

1984 April 11

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANTONIS SKAPOULLIS,

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, AND/OR  
THE PUBLIC SERVICE COMMISSION,

*Respondents.*

(Case No. 88/83).

ANDREAS KYPRIANOU,

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, AND/OR  
THE PUBLIC SERVICE COMMISSION,

*Respondents.*

(Case No. 99/83).

*Public Officers—Promotions—Annual confidential reports—Six monthly reports on officers serving on probation—They may, in the absence of annual confidential reports, be used to evaluate the performance of the candidates during their short period of service—And existence of annual confidential reports is not a prerequisite for promotion if a candidate possesses the qualifications laid down in the scheme of service and fulfils all other requirements—Section 44(1)(c) of the Public Service Law, 1967 (Law 33/67).*

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*Public Service Law, 1967 (Law 33/67)—Construction of section 44(1)(c) of the Law.*

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*Public Officers—Promotions—Schemes of service providing for “four*

*years experience out of which at least three in the public service”  
—Notion of “experience”—“Experience in the public service”  
should be distinguished from “service”—Whether service on  
contract satisfies above requirement.*

- 5 *Administrative Law—Misconception of fact—Administrative Judge  
in doubt regarding the existence or not of factual misconception  
—Entitled to annul the relevant administrative action in order  
to enable the Administration to ascertain the correct facts in a  
manner leaving no room for doubt.*
- 10 *Public Officers—Promotions—Public Service Commission—Labouring  
under a misconception as to the qualifications of one of the inter-  
ested parties—His promotion annulled.*

15 These recourses were directed against the decision of the  
respondent Commission to promote the interested parties to  
the post of Data Processing Officer.

Counsel for the applicants mainly contended:

- 20 (a) That the sub judge decision was contrary to section  
44(1)(c)\* and (3)\*\* of the Public Service Law, 1967  
(Law 33/67) in that two of the interested parties had  
no confidential reports for the last two years.
- (b) That the interested parties did not have the quali-  
fications of “at least 4 years experience out of which  
at least three in the public service”, envisaged by the  
schemes of service.
- 25 (c) That the Commission acted under a misconception  
of fact because it compared the annual confidential  
reports of permanent officers with the 6-monthly  
reports of officers on probation and because it wrote  
in its decision that interested party Aristidou was  
30 the holder of a University Degree whereas in fact he  
was the holder of a Diploma of Programmer of the  
Ministry of Education of Greece and a Diploma of  
the School of Statistics (Highest Industrial School)  
of Pireaus.

\* Section 44(1)(c) provides that no officer shall be promoted to another office unless he has not been reported upon in the last two annual confidential reports as unsuitable for promotion.

\*\* Section 44(3) provides that in making a promotion the Commission shall have due regard to the annual confidential reports on the candidates.

Contention (a) was based on the fact that in respect of two of the interested parties, who were serving on probation, there were only 6-monthly reports in accordance with section 43(2) of Law 33/67 but no annual confidential reports; and contention (b) was based on the fact that the interested parties were serving in the Data Processing Department on contract.

*Held*, (1) that the true construction of s.44(1)(c) of Law 33/67 is that an officer, who was reported as unsuitable for promotion in any of the last two annual confidential reports, is not eligible for promotion; that the existence of two annual confidential reports is not a prerequisite for promotion if the applicant possesses the qualifications laid down in the scheme of service for that office and fulfils all other requirements; that had it been otherwise then all officers on probation would be excluded from promotion; that this is not the object of the legislator and if there is any ambiguity—and there is none—this is determined in favour of the subject—the civil servant: accordingly contention (a) must fail.

(2) That “experience” contains the notion of knowledge acquired through acting in a certain capacity; that “experience in the public service” should be distinguished from “service” and that it may be acquired by discharging duties; that it is not necessary to actually hold a post in a substantive capacity; that had the intention been as submitted by counsel, it would have been clearly expressed by the use of the word “service” in place of “experience”; that all five candidates possessed the required qualifications at the material time, i.e. within one week of the receipt by the Public Service Commission of the request for filling these promotion vacancies, i.e. on 8.9.1982; and that the Departmental Board, and ultimately the Commission, rightly considered the interested parties and the applicant Kyprianou as candidates satisfying the requirements under the scheme of service and the Law; accordingly contention (b) must fail.

