales in his favour; accordingly the recourse should fail. 5

Held, further, that though the impression created by a candidate at the interview is not the most safe way of assessing a candidate because, inter alia, of the necessarily rather short duration of each interview and of the undeniable possibilities of an adroit candidate making the Commission think more highly of him than he deserves or of a timid or nervous candidate not being able to show his real merit it does not appear from the minutes that the Commission gave undue weight to the impression created by this candidate at the meeting. 10

Application dismissed. 15

Cases referred to:

- Pattichis and Another v. Republic* (1968) 3 C.L.R. 374 at p. 381;
Republic and Another v. Aristotelous (1982) 3 C.L.R. 497;
Andreou v. Republic (1979) 3 C.L.R. 379;
Theodossiou v. Republic, 2 R.S.C.C. 44 at p. 48; 20
Georghiades and Another v. Republic (1970) 3 C.L.R. 257 at pp. 262, 263;
HjiSavva and Another v. Republic (1967) 3 C.L.R. 155 at p. 179;
Petrou v. Republic (1967) 3 C.L.R. 40 at p. 48;
Georghiades and Others v. Republic (1967) 3 C.L.R. 653 at p. 666; 25
HadjiConstantinou and Others v. Republic (1973) 3 C.L.R. 65 at p. 71;
Haviaras v. Republic (1981) 3 C.L.R. 492;
Partellides v. Republic (1969) 3 C.L.R. 480;
Triantafyllides and Others v. Republic (1970) 3 C.L.R. 235. 30

Recourse.

Recourse against the decision of the respondent to appoint and/or promote the interested parties to the post of Accounting Officer 2nd Grade in preference and instead of the applicant.

- C. Loizou*, for the applicant. 35
G. Constantinou (Miss), Counsel of the Republic, for the respondent.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The applicant is an Accounting Officer, 3rd grade. There were six vacancies of Accounting Officer, 2nd grade, to be filled. They were first entry and promotion posts. The Departmental Board in its report short-listed 24 candidates for appointment or promotion, including the applicant. The Public Service Commission at its meeting of 6.6.80 filled the vacancies but did not prefer the applicant, who, being aggrieved, filed this recourse whereby he seeks annulment of the said decision of the Public Service Commission published in the Official Gazette No. 1631 dated 26.9.80 under Nots. No. 1694 and 1695.

The applicant complains that -

- (a) One of the interested parties, namely Andreas Kontopoulos, was not possessed of the qualifications prescribed in the scheme of service, and, therefore, he was not eligible;
- (b) The Public Service Commission misdirected itself as to the seniority of the applicant; and,
- (c) The Commission disregarded and/or failed to give due consideration to his striking seniority, as the other five interested parties had approximately equal merits with him.

The salient facts of the case are in brief as follows:

The Acting Director-General of the Ministry of Finance by letter 6000/69/J/C/III dated 4.7.79 requested the Public Service Commission to take the necessary steps to fill, inter alia, one post of Accounting Officer, 2nd grade, and other posts which would become vacant by promotion of Accounting Officers, 2nd grade, to Accounting Officers, 1st grade. Thus, in effect the Commission was requested to fill six posts of Accounting Officer, 2nd grade. This is a first entry and promotion post.

Pursuant to s.31(1), the posts were advertised in the Official Gazette of the Republic of 2.11.79. After the submission of applications, the prescribed procedural steps were taken. The Departmental Board established for the purpose sent its report to the Commission recommending 24 candidates, i.e. 4 for each vacancy, as suitable for appointment/promotion. Twenty-

three of the candidates - one did not turn up - were interviewed by the Commission in the presence of the Deputy Accountant-General at the meetings of 4th, 5th and 6th June, 1980. The Deputy Accountant-General after the completion of the interviews expressed his impression and opinion about each one of the candidates interviewed. The Commission then reached its sub judice decision. The relevant part of the minutes of the meeting reads as follows:-

