

1984 April 12

HADJIANASTASSIOU, A. LOIZOU, DEMETRIADES, SAVVIDES, LORIS, JJ.]

THE PUBLIC SERVICE COMMISSION,

*Appellant,*

v.

MYRIANTHI PAPAONISIFOROU,

*Respondent.*

(*Revisional Jurisdiction Appeal No. 306.*)

*Public Officers—Promotions—Confidential reports—Countersigning Officer making an unauthorised comment against the reporting Officer without an effort on his part to evaluate and report on the candidate concerned—Such unauthorised comment a factor taken into consideration by the appellant Commission as weighing against the respondent—And influenced it in taking the sub judice decision—Appellant labouring under a material misconception of fact effect of which was to nullify its decision.* 5

*Administrative Law—Misconception of fact—Material misconception of fact.* 10

The respondent was a candidate for promotion to the post of Senior Welfare Officer. In deciding on the promotions the appellant Public Service Commission though of opinion that the respondent “had a strong claim for promotion in this case due to her excellent gradings during the last three years” having taken, inter alia, into consideration that for the last two years the countersigning officer, the Director of Welfare Services, has commented the gradings as indicating tendency or over-evaluation” it decided to promote the interested party in preference and instead of the respondent. 15 20

Upon a recourse by the respondent the trial Judge bearing in mind the fact, that the Commission took into consideration and gave undue weight to the remarks of the countersigning officer in the last two reports of the respondent, who, instead of expressing an opinion and evaluating the respondent, commented the reporting officer as showing tendencies of overevaluation, came 25

to the conclusion that the appellant laboured under a material misconception as to the facts and annulled the promotion of the interested party.

Upon appeal by the Commission.

5        *Held*, that this Court is not faced with a situation of possible  
differences in the evaluation of candidates by different reporting  
officers but with an unauthorised comment by the countersigning  
officer against the reporting officer, without an effort on his part  
10        to evaluate and report on the candidate concerned and it is  
apparent from the minutes of the meeting of the appellant, at  
which the sub judice decision was taken, that such unauthorised  
comment was a factor taken into consideration by the appellant  
as weighing against the respondent, and influenced them in  
15        taking such decision; and that, therefore, this Court agrees  
with the finding of the learned trial Judge that in the circum-  
stances of the present case the appellant laboured under a  
material misconception of fact the effect of which was to nullify  
its decision; accordingly the appeal must be dismissed.

*Appeal dismissed.*

20    Cases referred to:

*Georghiou v. Republic* (1976) 3 C.L.R. 74;

*Kousoumides v. Republic* (1967) 3 C.L.R. 438 at p. 449;

*Georghiades v. Republic* (1970) 3 C.L.R. 257 at p. 267;

*Aristocleous v. Republic* (1974) 3 C.L.R. 321 at pp. 325-326.

25    **Appeal.**

Appeal against the judgment of a Judge of the Supreme Court  
of Cyprus (Pikis, J.) given on the 26th February, 1983 (Revisional  
Jurisdiction Case No. 42/82)\* whereby appellant's decision to  
30    promote the interested parties to the post of Senior Welfare  
Officer in preference and instead of the respondent was annulled.

*A. Vladimirov*, for the appellant.

*A. Markides*, for the respondent.

*Cur. adv. vult.*

35    **HADJIANASTASSIOU J.:** The judgment of the Court will  
be delivered by Mr. Justice Savvides.

**SAVVIDES J.:** This is an appeal against the judgment of a  
Judge of this Court sitting in the first instance whereby the deci-

\* Reported in (1983) 3 C.L.R. 64.

sion of the appellant Commission to promote G. Kastellanos in the post of Senior Welfare Officer, was annulled on the application of the respondent.