(3) That the confidential reports should be regarded as constituting part of the overall picture of the merits of each candidate which the Commission has to weigh as a whole; that though the confidential reports of the officers on probation are not prepared *stricto sensu* for the same purpose as annual con-

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fidential reports of the permanent officers, yet they are a picture of the merits of an officer; that they may, in the absence of annual confidential reports, be used to evaluate the performance of the candidates during their short period of service; and that there is nothing wrong in taking them into consideration in the evaluation of a candidate for promotion.

(4) That a misconception as to facts may consist of either the taking into account of non-existing facts or the non-taking into account of existing facts; that the content of the relevant part of the decision of the Commission betrays that it was labouring under a misconception as to the qualifications of interested party Aristidou; that, therefore, the factual position on which the decision with regard to Aristidou was based, was definitely incorrect in a material respect—his qualifications—notwithstanding the fact that the personal files were before the Commission; that when an administrative Judge is in doubt regarding the existence or not of factual misconception, he is entitled to annul the relevant administrative action in order to enable the Administration to ascertain the correct facts in a manner leaving no room for doubt; accordingly the decision to promote interested party Aristidou must be annulled and the recourse will partly succeed.

*Promotion of interested party  
 Aristidou annulled. Otherwise  
 recourse dismissed.*

Cases referred to:

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*Republic v. Aristotelous and others* (1982) 3 C.L.R. 497;  
*Papupetrou v. Republic*, 2 R.S.C.C. 61 at p. 70;  
*Ioannides v. Republic* (1972) 3 C.L.R. 318 at pp. 324–325.  
*Mikellidou v. Republic* (1981) 3 C.L.R. 461;  
*Christides v. Republic* (1966) 3 C.L.R. 732;  
*Jordanou v. Republic* (1967) 3 C.L.R. 245;  
*Evangelou v. Republic* (1965) 3 C.L.R. 292;  
*Ioannou v. Republic* (1977) 3 C.L.R. 61;  
*Theodossiou v. Republic*, 2 R.S.C.C. 44 at p. 47.  
*Pattichis and Another v. Republic* (1968) 3 C.L.R. 374;  
*Soteriadou and Others v. Republic* (1983) 3 C.L.R. 921;

*Georgiades and Another v. Republic* (1970) 3 C.L.R. 257 at p. 269;

*Georgiyou v. Republic* (1976) 3 C.L.R. 74 at pp. 82, 83;

*Photiades & Co. v. Republic*, 1964 C.L.R. 102;

*National Bank of Greece S.A. v. Republic* (1970) 3 C.L.R. 430. 5

### Recourses.

Recourses against the decision of the respondent to promote the interested parties to the post of Data Processing Officer, 1st Grade in preference and instead of the applicants.

A. S. *Angelides*, for the applicants. 10

R. *Gavrielides*, Senior Counsel of the Republic, for the respondents.

*Cur. adv. vult.*

STYLIANIDES J. read the following judgment. The Public Service Commission filled three vacancies of Data Processing Officer, 1st Grade. They are promotion posts. There were 5 candidates. The two applicants having not been selected for promotion filed these recourses whereby they seek the following relief:- 15

- “(1) A declaration of the Court that the decision and/or act of the respondent to promote *Aristos Aristides*, *Costas Kalopsidiotis* and *Katerina Perikleous* to the post of Data Processing Officer, 1st Grade, is null and void and of no effect whatsoever; 20
- (2) A declaration that the refusal and/or omission of the respondent to promote the applicants to the post of Data Processing Officer, 1st Grade, is null and void and of no effect, and what was omitted must be done”. 25

Counsel for the applicants relied on the following arguments:-

1. Two of the promotees, interested parties, who were appointed on probation to the immediate lower grade (2nd Grade) on 15.10.80, were not eligible for promotion as they did not have two annual confidential reports, in violation of s.44 of the Civil Service Law, No. 33/67; 30

2. The decision of the Commission is faulty as it lacked due inquiry into all the relevant factors; and,
3. The respondent Commission failed in its paramount duty to select the most suitable candidate for promotion.

5 **GROUND No. 1:**

“Promotion” is defined in s.28 of the Public Service Law and was judicially considered, inter alia, in *The Republic of Cyprus v. Charilaos Aristotelous and Others*, (1982) 3 C.L.R. 497.