“Απελθόντος τοῦ Βοηθοῦ Γενικοῦ Λογιστοῦ, ἡ Ἐπιτροπὴ ἐχώρησεν εἰς τὴν ἐξέτασιν πάντων τῶν ἐνώπιον αὐτῆς στοιχείων, συμπεριλαμβανομένων τῶν αἰτήσεων τῶν ὑποψηφίων μετὰ τῶν σχετικῶν δικαιολογητικῶν, τῶν πορισμάτων τῆς Τμηματικῆς Ἐπιτροπῆς καὶ τῆς ἀποδόσεως κατὰ τὰς συνεντεύξεις μετὰ τῆς Ἐπιτροπῆς Δημοσίας Ὑπηρεσίας ἐνὸς ἐκάστου τῶν προσελθόντων ἐνώπιον αὐτῆς ὑποψηφίων. Ἐν προκειμένῳ ἡ Ἐπιτροπὴ ἀπέδωσε τὴν προσήκουσα βαρῦτητα εἰς τὰς ἐκφρασεῖσας ὑπὸ τοῦ Βοηθοῦ Γενικοῦ Λογιστοῦ ἀπόψεις.

Ἡ Ἐπιτροπὴ ἐμελέτησεν ὡσαύτως τοὺς Προσωπικοὺς Φακέλλους καὶ τὰς Ἐμπιστευτικὰς Ἐκθέσεις περὶ τῶν ὑποψηφίων Δημοσίων Ὑπαλλήλων, λαβοῦσα δεόντως ὑπὸ ὄψιν τὴν ἐν γένει ἐπίδοσιν αὐτῶν κατὰ τὴν διάρκειαν τῆς ὑπηρεσίας των, καθὼς ἐπίσης καὶ τὴν ἀρχαιότητά των.

Ἡ Ἐπιτροπὴ, ἀφοῦ προέβη εἰς ἀξιολόγησιν καὶ σύγκρισιν τῶν ὑποψηφίων βάσει τῆς ἀξίας, τῶν προσόντων καὶ τῆς πείρας αὐτῶν (συμπεριλαμβανομένης προκειμένου περὶ τῶν ὑποψηφίων Δημοσίων Ὑπαλλήλων καὶ τῆς ἀρχαιότητός των), κατέληξεν εἰς τὸ συμπέρασμα ὅτι οἱ κ.κ. Γεώργιος Τρύφωνος ΘΕΟΦΙΛΟΥ, Ἀνδρέας Γ. ΚΕΝΤΑΣ, Ἀνδρέας ΚΟΝΤΟΠΟΥΛΟΣ, Πέτρος ΜΑΡΑΘΕΥΤΗΣ καὶ Δημήτριος Κ. ΠΑΤΣΙΑΣ καὶ ἡ δνὶς Χριστίνα Ἀντωνίου ΘΩΜΑ ὑπερτεροῦν ἐν τῷ συνόλῳ τῶν ὑπολοίπων ὑποψηφίων καὶ εἶναι κατάλληλοι διὰ τὰς ὑπὸ πλήρωσιν θέσεις καὶ ἐπέλεξε τοὺς πρῶτους μὲν πέντε διὰ προαγωγὴν, τὴν τελευταίαν δὲ διὰ διορισμὸν εἰς τὴν μόνιμον θέσιν Λογιστικοῦ Λειτουργοῦ, 2ας Τάξεως, εἰς τὸ Γενικὸν Λογιστήριον”.

(“The Deputy Accountant-General having withdrawn, the Commission proceeded with the examination of all the particulars before it, including the applications of the

5 candidates with the relevant certificates, the conclusions of
the departmental Committee and the performance in the
interviews with the Public Service Commission of each of
those candidates who came before it. In this respect the
Commission gave the proper weight to the views expressed
by the Deputy Accountant-General.

10 The Commission studied also the personal files and the
confidential reports of the candidates in the Public Service,
having taken duly into consideration their overall per-
formance during their service as well as their seniority.

