

1985 May 17

[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

IOANNIS KYPRIANOU,

Applicant,

v.

THE ELECTRICITY AUTHORITY OF CYPRUS,

Respondents.

(Case No. 237/80).

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- 5 *Administrative Law—Administrative acts or decisions—Validity—
Administrative process requiring action by two distinct or-
gans—Composition of each such organ must be different
—Promotions by Board of respondent Electricity Autho-
rity, after considering recommendations of sub-committee
consisting of the Chairman and one of the members of
the Board—Participation at meeting of the Board, which
took the sub judice decision, of the above members of
the said sub-committee not an irregularity of a substantial
10 nature vitiating the sub judice promotion.*
- Public Officers—Promotions—Qualifications—Additional or su-
perior to those required by the scheme of service—Do not
put the holder in an advantageous position vis-a-vis the
other candidates.*
- 15 *Public Officers—Promotions—Judicial control—Principles ap-
plicable—Striking superiority—Cannot be established ex-
clusively by reference to anyone of the criteria earmarked
by the Law but must be the result of the assessment of
the overall picture of the candidates.*
- 20 *Collective Organ—Not functioning as an independent organ
but as a section of another independent organ—Its com-
position not prescribed either by Law or regulations—*

Whether any defect in its composition can invalidate the final decision of the independent organ.

The applicant and the interested party were candidates for promotion to the post of Chief Foreman. The Board of the respondent Authority after taking into consideration, inter alia, the recommendations of the standing Sub-Committee on Staff matters in favour of the interested party decided to promote the interested party and hence this recourse. Both the applicant and the interested party possessed the qualifications required by the relevant scheme of service but applicant had more qualifications than the interested party.

Counsel for the applicant mainly contended that the participation of the Chairman and one of the members of the Board of the respondent Authority in both the Standing Sub-Committee on Staff Matters and the Board of the Authority vitiated the sub judice decision in that they could not make both the recommendations to the Authority and also take part in the decision for the promotion because, having decided to recommend the interested party they could not later decide to promote somebody else; and that in view of this the Authority did not exercise its powers with an impartial and independent judgment.

Held, that though it is a principle of administrative Law that where the administrative process concerned requires action on the part of two distinct organs—(one of them being a collective organ empowered to express a formal opinion and the other of them being the organ which takes the final decision after examining the correctness of such opinion)—the organ which is responsible for reaching the final decision should, unless a Law otherwise provides, be different from, and should not participate in the functioning of, the organ which expresses the final opinion, so that the organ taking the final decision can reach its own independent conclusion, the fact that a Board for the purpose of efficient and expedient carrying out of its duties entrusts to a sub-committee of its members the task of considering a particular topic and report or make recommendations to the full Board, does not constitute such sub-committee a distinct organ, participa-

tion in which disentitles the members so participating from attending the meeting of the Board at which a final decision on the matter is to be taken; and that, therefore, the participation of Chairman and one of the members of the Board who took part in the meeting of the Standing Sub-Committee on staff matters and also at the meeting of the Authority in which the decision complained of was taken is not an irregularity of a substantial nature vitiating the sub judice promotion (see *Evrripides v. E.A.C.* (1982) 3 C.L.R. 850).

Held, further, (1) that the possession by a candidate of additional or superior qualifications to those required by the scheme of service do not put the holder in an advantageous position vis-a-vis the other candidates.

(2) That striking superiority cannot be established exclusively by reference to anyone of the criteria earmarked by the Law, i.e. merits, qualifications and seniority, but must be the result of the assessment of the overall picture of the candidates.

(3) That the selection of a candidate for promotion is within the powers and discretion of the authority or organ concerned conferred upon it by Law and that the exercise of the discretion of the administration is not subject to the control of an administrative Court except in cases where there exists an improper use of the discretionary power, or a misconception concerning the factual situation or the non taking into account of material factors; that in the present case this Court has not been persuaded that the Board of the respondent Authority has exercised its discretionary powers, in a manner which would justify interference by this Court; and that it must, also, be pointed that the burden was on the applicant to show that he was strikingly superior to the interested party which he has failed to do.

(4) *On the contention that the composition of the Sub-Committee on staff matters was defective*: That taking into consideration the nature of the Sub-Committee, on Staff Matters, namely, that it was functioning as a result of internal arrangements of the Authority not as an independent organ of it but as a section of the Board entrusted

with the preliminary and preparatory task of making recommendations to the Board and as its composition is not prescribed either by Law or by regulations, any defect in its composition is not of a substantial nature leading to the invalidity of the final decision reached by the Board of the Authority.