- 10 “Promotion posts” in a Government scheme of service does not connote any restriction of eligibility to holders of particular posts in the public service but merely implies the exclusion of persons holding no public posts in the immediate lower grade.

15 Applicant in Recourse No. 99/83 and interested parties Kalo-psidiotis and Aristidou were appointed as Data Processing Officers, 2nd Grade, on probation on 15.10.80, and they were confirmed on 15.10.82. (See Official Gazette dated 31.12.82, Notification No. 2934). During the two years of their probation confidential reports were submitted every 6 months in compliance with s.45(2) of the Law. The final report of the probationary period contained a definite recommendation for their confirmation.

25 The forms of the ordinary confidential reports for the permanent civil servants, who are not on probation, are different from those submitted for officers on probation. The confidential reports on all officers, except those on probation, are annual. The Commission in making a promotion shall have due regard to the annual confidential reports on the candidates - (section 44(3)). No officer shall be promoted to another office unless he has not been reported upon in the last two annual confidential reports as unsuitable for promotion - (section 44(1)(c)).

30 It was vigorously argued by counsel for the applicants that it is a prerequisite for the promotion of any officer to have at least two annual confidential reports, and as two of the promotees,

interested parties, lacked this qualification, the sub judice decision is contrary to Law.

It is correct that the six-monthly reports for the officers on probation aim at the ascertainment of the suitability of the probationer for confirmation whereas the object of the annual confidential reports on all other officers is the suitability of the officer for promotion and in general for the advancement in his career and the achievement of the objective of the public service.

The true construction of s.44(1)(c) is that an officer, who was reported as unsuitable for promotion in any of the last two annual confidential reports, is not eligible for promotion. The existence of two annual confidential reports is not a prerequisite for promotion if the applicant possesses the qualifications laid down in the scheme of service for that office and fulfils all other requirements. The true meaning of s.44(1)(c) is that an officer is precluded from promotion if he was reported as unsuitable. Had it been otherwise, then all officers on probation would be excluded from promotion. This is not the object of the legislator and if there is any ambiguity - and I see none - this is determined in favour of the subject - the civil servant.

The scheme of service provides that the required qualifications are at least 4 years' experience out of which at least three in the public service. The applicant in Recourse No. 88/83 was appointed in the public service on 1.12.78; the applicant in Recourse No. 99/83 was appointed on probation on 15.10.80; interested party Perikleous was appointed on 1.12.78 and interested parties Aristidou and Kalopsidiotis were appointed on probation on 15.10.80.

The Departmental Board in its report dated 6.12.82, at page 2, noted the following:-

“Σχετικά με την πείρα των υποψηφίων στη μηχανογράφηση η οποία να περιλαμβάνει Ανάλυση Συστημάτων και/η Προγραμματισμό όπως απαιτείται από τό σχετικό Σχέδιο Υπηρεσίας η Τμηματική Επιτροπή επιθυμεί ν' αναφέρει πώς οι υποψήφιοι πέραν της πείρας τους στη Δημόσια Υπηρεσία έχουν και την πιο κάτω επιπρόσθετη πείρα:

Αριστίδου Άριστος

Εργάστηκε στο Τμήμα Μηχανογραφικών Υπηρεσιών

σαν Προγραμματιστής με σύμβαση για την περίοδο 2.1.1979-14.10.1980. Εργάστηκε επίσης για δύο περίπου χρόνια σαν Προγραμματιστής στο Υπουργείο Παιδείας της Ελλάδας.

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*Καλοφιδιώτης Κώστας*

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Εργάστηκε στο Τμήμα Μηχανογραφικών Υπηρεσιών σαν Προγραμματιστής με σύμβαση για την περίοδο 2.1.1979-14.10.1980. Εργάστηκε επίσης για δύο χρόνια σαν Προγραμματιστής/Αναλυτής στο Μεσογειακό Κέντρο Ερευνών.

*Κυπριανού Άνδρέας*

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Εργάστηκε στο Τμήμα Μηχανογραφικών Υπηρεσιών σαν Προγραμματιστής με σύμβαση για την περίοδο 2.1.1979-14.10.1980. Εργάστηκε επίσης για τρεις μήνες σαν Προγραμματιστής στο Μεσογειακό Κέντρο Ερευνών και για τρία σχεδόν χρόνια στο Κέντρο Επιστημονικών Ερευνών του Υπουργείου Παιδείας της Τσέχικης Δημοκρατίας”.

