

1984 June 30

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SOTERIOS CONSTANTINIDES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 540/82).

5 *Public Officers—Promotions—Seniority—It only prevails if all other things are more or less equal—Merit should carry the most weight even vis-a-vis superior qualifications—Applicant’s seniority of 5 months over the interested party could not tip the scales in his favour in view of the latter’s superiority in merit and superior qualifications.*

10 The applicant in this recourse challenged the validity of the decision of the respondent to promote the two interested parties to the post of Senior Instructor in the Cyprus Productivity Centre in preference and instead of him. Applicant had a seniority of 5 months over each one of the interested parties but as regards merit one of the interested parties had a striking superiority over the applicant and the other interested party had superiority over him. Also, the qualifications of one of the interested parties were superior to those of the applicant and the qualifications of the other interested party were more or less equal to those of the applicant.

20 *Held*, that seniority is not the decisive factor which regulates promotions; it should be duly taken into consideration and ought to prevail “all other things being more or less equal”; and that if merit and qualifications are superior, seniority alone could not tip the scales in favour of a candidate for promotion; that in promotions merit should carry the most weight even vis-a-vis

superior qualifications which is not the present case: that in view of the fact that both interested parties are superior in merit from the applicant, and in view of the superior qualifications of one of the interested parties over the applicant, even if the qualifications of the other interested party are more or less equal to those of the applicant, the seniority of 5 months over both interested parties cannot tip the scales in favour of the applicant; and that, therefore, it was reasonably open to the respondent Commission to reach the sub judice decision: accordingly the recourse must fail.

Application dismissed.

Cases referred to:

Partellides v. Republic (1969) 3 C.L.R. 480;

Menelaou v. Republic (1969) 3 C.L.R. 36 at p. 41;

Theocharous v. Republic (1969) 3 C.L.R. 318 at p. 323;

Georghiades and Others v. Republic (1967) 3 C.L.R. 653 at p. 666;

HadjiSavva v. Republic (1972) 3 C.L.R. 174 at p. 225;

Petrides v. Republic (1983) 3 C.L.R. 216;

Demosthenous v. Republic (1973) 3 C.L.R. 354.

Recourse.

Recourse against the decision of the respondent to appoint and/or promote the interested parties to the post of Senior Instructor, Cyprus Productivity Centre in preference and instead of the applicant.

E. Lemonaris, for the applicant.

A. Papasavvas, Senior Counsel of the Republic, for the respondent.

Chr. Triantafyllides, for interested party *M. Themistokleous*.

Cur. adv. vult.

LORIS J. read the following judgment. The applicant in the present case applies for the following relief:

"A declaration that Respondents' decision (dated 20.10.1982) to appoint and/or promote Messrs Michalakis Themistokleous

stocleous and Loucis Demosthenous, to the post of Senior Instructor, Cyprus Productivity Centre, in preference and instead of the applicant is null and void and of no effect whatsoever".

5 The applicant holds his present post of Instructor (permanent) at the Cyprus Productivity Centre with effect from 15.11.1978 having been appointed in the temporary post of Instructor on 1.5.1970, the latter date being also the date of his first appointment in the public service.

10 The Director-General of the Ministry of Labour and Social Insurance by a letter dated 7.4.1982 moved the respondent Public Service Commission, (The Minister of Finance consenting) with a view to filling inter alios four posts of Senior Instructors in the Cyprus Productivity Centre (vide Appendix I attached
15 to the opposition).

In view of the fact that the post in question is a promotion post in a "not specialised office" the P.S.C. by its decision of 20.5.1982 (vide Appendix 2 attached to the opposition) referred the matter to a Departmental Board set up pursuant to the provisions of s.36 of the Public Service Law 1967, as amended
20 (Law No. 33 of 1967) and the relevant regulations.

After compliance with the relevant procedure the Departmental Board which was convened on 8.9.1982 decided and recommended for promotion 8 (including the applicant) out
25 of the 10 candidates in alphabetical order (vide Appendices 3 and 4 attached to the opposition).