15 The Commission after having gone into evaluation and
comparison of the candidates on the basis of merit, quali-
fications and their experience (including, in the case of
candidates who are Public Officers, and their seniority)
came to the conclusion that Messrs. Georghios Tryfonos
Theophilou, Andreas G. Kentas, Andreas Contopoulos,
20 Petros Maratheftis and Demetrios K. Patsias and Miss
Christina Antoniou Thoma are superior to all other can-
didates and are suitable for the posts to be filled and has
selected the first five for promotion, and the last one for
appointment in the permanent post of Accounting Officer,
2nd Grade, in the Treasury”).

25 The principles governing the judicial review of appointments,
including promotions, in the public service are illustrated by
numerous decisions of this Court. It is the duty of the appoint-
ing authority to appoint/promote the most suitable candidate.
The first duty of this Court in reviewing promotions is to see
whether the appointing authority exercised its discretionary
30 power in conformity with statutory provisions and the rules and
requirements of administrative law generally, including good
faith. So long as the authority acted within those limits, the
Court cannot interfere; it cannot substitute its own opinion as
to the merits of the candidates for that of the appointing autho-
rity - (*Pattichis and Another v. The Republic*, (1968) 3 C.L.R. 374).

35 The Public Service Commission in effecting appointments or
promotions should 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 the exclusive vital criterion for promotion.

The Public Service is a most important factor for the efficient functioning of the State. The interests of the citizens in a modern State, whose activities are expanding, are best served by qualified, experienced and efficient civil servants. The object of our law in creating the category of first entry and promotion posts is to attract candidates from outside the service and at the same time give the opportunity for promotion to suitable persons already in the service. The existence of the institution of promotion posts, restricted to members of the service, safeguards adequately the interests of those in the service. On the other hand, there are posts entailing duties that require in the public interest opening up the ranks of the service to attract the best possible from a wider section of the public - (*The Republic and Another v. Aristotelous*, (1982) 3 C.L.R. 497).

Preference for those already in the service can never override the fundamental principle that the most suitable candidate has to be selected for appointment or promotion to a vacant post in the public service. A person in the service may, for the above reason, be bypassed in order to appoint an outsider to the service - (*Andreou v. The Republic*, (1979) 3 C.L.R. 379; *Theodossiou v. The Republic*, 2 R.S.C.C. 44, 48; *Georghiades and Another v. The Republic*, (1970) 3 C.L.R. 257, 262, 263; *Pattichis and Another v. The Republic*, (1968) 3 C.L.R. 374, 381; *Hjisavva and Another v. The Republic*, (1967) 3 C.L.R. 155, 179; *Petrou v. The Republic*, (1967) 3 C.L.R. 40, 48; *Georghiades and Others v. The Republic*, (1967) 3 C.L.R. 653, 666; *Hadji-constantinou and Others v. The Republic*, (1973) 3 C.L.R. 65, 71).

This principle applies to "first entry and promotion" posts with regard to those already in the service, and to "first entry" posts with regard to those on contract. Had it been otherwise, there would be no fair competition for the outsiders with those in the service or on contract. The paramount consideration is the selection of the most suitable candidates in the interests of the citizens and the State, and not the interest of the restricted class of persons already in the public service, be they actually in the service or on contract. As stated above, the interests of those in the service are safeguarded by the promotion posts.

1. *Qualifications of interested party Kontopoulos:*

This is a first entry and promotion post. The prescribed qualifications are set out in the Gazette of 2.11.79, Not. No. 1995.

- 5 The qualifications of Kontopoulos appear in his personal file. He did not pass Financial Instructions and Store Regulations and, therefore, he lacked the qualifications for promotion. A comparison between the qualifications for first entry and the qualifications possessed by this interested party
10 leaves no doubt that he had the required qualifications for first entry. He was in the service for many years as a permanent Accounting Officer, 3rd grade.