The material facts as briefly mentioned in the judgment, are as follows:

The administration set in motion the machinery for the filling of five posts of Senior Welfare Officers. This was accomplished by the Director-General of the Ministry of Labour, inviting the Public Service Commission to take necessary steps in that direction. The position of Senior Welfare Officer belongs to the category of specialised posts under section 35(2) of the Public Service Law, 33/67, making necessary the setting up of a departmental committee for the examination of the merits and suitability of those eligible for appointment. The departmental committee examined the merits of those competing for appointment, about 20 Welfare Officers, who possessed the qualifications necessary for promotion. Their recommendations were embodied in two reports submitted to the Public Service Commission on the 4th and the 22nd day of September, 1981. The applicants and the interested party were among the 12 candidates recommended for promotion.

The Public Service Commission examined, on the 2nd October, 1981, matters relevant to the filling of the posts. They were aided in sifting the merits and qualifications of the candidates by the Director of Welfare Services Mr. Konis who passed on his views to the Commission as to the suitability of each candidate for appointment and comparative merits. He expressed preference for the four candidates that were eventually selected, including of course the interested party. The Public Service Commission met afresh on the 10th October, 1981, to complete its deliberation this time in the absence of the Head of the Department. A decision was taken promoting the four interested parties to Senior Welfare Officers. Promotions were limited to four and not five, as originally planned, because it was discovered that four were in reality the vacant posts for promotion.

The respondent in this appeal and Demetra Papantoniou, applicant in Recourse No. 487/81, challenged by their recourses the validity of the promotion of one of the four successful

candidates, namely, Georghios Kastellanos. Such recourses were heard together and whereas that of Demetra Papantoniou failed on the ground that she failed to establish any ground justifying interference with the decision of the Public Service Commission and was dismissed, the recourse of the respondent in this appeal was successful and as a result the sub judge decision in so far as the promotion of the interested party Georghios Kastellanos was concerned, succeeded and the decision of the appellant for his promotion was annulled.

10 In the minutes of the meeting at which the sub judge decision was taken, the reasons for selecting the four other candidates to the exclusion of the respondent in this appeal, are set out at some length. For the purposes of this appeal we shall refer only to the following extracts from the said minutes:

15 "The Committee after having considered the material before it, from the personal files of the candidates and the confidential reports about them, and having taken into consideration the conclusions of the Advisory Committee and also the recommendations of the Head of the Department of Social Service, came to the conclusion that Messrs. Antonis Hj. Christou, Georghios Kastellanos, Christakis Pavlou and Miss Malamo Neophytou were the most suitable on the basis of the totality of the established criteria (merit, qualifications, seniority), and elected them as the most suitable for promotion in the post of Senior Welfare Officer

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Furthermore, the Committee noticed that Myrianthi Papaonisiforou had a strong claim for promotion in this case due to her excellent gradings during the last three years. Having taken, however, into consideration—

- 30 (a) that for the last two years the countersigning officer, the Director of Welfare Services, has commented the gradings as indicating tendency of over-evaluation,
- (b) the fact that Miss Papaonisiforou follows in seniority the candidates recommended by the Director, having entered in the service much later, that is on the 1st
- 35 May, 1966, and

(c) that all those recommended by the Director have high gradings, the Committee considered that there is no reason to disagree with the recommendations of the Head of the Department. For this reason he elected the four recommended as the most suitable for promotion than Miss Papaonisiforou and all the rest who were recommended by the Departmental Committee". 5

The learned trial Judge bearing in mind the fact, which was obvious from the record, that the appellant took into consideration and gave undue weight to the remarks of the countersigning officer, in the last two reports of the respondent, who, instead of expressing an opinion and evaluating the respondent, commented the reporting officer as showing tendencies of over-evaluation, came to the conclusion that the appellant laboured under a material misconception as to the facts and annulled the promotion of the interested party. The learned trial Judge had this to say in his judgment: 10 15

"..... we must resolve whether the misconception of the Public Service Commission, as to the merits of the applicant arising from the unauthorised comments of the countersigning officer, was material in the sense that had the Commission not taken the remarks into account, there is a real probability they would arrive at a different decision. The ultimate question is whether we can predict what the decision of the Public Service Commission would be had it not been for the aforementioned misconception. If such a decision can be envisaged with a degree of certainty from the reasoning of the decision and can be asserted that the decision would be the same, the misconception cannot be deemed to have been material. If the opposite is the case and we are unable to depict what their decision would be, the answer must be that the misconception was material and, as such, it vitiates the decision taken. I am totally unable to make any predictions about what the decision of the respondents would be had it not been for the misconception under which they laboured ..... In my judgment, 20 25 30 35

the decision of the Commission was taken while they laboured under a material misconception as to the facts and must, consequently, be annulled so far as the applicant and the interested party are concerned".