The P.S.C. at its meeting of 15.10.1982 having before it the recommendations of the Departmental Board and other relevant material, decided to examine the filling of the said 4 vacant
30 posts at a future meeting to be attended by the Director of the Productivity Centre (vide Appendix 5 attached to the opposition).

The respondent P.S.C. on 20.10.1982 after hearing the recommendations of the Director of the Productivity Centre proceeded in his absence to evaluate and compare the candidates; after
35 examining their confidential reports and their personal files and taking into consideration the report of the Departmental Board and the recommendations of the Director of the Productivity Centre, the P.S.C. reached its decision, which appears in Appen-

dix 6 attached to the opposition, by virtue of which the following 4 candidates were promoted to the post of Senior Instructor as from 1.11.1982:

1. ARISTOU Thomas
2. DEMOSTHENOUS Loucas 5
3. THEMISTOCLEOUS Michalakis
4. POYIADJIS Efthymios

It is significant to note at this stage that the applicant in the present recourse impugnes the decision which refers to the appointment of Loucas Demosthenous and Michalakis Themistocleous only. 10

Their aforesaid appointment is being attached on the following 4 grounds of law as set out verbatim in the application:

- “1. The Respondents failed in their paramount duty to select the best candidate thus acting contrary to law and in abuse of powers. (*Michael Theodossiou v. The Republic*, 2 R.S.C.C. 44). 15
2. The Respondents disregarded Applicant's substantially greater seniority without cogent reasons thus acting contrary to law and in abuse of powers. (*Costas Partelides v. The Republic* (1969) 3 C.L.R. 480). 20
3. The Respondents disregarded Applicant's superior merit, seniority and qualifications and have thus acted contrary to law and in abuse of powers (s.44(2) of Law 33/67).
4. Respondents decision is not duly reasoned and/or the reasoning behind same is wrong in law and/or defective”. 25

The respondent Public Service Commission filed an opposition to the present recourse on 29.1.1983 where it is stated that “the decision impugned was reached at correctly and lawfully according to the provisions of the relevant law, with correct exercise of the powers vested to the Committee by Law, and after the taking into consideration of all relevant facts and circumstances of the case”. 30

Interested party Loucas Demosthenous did not appear at all in the present proceedings inspite of the fact that present application was duly served on him. 35

Interested party Michalakis, Themistocleous appeared originally in person and later through his learned counsel submitted a written address pursuant to relevant directions of this Court.

5 Learned counsel for applicant submitted a written address, as well as address in reply to the written address of the respondent and the interested party, as aforesaid.

10 Several appendices, six in number; attached to the opposition were filed by the respondent Commission which include apart from the letters and decisions mentioned above; the scheme of service of the post of Senior Instructor—Cyprus Productivity Centre, and list of the services and qualifications of the applicant and the interested parties.

15 Finally, the respondents filed 3 personal files (1 of the applicant and 2 of the respective interested parties and 3 files, containing the confidential reports of the applicant and the two interested parties.

On 5.6.1984 at the clarification stage no other evidence was adduced or any other document produced by any side.

20 I intend to examine together the first three grounds on which the sub judice decision is being impugned and in the first place I shall deal very briefly with the legal aspect pertaining these grounds:

Section 44 of the Public Service Law, 1967 (Law No. 33 of 1967) provides as follows:

25 "44.-(1) No officer shall be promoted to another office, unless—

(a) a vacancy exists in that office;
Provided,

(b) he possesses the qualifications laid down in the schemes of service for that office;

30 (c) he has not been reported upon in the last two annual confidential reports as unsuitable for promotion;

(d)

(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 Department in which the vacancy exists.
- (4)
- (5)
- (6)
- (7)

Section 45 of Law 33/67 provides for the preparation and submission of confidential reports whilst s. 46 thereof deals with seniority of officers; it may as well be added here that s.46 was amended by s. 5(a) of Law 10/83 but it must always be borne in mind that the sub judice decision was reached prior to the aforesaid amendment. 5
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It was held as early as 1961 by the then Supreme Constitutional Court of Cyprus in the case of *Theodossiou v. The Republic*, 2 R.S.C.C. 44 at p. 47 that "The paramount duty of the Public Service Commission in effecting appointments or promotions is to select the candidate most suitable, in all the circumstances of each particular case, for the post in question. 15