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Application dismissed.

Cases referred to:

Savoulla and Others v. Republic (1973) 3 C.L.R. 706 at pp. 712, 713;

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Evrripides v. Electricity Authority of Cyprus (1982) 3 C.L.R. 850;

Larkos v. Republic (1982) 3 C.L.R. 513 at p. 518;

Papadopoulos v. Republic (1982) 3 C.L.R. 1070;

HadjiGeorghiou v. Republic (1974) 3 C.L.R. 436 at p. 445;

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Ioannou v. Public Service Commission (1983) 3 C.L.R. 449 at p. 462;

Kokkinos v. Republic (1982) 3 C.L.R. 588 at p. 591.

Recourse.

Recourse against the decision of the respondents to promote the interested party to the post of Chief Foreman in preference and instead of the applicant.

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L. N. Clerides with *A. Saveriades*, for the applicant.

G. Arestis for *G. Cacoyiannis*, for the respondents.

Cur. adv. vult.

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L. LOIZOU J. read the following judgment. By this recourse the applicant challenges the decision of the respondents to promote the interested party, Y. Iacovides, to the post of Chief Foreman instead of himself and seeks a declaration that the said decision which was communicated to him on or about the 9th July, 1980, is null and void and of no legal effect.

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The applicant was first appointed by the respondents on the 14th May, 1956, as a temporary labourer. He became permanent on the 14th November, 1956, and as from the 1st June, 1972, he is serving at the immediately lower post of Foreman 1st Grade.

The post of Chief Foreman was published in Staff Vacancy Notice No. 2/80 on the 12th June, 1980. The applicant and the interested party were candidates for promotion to the said vacant post.

On the 19th June, 1980, the Joint Advisory Committee for Promotions and Regradings after considering the applications of all candidates recommended unanimously for promotion to the post concerned three candidates in alphabetical order, namely, Stephos Theodorou, who is not a party to these proceedings, the interested party, Yiannakis Iacovides, and the applicant.

The relevant report of the Joint Advisory Committee for Promotions and Regradings (exhibit 1) was submitted to the Standing Sub-Committee on Staff Matters, which was composed of the Chairman and two members of the respondents, and it was considered at its meeting of the 16th June, 1980, at which the Engineering Controller and Deputy General Manager (Chief Engineer and General Manager designate), the Secretary/Manager of Legal Services and the Chief Commercial Officer of the Authority were in attendance.

From its relevant minutes (exhibit 2) it appears that after an exchange of views and consideration of all applications submitted, as well as "the applicant's experience, merit, ability, years of service with the Authority, qualifications in accordance with the relevant schemes of service, conduct, age, general record, and having compared the above criteria for promotion with the same criteria of those recommended for promotion and after taking into consideration the recommendations of the Heads of the Departments, the recommendations of the Engineering Controller and Deputy General Manager (Chief Engineer and General Manager designate) and the unanimous proposal (Κοινή Εισήγησης) of the Joint Advisory Committee..." it decided to

recommend the interested party for the filling of the post concerned.

The said recommendation was forwarded to the Board of the Authority which met on the 8th July, 1980, for the consideration of the filling of the above mentioned vacant post. The Board was composed of the Chairman, the Vice Chairman and four members, as the other member participating was absent on that date and there were in attendance the Legal Adviser, the General Manager, the Deputy General Manager and the Secretary of the Authority.

From its relevant minutes (exhibit 3) it appears that the Board before proceeding with the filling of the post had considered a letter from the applicant dated the 5th July, 1980 (exhibit 5) by which he was informing them that he had heard, before the matter came to the Authority, that the Sub-Committee on Staff Matters had recommended the interested party to be promoted instead of himself or the more senior candidate, Stephos Theodorou, and was complaining about such decision.

The material part of such minutes reads as follows:

“The Chairman then read out the provisions of the scheme of service for the post of Chief Foreman and Members compared the criteria for promotion for each of the selected candidates, namely, Stefos Theodorou, Yiannakis Iacovides and Ioannis Kyprianou, and weighed these against the recommendations of the Sub-Committee for the promotion of Yiannakis Iacovides.