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25 (“In relation to the experience of the candidates in Data processing includes analysis of programmes and/or programmization as required by the relative scheme of service the Departmental Committee wishes to state that the candidates in addition to the experience in the public service have the following additional experience.

*Aristidou Aristos*

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Worked in the Data Processing Services Department as a Programmer on contract for the period 2.1.79 - 14.10.80. He worked also for about two years as a Programmer in the Ministry of Education in Greece.

*Kalopsidiotis Costas*

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Worked in the Data Processing Service Department on contract for the period 2.1.79 - 14.10.80. He worked also for two years as a Programmer/Analyst at the Mediterranean Research Centre.



*Kyprianou Andreas*

Worked in the Data Processing Services Department as a Programmer on contract for the period 2.1.79 - 14.10.80. He worked also for three months as a Programmer at the Mediterranean Centre and for almost three years at the Centre of Science Research of the Ministry of Education of the Czechoslovak Republic").

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The scheme provides for at least three years' experience in the public service. "Experience" contains the notion of knowledge acquired through acting in a certain capacity. (*Theodoros G. Papapetrou v. The Republic*, 2 R.S.C.C. 61, at 70). "Experience in the public service" should be distinguished from "service". Experience may be acquired by discharging duties. It is not necessary to actually hold a post in a substantive capacity. Had the intention been as submitted by counsel, it would have been clearly expressed by the use of the word "service" in place of "experience". All five candidates possessed the required qualifications at the material time, i.e. within one week of the receipt by the Public Service Commission of the request for filling these promotion vacancies, i.e. on 8.9.82.

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In view of the foregoing the Departmental Board, and ultimately the Commission, rightly considered the interested parties and the applicant Kyprianou as candidates satisfying the requirements under the scheme of service and the Law.

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*GROUND No. 2:*

Failure to make a due inquiry causing lack of knowledge of material facts amounts to misconception of fact. (*Ioannides v. The Republic*, (1972) 3 C.L.R. 318, at pp. 324-325; *Mikellidou v. The Republic*, (1981) 3 C.L.R. 461). A misconception as to facts may consist of either the taking into account of non-existing facts or the non-taking into account of existing facts. (*The Judicial Control of Discretionary Powers* by Economou, 1965, p. 243; *Christides v. The Republic*, (1966) 3 C.L.R. 732; *Iordanou v. The Republic*, (1967) 3 C.L.R. 245).

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The argument on this ground was based on:-

- (a) Comparison of annual confidential reports of permanent officers with 6-monthly reports;

(b) The Commission wrote in its decision that interested party Aristidou was the holder of a University Degree "Πανεπιστημιακὸν Πτυχίον" whereas in fact he is the holder of a Diploma of Programmer of the Ministry of Education of Greece and a Diploma of the School of Statistics (Highest Industrial School) of Pireaus; and

(c) The Commission erroneously considered that Perikleous was graded "excellent" in her 6-monthly confidential reports in 1980-81 whereas she was only "Very Good", and the recommendations of the Head of the Department were inconsistent with the record.

The claim of officers to promotion is considered on the basis of merit, qualification and seniority -- (section 44(2) of Law 33/67):

The confidential reports should be regarded as constituting part of the overall picture of the merits of each candidate which the Commission has to weigh as a whole -- (*Evangelou v. The Republic*, (1965) 3 C.L.R. 292; *Ioannou v. The Republic*, (1977) 3 C.L.R. 61). Though the confidential reports of the officers on probation are not prepared strictly *sensu* for the same purpose as annual confidential reports of the permanent officers, yet they are a picture of the merits of an officer. They may, in the absence of annual confidential reports, be used to evaluate the performance of the candidates during their short period of service. There is nothing wrong in taking them into consideration in the evaluation of a candidate for promotion:

Interested party Aristidou, as it emerges from his personal file, is the holder of a certificate issued by the Ministry of Education of Greece, certifying that he graduated as private vocational school of secondary education that is equivalent to the public vocational schools of the same grade. He is also the holder of a Diploma of the School of Statistics which functions under the supervision of the Highest Industrial School of Pireaus. In the *sub*judice decision we read: "Οι Περικλέους και Ἀριστείδου κατέχουν πανεπιστημιακά πτυχία ἐνῶ ὁ Σκαπούλλης κατέχει τὸ Higher National Diploma". (English translation: "Pè-

rikleous and Aristidou are the holders of university degrees whereas Skapoullis possesses a Higher National Diploma"). Perikleous is the holder of a B.Sc. Degree in Computing and Statistics. The personal file of Aristidou was before the Commission. Nevertheless, the context of the relevant part of the decision above-quoted betrays that the Commission was labouring under a misconception as to his qualifications. It does not simply misdescribe his certificates but it compares his academic qualifications with those of Skapoullis, upgrading thereby Aristidou and undergrading Skapoullis qualification-wise.

