

1985 March 23

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146  
OF THE CONSTITUTION

ANDREAS CHRISTOU,

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE PUBLIC SERVICE COMMISSION,

*Respondent.*

(Case No. 106/82).

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*Public Officers—Promotions—Seniority—It is only one of the factors to be taken into consideration—It can prevail when other factors are more or less equal.*

5 *Public officers—Promotions—Confidential reports—The Public Service Law 33/67—S. 45(4)—A report is not adverse in the sense of this section merely because a Public Officer is not rated at least as “good”—Effect of failure to communicate to a Public Officer a confidential report “adverse” in the sense of said section.*

10 *Public Officers—Promotion—Views of Head of Department—Unfavourable to a candidate—Effect of failure to communicate such views to the candidate concerned—Depends on the circumstances of each case whether such failure deprives or not the P.S.C. from the opportunity of conducting a due inquiry—Natural justice—Such failure does not violate its rules as the process is not a disciplinary one.*

20 *By this recourse the applicant challenges the promotion of the interested parties to the post of Land Officer 2nd Grade (Cartography/Photolithography Branch) in the Department of Lands and Surveys.*

The Acting Director of the said Department, who was present at the relevant meeting of the respondent Commission, recommended for promotion all five interested parties; as regards the applicant he stated that despite his seniority he was not recommending him because he showed no interest, he had a negative attitude and continuously created problems in the Department.

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Counsel for the applicant complained inter alia that contrary to the provisions of s. 45(4)\* of Law 33/67 an adverse confidential report in respect of 1979 had not been communicated to the applicant, that applicant's seniority ought to have prevailed and that the said views of the Acting Director amounted to charging the applicant with a disciplinary offence and, therefore, the disciplinary process ought to have been set in motion and that such view ought to have been communicated to applicant in order to afford to him an opportunity to be heard in relation to them.

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It should be noted that in the confidential report for the year 1979 the applicant was rated in relation to devotion to duty as "average", in relation to cooperation/relations as "inadequate" and in relation to character as "average". There were no further observations either against or in his favour.

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*Held*, dismissing the recourse.

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(1) The confidential report for 1979 cannot be treated as adverse in the sense of s. 45(4) of Law 33/67. It is not correct to say that every report in which an Officer is not rated at least as "good" has to be regarded as an adverse report. (*Soteriades v. The Republic* (1985) 3 C.L.R. 300 distinguished). Even assuming that the report is adverse the fact that it was not communicated to the applicant could not in the present case lead to the annulment of the sub judice decision.

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(2) Seniority is only one of the factors to be considered when promotions are made. If the applicant was more or

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\* Quoted at p. 2241 post.

less equal in other respects with the interested parties his seniority could prevail; but he was not.

5 (3) Though the applicant possesses better qualifications than interested party Chysafinis, it must be borne in mind that the promotion in question was not and could not have been based only on the criterion of qualifications.

(4) It is not necessary or proper to initiate disciplinary proceedings whenever the Head of a Department states anything unfavourable against a candidate.

10 As regards the need to communicate such views to the candidate concerned this Court has to examine in the context of the circumstances of each case whether the failure to communicate such views deprives the Commission of the opportunity to conduct a due inquiry. In this case  
15 the Commission was not thus deprived as the views of the Head of the Department were substantially borne out by the confidential reports about the applicant over a period of years. As the process before the Commission was not a disciplinary one it cannot be said that the rules  
20 of natural justice had been violated.

(5) In the light of all the material before the Court the selection of the interested parties was reasonably open to the Commission.

*Recourse dismissed.*

25 *No order as to costs.*

Cases referred to:

*Soteriades v. The Republic* (1985) 3 C.L.R. 300;

*Petrides v. The Republic* (1975) 3 C.L.R. 371;

30 *Kontemeniotis v. The Cyprus Broadcasting Corporation* (1982) 3 C.L.R. 1027;

*Tantas v. The Republic* (1983) 3 C.L.R. 1430;

*Kalaitzis v. The Republic* (1984) 3 C.L.R. 839;

*Kokkinos v. The Republic* (1984) 3 C.L.R. 588;

*Constantinides v. The Republic* (1984) 3 C.L.R. 567;

*Jordanou v. The Republic* (1967) 3 C.L.R. 245;

*Frangides v. The Republic* (1968) 3 C.L.R. 90;

*Karamichalis v. The Republic* (1972) 3 C.L.R. 37;

*Christofides v. The Republic* (1982) 3 C.L.R. 763.