- Relevant on the matter are the definitions of "appointment" and "promotion" as set out in s.28 of the Public Service Law
15 No. 33/67. It reads as follows:-

"28. Διά τούς σκοπούς τού παρόντος Μέρους, έκτός ένν εκ τού κειμένου προκύπτη διάφορος έννοια—

- 20 'διορισμός' σημαίνει τήν άπονομήν θέσεως εις πρόσωπον μη τελοῦν έν τῇ δημοσία ύπηρεσία ή τήν άπονομήν εις ύπαλληλον θέσεως άλλης ή τῆς ύπ' αύτου μονίμως κατεχομένης, μη άποτελοῦσαν προαγωγήν, ό δέ όρος 'διορίζειν' έρμηνεύεται άναλόγως.

- 25 'προαγωγή' σημαίνει άλλαγήν εις τήν μονίμιον κατάστασιν ύπαλλήλου ήτις συνεπάγεται αύξησιν εις τήν άμοιβήν τού ύπαλλήλου ή συνεπάγεται τήν ένταξιν αύτου εις άνώτερον βαθμόν δημοσίας ύπηρεσίας ή επί μισθοδοτικῆς κλίμακος έχούσης ύψηλότερον άνώτατον όριον, είτε ή άμοιβή τού ύπαλλήλου αύξάνεται άμέσως διά τῆς τοιαύτης άλλαγῆς είτε μη, ό όρος 'προάγειν' έρμηνεύεται άναλόγως".

- 30 ("28. For the purposes of this Law, unless the context otherwise requires -

- 35 'appointment' means the conferment of an office upon a person not in the public service or the conferment upon an officer of an office other than that which he substantively holds, not being a promotion; and the expression 'to appoint' shall be 'construed accordingly;

'promotion' means any change in an officer's substantive

status which carries with it an increase in the officer's remuneration or which carries with it the emplacement of the officer in a higher grade of the public service, or on a salary scale with a higher maximum, whether the officer's remuneration at the time is increased by such a change or not; and the expression 'to promote' shall be construed accordingly"). 5

Having regard to the provisions of s.28, cited above, and s.30(1)(b), I see no fault in the description of "promotion" in the sub judge decision with regard to this interested party. 10

2. *Misconception as to the seniority of the applicant:*

Seniority is a relevant and material consideration that cannot but influence a decision taken by the Commission in promotions. A misconception of fact as to the seniority of a candidate exists whenever the influence thereof is material and such a misconception of fact leads to a contravention of the law and constitutes a ground of annulment - (*Haviaras v. The Republic*, (1981) 3 C.L.R. 492). 15

It was argued by learned counsel for the applicant that exhibit No. 17 - a table showing particulars of the Government Service and Qualifications of the applicant and the interested parties - wrongly reckons the seniority of the applicant in the post of Accounting Officer, 3rd grade, as from 1.1.70. The applicant entered the permanent service of the Greek Communal Chamber on 1.10.61. According to Law 12/65, whereby the officers serving with the Communal Chamber were emplaced in the public service and a decision of the Public Service Commission dated 20.1.67, the seniority of the applicant reckons as from 1.10.61 - (Personal file of applicant, Red 3 and 4). 20 25

Had the respondent Commission laboured under the misconception that applicant's seniority reckoned as from 1.1.70, this would have been a material misconception of fact and would constitute a ground for annulment of the sub judge decision. 30

Miss Constantinou for the respondents stated that the Commission had before it the personal files of the applicant and not this table, that was only prepared by the secretariat of the Commission after the filing of this recourse in order to facilitate counsel for the respondents to defend the recourse. The state- 35

ment of Miss Constantinou is well borne out from the table itself. It refers only to the applicant and the interested parties and not to all the candidates. It contains under the name of each one of the interested parties, including first entrant Christina Thoma: “(iii) Accounting Officer, 2nd Gr. (P) - 15.8.80 - To-date”. Definitely this entry could not have been made before the sub judice decision which was taken on 6.6.80. In the decision itself it is stated that the Commission took into consideration the seniority of the candidates after studying their personal files.