In the minutes of the sub judge decision Perikleous is recorded as "Excellent" for 1980-81 whereas in fact she was rated with 9 "Very Good" and one "Good" for 1980, and 9 "Very Good" and 3 "Good" for 1981. Even with this correction of the assessment, her confidential reports continue to be the best. The Commission had before it the file of the confidential reports.

Towards the end of the hearing of these cases counsel for the respondents produced an extract from the minutes of the meeting of the Commission of 12.11.83 whereby it is explained how this error of record was committed. Had I entertained any doubt as to the correctness of this explanation, I would have had no alternative but to annul this promotion.

The Commission takes into consideration the recommendations of the Head of the Department. If it is found that such recommendations are inconsistent with the overall picture presented by the confidential reports of the applicants and the interested parties, the sub judge decision has to be annulled as the Commission acted under a misconception of fact.

I went through the personal files and confidential reports of the parties, with the exception of the personal file of Perikleous, which was not produced, and I could find no inconsistency between the recommendations of the Head of the Department before the Commission and the record as appearing in the said files.

*GROUND No. 3:*

I need not repeat that the paramount duty of the Commission is to promote the most suitable candidate for the interest of the

service and the public. In doing so the Commission should decide who is the most suitable amongst the qualified candidates on the totality of the circumstances pertaining to each one of them - (*Theodossiou v. The Republic*, 2 R.S.C.C. 44, at p.47).

5 So long as the Authority exercises its discretionary power in conformity with the statutory provisions and the rules and requirements of administrative law generally, including good faith the Court cannot interfere. It cannot substitute its own opinion as to the merits of the candidates for that of the promoting authority - (*Pattichis and Another v. The Republic*, (1968) 3 C.L.R. 374; *Soteriadou and Others v. The Republic*, (1983) 3 C.L.R. 921).

15 When the Public Service Commission selects a candidate on the basis of comparison with others, it is not necessary to show in order to justify his selection, that he was strikingly superior to the others. The administrative Court cannot intervene in order to set aside the decision regarding such selection unless it is satisfied, by an applicant in a recourse before it, that he was an eligible candidate who was strikingly superior to the one who was  
20 selected, because only in such a case the organ which has made the selection for the purpose of an appointment or promotion is deemed to have exceeded the outer limits of its discretion and, therefore, to have acted in excess or abuse of its powers. The onus of establishing his striking superiority lies always on the  
25 applicant in a recourse. (*Evangelou v. The Republic*, (1965) 3 C.L.R. 292, at 299-300; *Georghiades and Another v. The Republic*, (1970) 3 C.L.R. 257, at 269; *Georghiou v. The Republic*, (1976) 3 C.L.R. 74, at 82, 83).

30 In view of what I have endeavoured to explain in this judgment, I find that the factual position on which the aforesaid decision with regard to Aristidou was based, was definitely incorrect in certain material respect - his qualifications - notwithstanding the fact that the personal files were before the Commission. When an administrative Judge is in doubt regarding the  
35 existence or not of factual misconception, he is entitled to annul the relevant administrative action in order to enable the Administration to ascertain the correct facts in a manner leaving no room for doubt - (*Constantinos Ioannides v. The Republic* (supra);

*Stassinopoulos - The Law of Administrative Acts*, (1951) 305;  
*Photos Photiades & Co. v. The Republic*, 1964. C.L.R. 102;  
*Christides v. The Republic* (supra); *National Bank of Greece S.A. v. The Republic*, (1970) 3 C.L.R. 430);

For the aforesaid reasons I decided to annul the decision to promote interested party Aristidou, only. The recourse, therefore, partly succeeds. Order is made accordingly but in all the circumstances of the case I make no order as to costs. 5

*Sub judice decision partly annulled. No order as to costs.* 10