5 There is no doubt that it is open to the Public Service Commission when examining confidential reports to give due weight to the fact that different Reporting Officers cannot be expected to make their assessments by using identical standards and that some allowance for possible difference in evaluations of candidates by different reporting officers, may have to be made. In *Odysseas Georghiou v. The Republic* (1976) 3 C.L.R. 74, the following was said at page 81:

15 "We refused to allow the above evidence to be adduced because we were not prepared to accept, as a matter of principle, that it is properly open to the Commission to evaluate the contents of confidential reports by reference to the Reporting or Countersigning Officers making such reports, as in such a case there would have to be embarked upon inquiries as to how each one of them assesses the performance of his subordinates. In our opinion a public officer who has been appointed to a post among the duties of which is the making of confidential reports about subordinate officers has to be regarded as having been found, by the appointing authority, to be responsible, experienced and reliable enough to make, more or less, accurate assessments of such subordinates; consequently, we cannot accept that it would be legitimately open to the Commission to say that because it knew that Mr. Kythreotis did not ever make a 'special confidential report', it was, therefore, entitled to disregard the 'special confidential reports', made by Mr. Vryonides in favour of the appellant.

25 Moreover, such a course would, in our view, be inconsistent with section 44(3) of the Public Service Law, 1967 (Law 33/67), under which the Commission is required to pay due regard to the annual confidential reports concerning the candidates before it, because it could make it possible for the Commission to disregard practically completely a confidential report, or even a 'special confidential report', if it happened to have a poor opinion about the particular

Reporting or Countersigning officer; this would amount to introducing into the application of section 44(3) a subjective element which might divert such application down a very slippery path indeed.

We do agree that it is open to the Commission—as well as to an administrative Court trying a recourse—to give due weight to the fact that different Reporting Officers cannot be treated as having made their assessments by using identical standards and that, therefore, some allowance may have to be made for possible differences in the evaluation of various candidates when they have not been reported on by the same Reporting or Countersigning Officer (see, inter alia, *Kousoulides and Others v. The Republic*, (1967) 3 C.L.R. 438, 449, *Georgiades and Another v. The Republic*, 1970) 3 C.L.R. 257, 267, *Aristocleous and Another v. The Republic*, (1974) 3 C.L.R. 321 at pp. 325–326); but such an approach falls far short of the far more radical one that the respondent's side has attempted to introduce in the present case".

In the present case we are not faced with a situation of possible differences in the evaluation of candidates by different reporting officers but with an unauthorised comment by the countersigning officer against the reporting officer, without an effort on his part to evaluate and report on the candidate concerned and it is apparent from the minutes of the meeting of the appellant, at which the sub judge decision was taken, that such unauthorised comment was a factor taken into consideration by the appellant as weighing against the respondent, and influenced them in taking such decision. We agree with the finding of the learned trial Judge that in the circumstances of the present case the appellant laboured under a material misconception of fact the effect of which was to nullify its decision.

Before concluding we wish to state that once this recourse has been decided on the issue of material misconception of fact, we find it unnecessary to make any observations on any comments made by the learned trial Judge in his judgment as to merit and seniority of the respondent in comparison with the interested party and we shall avoid to make any comments ourselves in this respect in this appeal, as we wish to let the

appellant, when reconsidering the promotion to proceed with the examination and selection of the best candidate for promotion, unimpeded from any comments which may affect its decision.

- 5 In the result the appeal fails and is hereby dismissed with no costs.

*Appeal dismissed with no order  
as to costs.*