This ground fails.

3. Seniority as a Factor for Promotion:

The claim of officers to promotion is considered on the basis of merit, qualifications and seniority—(section 44(2) of Law 33/67). Seniority is not the decisive factor which governs promotions but one that should be duly taken into consideration and it should only prevail if all other things were more or less equal—*Partellides v. The Republic*, (1969) 3 C.L.R. 480, a Full Bench case followed invariably in all later decisions of this Court).

The seniority of the applicant and the interested parties already in the service, as emerging from their personal files, reckons as from:-

Applicant	1.10.61
A. Kontopoulos	15.11.61
D. Patchias	1. 8.63
Petros Maratheftis	2. 8.76
Andreas Kentas	2. 8.76
Georghios Theophilou	1. 4.77

I need not concern myself with Miss Thoma, a first entrant, who had such a striking superiority over all the candidates, being excellent in the Gymnasium, in her university studies and at the interview, that forced even advocate for the applicant to state in his final address that he withdraws the case against her appointment.

Merit - The picture of the applicant, as reflected in his confidential reports, is really a gloomy one. In his confidential report of 31.1.77 for the year 1976 the reporting officer assessed

him mostly as "Fairly Good" and the countersigning officer wrote that the applicant was exhibiting lack of interest in his work and he should make a really good effort before he could be considered for promotion. In the following year he was assessed "Good" with the remark that in the performance of his duties he lacked speed and methodicalness. In the report of 25.1.79 for the year 1978 the reporting officer assessed the applicant as "Very Good" and observed that during the period under review the applicant showed an all-round improvement in the performance of his duties. But the views of the countersigning officer, were - and significance should be attributed to this - that the assessment of the reporting officer was rather generous. The general observations of the reporting officer in the last report for the year 1979 were simply "axiopiito katalilios".

Interested party Kentas for 1978 was generally assessed "Very Good" and in the last report "Excellent". The recommendations of the reporting officer, with which the countersigning officer agreed, were that he was mature and able to undertake higher duties of accounting officer.

Interested party Patchias was assessed as "Excellent" in the reports for 1978 and 1979. In the report of 1978 we read: "He is very efficient, conscientious and hard working", and in the one for 1979: "He is capable to undertake the duties of the post of Accounting Officer, 2nd grade".

Interested party Theophilou was assessed between "Very Good" and "Excellent" with intelligence "above average". He is described as a promising officer.

Interested parties Maratheftis and Kontopoulos - Their confidential reports are better than those of the applicant.

Qualifications - The qualifications of the interested parties Kontopoulos, Maratheftis and Kentas are higher than those of the applicant, and Theophilou, besides other qualifications, he is a graduate of the Highest School of Economics and Business Science.

In the report of the Departmental Board the applicant is hardly recommended for promotion whereas the interested

parties were strongly recommended. Furthermore, the applicant is disfavoured by the opinion and recommendation of the Deputy Accountant-General who was present at the interview.

5 The impression created by a candidate at the interview is not the most safe way of assessing a candidate because, inter alia, of the necessarily rather short duration of each interview and of the undeniable possibilities of an adroit candidate making the Commission think more highly of him than he deserves or of a timid or nervous candidate not being able to show his real merit -
10 (*Triantafyllides and Others v. The Republic (Public Service Commission)*, (1970) 3 C.L.R. 235). It does not appear from the minutes that the Commission gave undue weight to the impression created by this candidate at the meeting.

15 I have gone carefully in every aspect of the case. It is clear that the interested parties are superior to the applicant in merit and qualifications. His seniority alone could not tip the scales in his favour.

In view of the above this recourse fails and it is hereby dismissed with no order as to costs.

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Recourse dismissed with no order as to costs.