After further discussion during which Members considered all applications submitted in response to Item 3(a) of Staff Vacancy Notice 2/80 for filling of the post of Chief Foreman, S. W. Area Office and having taken into consideration the arguments put forward by Mr. Kyprianou in his letter dated 5.7.1980, the applicants' qualifications in accordance with the relevant scheme of service, conduct, age, general record and having compared the above criteria for promotion with the same criteria of the employee recommended for promotion after taking into consideration the recommendations of the Head of Depart-

ment, the recommendations of the Engineering Controller & Deputy General Manager (Chief Engineer & General Manager-Designate), the unanimous proposals of the Joint Advisory Committee for Promotions & Regradings in respect of the filling of the above-mentioned vacant post and the recommendation of the Standing Sub-Committee on Staff Matters, on the proposal of the Chairman, seconded by Mr. Cleanthis Papadopoulos it was resolved unanimously.

10 that 8982 Yiannakis Iacovides be promoted to the post of Chief Foreman, S.W. Area Office, with effect from 1st July 1980.”

Against this decision of the Board of the respondent Authority the applicant filed the present recourse.

15 At the hearing of the case learned counsel for the applicant raised and argued a new ground of Law, on which he ultimately mainly based his case, namely, that the participation of the Chairman Mr. A. Moushouttas and one of the members, Mr. A. Papadopoulos, in both the Standing Sub-Committee on Staff Matters and the Board of the Authority vitiates the sub judice decision in that they could not make both the recommendations to the Authority and also take part in the decision for the promotion because, having decided to recommend the interested party they could not later decide to promote somebody else; and that in view of this the Authority did not exercise its powers with an impartial and independent judgment.

25 This procedure, learned counsel further submitted, is contrary to the rules of natural justice because these two officers became judges in their own cause.

30 On this ground useful guidance may be derived from the following cases, decided by this Court:

In *Savoulla and Others v. The Republic* (1973) 3 C.L.R. 706 the following are stated (at pp. 712, 713):

35 “It is correct that it is a principle of administrative Law that where the administrative process concerned requires action on the part of two distinct organs—(one of them being a collective organ empo-

wered to express a formal opinion and the other of them being the organ which takes the final decision after examining the correctness of such opinion)—the organ which is responsible for reaching the final decision should, unless a Law otherwise provides, be different from, and should not participate in the functioning of, the organ which expresses the final opinion, so that the organ taking the final decision can reach its own independent conclusion (see, inter alia, the decisions of the Council of State in Greece in Cases 2764/1964 and 2517/1967).”

Such principle was found by Triantafyllides, P., as being inapplicable to the circumstances of the *Savoulla* case (supra) as it was held that the participation of the Deputy Commander of Police in the Selection Board during the time when he was Acting Commander and his conduct later, in deciding, in his capacity as Acting Commander, on the promotions concerned in that case, though perhaps undesirable, did not amount to a material irregularity leading to the invalidity of the promotions challenged. It was pointed out that the administrative process which resulted in the promotions did not involve distinct organs acting in the course of separate competences, but was an integrated preparation process aimed at spotting the best candidates from amongst whom the final selection was to be made by the Commander.

The same ground raised in the present case was decided in the case of *Evipides v. The Electricity Authority of Cyprus* (1982) 3 C.L.R. 850, where it was held that the participation at the meeting of the Board at which the sub-judice decision was taken of the Chairman and the two members of the Board who were members of the Standing Sub-Committee on Staff Matters which made the recommendations to the Board on the subject-matter did not amount to a material irregularity vitiating the administrative process which resulted in the promotion challenged by that recourse. Savvides, J., in the course of his judgment said the following (at p. 857):

“In the present case, the following distinction has to be drawn: The Sub-Committee on Staff Matters was not an independent collective organ outside the

Board empowered to take a decision the correctness of which had to be examined by the Board as a separate organ, but was part and parcel of the Board, a section of it, to which the Board entrusted the task of considering and scrutinizing the report and the recommendations of the Joint Advisory Committee for Promotions and Regradings. The preliminary examination by this Sub-Committee of the applications and of the recommendations of the Joint Advisory Committee for Promotions and Regradings was a matter of internal arrangement of the Board of the respondent Committee for the carrying out in a more effective and expedient way the administration of the Authority. The recommendation of the Sub-Committee came before the full session of the Board for consideration and exhaustive discussion as it appears from the minutes of the meeting at which the final decision was taken and at which each member was free to vote in the light of such discussion.