In doing so, the Public Service Commission should decide who is the most suitable among the qualified candidates on the totality of the circumstances pertaining to each one of them and should not adopt any ready-made rigid rule of thumb divorced from the circumstances and necessities of each particular case". 20

It was further decided in this case that the recommendation of a Head of Department is a most vital consideration which should weigh with the Public Service Commission in coming to a decision in a particular case and "such recommendation should not be lightly disregarded". If, nevertheless the Public Service Commission comes to the conclusion not to follow the aforesaid recommendation "the reasons for taking such an exceptional course would be clearly recorded in the relevant minutes of the Public Service Commission". 25
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It is well settled that seniority is not the decisive factor which regulates promotions; it should be duly taken into consideration and according to the Full-Bench case of *Partellides v. The*

Republic (1969) 3 C.L.R. 480 seniority ought to prevail "all other things being more or less equal". If therefore merit and qualifications are superior, seniority alone could not tip the scales in favour of a candidate for promotion.

5 The proposition that in cases of promotion "merit should carry the most weight" even vis-a-vis superior qualifications is not devoid of authority (vide *Menelaou v. The Republic* (1969) 3 C.L.R. 36 at p. 41, *Theocharous v. The Republic* (1969) 3 C.L.R. 318 at p. 323).

10 Turning now to the facts of this case:

The sub judge decision appears in Appedix 6 attached to the opposition; being quite long I shall refrain from embodying it verbatim in the present judgment, confining myself in referring to passages from it where necessary.

15 As already stated earlier on in the present judgment, the task of the respondent P.S.C. was to select the four most suitable candidates for the post of Senior Instructor, Cyprus Productivity Centre; the vacant posts were four and they were promotion posts. The Departmental Board which was set up pursuant
20 to s. 36 of Law 33/67 and the relevant regulations, was convened on 8.9.1982 and having before it the required material including the relevant scheme of service (which appears in Appendix "D" attached to the opposition recommended eight out of
25 the ten candidates; the applicant as well as the interested parties were amongst those recommended.

The respondent P.S.C. on 20.10.1982 after hearing the recommendations of the Director of the Productivity Centre proceeded to evaluade and compare the candidates; they examined the confidential reports and the personal files of all candidates
30 (the personal files and confidential reports of the applicant and the two interested parties in this case are exhibits before me) and taking into consideration the above, together with all other necessary material including the report of the Departmental Board and the recommendations of the Director reached
35 the sub judge decision.

Although the applicant complains, (ground 2) that the respondent commission disregarded without cogent reasons his alleged greater seniority vis-a-vis the interested parties, it is true that

he also complains (ground 3) that his alleged superior merit and qualifications were disregarded as well. In particular with regard to "qualifications" the applicant maintains in his written address in reply—and this he repeated at the clarification stage—that the Director of the Productivity Centre was wrong in asserting before the P.S.C. that the interested party Themistocleous had superior qualifications than the applicant; this wrong statement of the Director—the applicant alleges—led the P.S.C., who accepted such statement as correct, to a misconception of fact which is a ground for annulment of the sub-judice decision. 5 10

The qualifications of applicant and the interested parties appear in the lists attached to Appendix 3 (attached to the opposition); those of applicant appear at page 3 of the list, those of interested party Themistocleous at page 4 of the list and those of interested party Demosthenous at page 5 of the list under serial No. 6. 5

Furthermore the qualifications, embodied in the respective certificates c.t.c., of all concerned appear in the personal files of the applicant and the interested parties which were before the P.S.C. at the time the sub-judice decision was taken and they are exhibits before me in the present case. 20

Having examined the qualifications of the applicant and those of the interested parties in the present case I hold the view that the Director of the Productivity Centre quite rightly stated before the P.S.C. that the qualifications of interested party Themistocleous were superior to those of the applicant; his said statement is quite consonant with the lists attached to appendix 3 and the material contained in the personal files of the applicant and the interested parties. 25

As regards merit careful examination of the confidential reports indicates that the interested parties were superior to the applicant throughout their service; in particular for the last two years interested party Themistocleous was graded with "7 excellent" and "5 very good", for the year 1980 whilst for the year 1981 he was given "12 excellent"; interested party Demosthenous has "5 excellent" and "7 very good" for both years (1980-1981). As regards interested party Demosthenous it must also be noted that the Director of Productivity Centre evaluated his merit for 1982 higher than that of Arghyrou (another candi- 30 35

date, not a party to the present proceedings; vide appendix 6, page 3 under serial No. 5) who had "6 excellent" and "six very good" for 1980 and "7 excellent" and "5 very good" for 1981.