The fact that a Board for the purpose of efficient and expedient carrying out of its duties entrusts to a sub-committee of its members the task of considering a particular topic and report or make recommendations to the full Board, does not constitute such sub-committee a distinct organ, participation in which disentitles the members so participating from attending the meeting of the Board at which a final decision on the matter is to be taken."

I find myself in complete agreement with the approach and reasoning of the learned Judge in the above case and I, therefore, find that the participation of the Chairman and one of the members of the Board who took part in the meeting of the Standing Sub-Committee on staff matters and also at the meeting of the Authority in which the decision complained of was taken is not an irregularity of a substantial nature vitiating the sub judice promotion.

It was further argued by learned counsel that the respondents had failed in their paramount duty to select the best candidate as the applicant was better qualified than the interested party and no reasons were given by the Standing Sub-Committee on Staff Matters for ignoring the

recommendations of the Joint Advisory Committee.

As it appears from a list placed before the Court showing all relevant data in respect of the years of service, seniority and qualifications of the applicant and the interested party (exhibit 4) the applicant had attended for three years the Night Technical Section of the Limassol Technical School and at the material time he was attending the 5th class of the Evening Limassol Gymnasium. He possesses the Cyprus Certificate of Education in English (lower) and Mathematics "A" and the Certificate of Competency of Contractor for Electrical Installations. 5 10

On the other hand the interested party had attended for three years the Solea Gymnasium, he is senior to the applicant in the immediately lower post by two years, and has, also, a longer period of service since he was appointed by the Authority on the 27th September, 1954, whereas the applicant on the 14th May, 1956. 15

It has not been disputed that the interested party has the required qualifications under the relevant scheme of service (exhibit 8). 20

From the sub judice decision referred to above (exhibit 3) it appears clearly that the qualifications of the applicant and the interested party were taken into consideration by the Board of the respondent Authority when taking the sub judice decision. 25

It has been held by this Court in a number of cases that the possession by a candidate of additional or superior qualifications to those required by the scheme of service do not put the holder in an advantageous position vis-a-vis the other candidates. 30

In the case of *Larkos v. The Republic* (1982) 3 C.L.R. 513, Pikis, J., stated the following in this respect (at p. 518):

"The possession of additional qualifications simpliciter to those required by the relevant scheme of service does not specifically enhance the claims of the holder to promotion. I find myself in agreement with the statement of A. Loizou, J., in *Cleanthous v.* 35

5 *The Republic* (1978) 3 C.L.R. 320, 327, 328, that possession of a qualification additional to those expressly required by the scheme of service does not necessarily put the holder in an advantageous position vis-a-vis other candidates. Certainly it is a fact that should be duly evaluated in the context of the totality of the qualifications of the parties, but not a factor to be singled out for separate and distinct consideration."

10 Also, in the case of *Papadopoulos v. The Republic* (1982) 3 C.L.R. 1070 the same learned Judge held that superiority cannot be established exclusively by reference to anyone of the criteria earmarked by the Law, i.e. merits, qualifications and seniority, but must be the result of the assessment
15 of the overall picture of the candidates. He said, in this respect, the following (at pp. 1075, 1076):

20 "STRIKING SUPERIORITY: In *HadjiSavva v. The Republic* (1982) 3 C.L.R. 76, 78, 79, I made a brief attempt to analyse the constituents of 'striking superiority' in the field of administrative Law. Such superiority must emerge on a consideration of the worth of the candidates by reference to the criteria laid down by Law for the evaluation of the suitability of candidates for promotion or appointment, i.e. merits, qualifications and seniority (s. 44-Law 33/67). Superiority
25 cannot be established exclusively by reference to anyone of the three criteria earmarked by Law. Striking superiority must arise as an inevitable result from the assessment of the overall merits of the candidates.
30 In order to be striking, superiority must be self-evident and strike one at first sight, so compelling as ignoring it would lead inexorably to a case of manifest injustice to a candidate's suitability for promotion.

35 The possession of qualifications, additional to those envisaged by the schemes of service, is never by itself a decisive consideration. Such qualifications have never been held as sufficient by themselves to make out a case of striking superiority. (See, *Elli Chr. Korai and Another v. C.B.C.* (1973) 3 C.L.R. 546; *K. Bagdades v. The Central Bank of Cyprus* (1973) 3 C.L.R.
40 417; *Andreas D. Georgakis v. The Republic* (P.S.C.)

(1977) 3 C.L.R. 1; *E. Hadjigeorghiou v. The Republic* (1977) 3 C.L.R. 35; *Cleanthous v. The Republic* (1978) 3 C.L.R. 320).

As I had occasion to observe in *Larkos v. The Republic* (1982) 3 C.L.R. 513, possession of academic qualifications, additional to those required by the scheme of service, is not a distinct consideration meriting separate examination. It is one of many relevant factors that serve to paint the picture of a candidate's suitability for promotion; at the highest, they may confer a marginal advantage but, certainly, they do not specifically enhance the claims of the holder to promotion. Additional qualifications to those laid down in the scheme of service, confer a distinct advantage only where they are specified in the scheme of service as an advantage, not otherwise."

On the totality of all relevant factors as they appear from the minutes referred to above it is clear that the Board before reaching its decision had weighed properly all material considerations and decided to appoint the interested party instead of the applicant. In the case of *HadjiGeorghiou v. The Republic* (1974) 3 C.L.R. 436, *Malachtos, J.*, stated the following (at p. 445):

"It is the paramount duty of a public authority or organ in effecting appointments or promotions to select the candidate most suitable, in all the circumstances of each particular case, for the post in question (*Michael Theodossiou and The Republic*, through the P.S.C., 2 R.S.C.C. 44). The selection of a candidate for promotion is within the powers and discretion of the authority or organ concerned conferred upon it by law. When the authority or organ concerned has exercised its discretion in reaching a decision, after paying due regard to all relevant considerations, and without taking into account irrelevant factors, the Court will not interfere as to the exercise of such discretion unless it can be shown to the satisfaction of the Court that such exercise has been made in disregard of any provisions of the Constitution or of any law or has been made in excess or abuse of powers vested in the authority or organ concerned.

5 The exercise of the discretion of the administration is not subject to the control of an administrative Court except in cases where there exists an improper use of the discretionary power, or a misconception concerning the factual situation or the non taking into account of material factors (*Costas Vafeadis v. The Republic of Cyprus, through the P.S.C., 1964 C.L.R. 454*.)”

10 In the present case I have not been persuaded that the Board of the respondent Authority has exercised its discretionary powers, in a manner which would justify interference by this Court. It must, also, be pointed out that the burden was on the applicant to show that he was strikingly superior to the interested party which he has
15 failed to do (*see, inter alia, Ioannou v. The Public Service Commission* (1983) 3 C.L.R. 449, 462; and *Kokkinos v. The Republic* (1982) 3 C.L.R. 588, 591).

20 The last point raised by counsel for the applicant, also at the hearing of the recourse, is that the composition of the Standing Sub-Committee on Staff Matters on the 18th June, 1980, was not the proper one in that it was contrary to the decision of the stated meeting of the Authority dated the 11th March, 1975 (exhibit 6) and therefore, the re-
25 commendation of the Sub-Committee on Staff Matters was ab initio void, illegal and ultra vires contrary to the aforesaid decision rendering thus the sub judice decision of the Board null and void and of no legal effect whatsoever.

30 From the relevant minutes of such meeting it appears that the Sub-Committee on Staff Matters should have been composed of the Vice Chairman, as Chairman of the Committee, two members of the Authority, as members, and the General Manager. In the absence of the Vice
35 Chairman any one of the two members could preside. The Deputy Chief Engineer and the Chief Personnel Officer would attend the meetings of the Sub-Committee. Functional Managers could also attend the meeting when this was considered necessary by the General Manager.

40 On the 16th June, 1980, the Sub-Committee on Staff Matters was composed of the Chairman and two members and the Engineering Controller and Deputy General

Manager, the Secretary/Manager of Legal Services and the Chief Commercial Officer were in attendance.

It is clear that such composition was not in accordance with the decision of the respondent of the 16th June, 1980.

Taking into consideration the nature of this Sub-Committee, namely, that it was functioning as a result of internal arrangements of the Authority not as an independent organ of it but as a section of the Board entrusted with the preliminary and preparatory task of making recommendations to the Board and as its composition is not prescribed either by Law or by regulations, I am of the view that any defect in its composition is not of a substantial nature leading to the invalidity of the final decision reached by the Board of the Authority. 5
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For all the above reasons this recourse fails and it is hereby dismissed. 15

There will be no order as to costs.

Recourse dismissed.

No order as to costs.