- 5 The applicant is graded for 1980 with "1 excellent" and "11 very good" and for 1981 with "5 excellent" and "7 very good".

10 Bearing in mind the above it is quite clear that as regards merit, interested party Themistocleous has a striking superiority over the applicant whilst interested party Demosthenous can be considered as having superiority over the applicant.

15 Now as regards seniority the applicant and both interested parties in the present case were promoted to the permanent post of Instructor on the same day i.e. on 15.11.1978; it is a fact though that the applicant was appointed in the temporary post of Instructor on 1.5.1970 whilst both interested parties were so appointed on 1.10.1970 i.e. the applicant has a seniority of 5 months over each one of the interested parties in the present case.

20 In connection with seniority I feel duty bound to mention at this stage that it is crystal clear from the sub judge decision itself that the respondent P.S.C. was at all material times well conversant with applicant's 5 months seniority over both interested parties; in fact the Director of the Productivity Centre himself has referred to such seniority (vide appendix 6).

25 In view of the fact that both interested parties are superior in merit from the applicant, and in view of the superior qualifications of interested party Themistocleous over the applicant, even if the qualifications of interested party Demosthenous are more or less equal to those of the applicant, the seniority of 5 months over both interested parties cannot tip the scales in
30 favour of the applicant.

In this respect it must always be borne in mind that in promotions "merit should carry the most weight" even vis-a-vis superior qualifications which is not the present case anyway.

35 In the light of the above I hold the view that it was reasonably open to the respondent P.S.C. to reach the sub judge decision; grounds 1, 2 and 3 are doomed to failure and they are accordingly dismissed.

Turing now to the last complaint of the applicant namely lack of due reasoning and/or defective reasoning (ground 4).

It is well settled that administrative decisions have to be duly reasoned; what is due reasoning is a question of degree dependant upon the nature of the decision concerned (*Athos Georgiades & others v. The Republic* (1967) 3 C.L.R. 653 at p. 666). 5

Reasoning behind an administrative decision may be found either in the decision itself or in the official records related thereto (*Georghios HadjiSavva v. The Republic* (1972) 3 C.L.R. 174 at p. 225, *Petrides v. The Republic* (1983) 3 C.L.R. 216). 10

In the present case the applicant has raised by virtue of ground 4, lack of due reasoning and/or defective reasoning. He did not proceed though in his written address to elaborate on this issue at all. I think that it was quite proper for this Court to treat the ground in question as abandoned. Nevertheless I shall proceed to examine this ground as well once raised inspite of the failure of learned counsel appearing for the applicant to pursue it any further. 15

Having considered the sub judice decision set out in exh. 6, I am satisfied that it is sufficiently and duly reasoned; it contains all the elements necessary for the ascertainment of the legality of the decision concerned (*Demosthenous v. The Republic* (1973) 3 C.L.R. 354); and if the insinuation on behalf of the applicant is that the Commission adopted the view given by the Head of Department as to the qualifications of the applicant and the interested parties without themselves inquiring into the matter, it is abundantly clear that they did so inquire and it was perfectly legitimate for them to adopt his assessment, as they did, in view of the material contained in the personal files of all concerned which were before the P.S.C. and which were examined and considered by them, as expressly stated in the sub judice decision, which was in the circumstances of this case reasonably open to them; therefore ground 4 fails as well. 20 25 30

In the result, for all the above reasons, the present recourse fails and it is accordingly dismissed; and it is with great reluctance that I have decided to make no order as to costs. 35

Recourse dismissed. No order as to costs.