### Recourse.

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Recourse against the decision of the respondent to promote the interested parties to the post of Land Officer 2nd Grade (Cartography/Photolithography Branch) in the Department of Land and Surveys in preference and instead of the applicant.

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*C. Loizou*, for the applicant.

*E. Papadopoullou (Mrs.)*, for the respondent.

*A. Pandelides*, for interested parties S. Chrysafinis, E. Papaconstantinou, G. Nathanael and C. Constantinides.

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*Cur. adv. vult.*

TRIANAFYLLIDES P. read the following judgment. By means of the present recourse the applicant is challenging the decision of the respondent Public Service Commission by virtue of which there were promoted, instead of him, to the post of Land Officer 2nd Grade (Cartography/Photolithography Branch) in the Department of Lands and Surveys, as from the 12th February 1982, the interested parties in the present proceedings S. Chrysafinis, E. Papaconstantinou, C. Constantinides, L. Telemachou and G. Nathanael.

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The sub judice decision was reached at a meeting of the respondent Commission on the 28th December 1981. The Acting Director of the Department of Lands and Surveys, Mr. Andreas Christofi, who was present at such meeting, recommended for promotion the five interested parties and stated that as regards the applicant he was not recommending him because, despite the fact that he was the most senior of all, nevertheless he showed no interest, he had a negative attitude and continuously created problems to the Depart-

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ment. After the departure from the meeting of Mr. Christofi the Commission proceeded to the evaluation and comparison of the candidates and stated in its minutes that having examined the material facts from the personal files  
5 of the candidates and their confidential reports and having taken into consideration the assessment of the Departmental Committee and the views and recommendations of the Acting Director of the Department of Lands and Surveys it came to the conclusion that on the basis of the totality  
10 of the established criteria (merit, qualifications, seniority) the interested parties were superior to the remaining candidates for promotion to the post concerned.

The first submission put forward by counsel for the applicant was that the Commission had acted under a misconception of fact as it had taken into account, in reaching its sub judice decision, an adverse for the applicant  
15 confidential report in respect of the year 1979, the contents of which had never been communicated to him in accordance with the provisions of section 45(4) of the Public Service Law, 1967 (Law 33/67).  
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Section 45(4) of Law 33/67 reads as follows:

“(4) The person preparing a confidential report on a particular officer in which the latter is criticized for negligence, failures or improper behaviour in the performance of his duties must, on the submission thereof, communicate to the officer concerned this part  
25 of the report.

Within fifteen days of the communication to him, the officer is entitled to require in writing from the competent authority concerned to strike out or modify  
30 this part of the report and the competent authority shall consider the matter and decide thereon.”

I have perused the confidential report in respect of the applicant for 1979 and I have noted that in relation to  
35 item 2 (devotion to duty) he was rated as “average”, in relation to item 7 (cooperation/relations) he was rated as “inadequate” and in relation to item 12 (character) he was rated as “average”. No further observations were made either in his favour or against him by the Reporting Of-

ficer or by the Countersigning Officer. He is not criticized in such report for negligence, failures or improper behaviour in the performance of his duties. I am of the view, looking at the said report as a whole, that it cannot be treated as an adverse report in the sense of section 45(4) of Law 33/67, because it would not be correct to say that every report in which a public officer is not rated at least as "good" has to be regarded as an adverse report. In my opinion the present case is clearly distinguishable from the case of *Soteriades v. The Republic*, (R.A. 322 determined on 31st January 1985 and not reported yet)\* where a report was considered as "adverse" because the officer concerned was described therein as "irresponsible".

But even assuming that the aforesaid report for 1979 was "adverse" the fact that it was not communicated to the applicant could not lead to the annulment of the sub judice decision in the present case (see, inter alia, in this respect, *Petrides v. The Republic*, (1975) 3 C.L.R. 371, 376, 377, *Kontemeniotis v. The Cyprus Broadcasting Corporation*, (1982) 3 C.L.R. 1027, 1033, 1034 and *Tantas v. The Republic*, (1983) 3 C.L.R. 1430, 1436, 1437).

It has been contended, also, on behalf of the applicant that the confidential report for 1980 was biased against the applicant. A mere perusal of such report shows that it is framed in a way which excludes the contention that it was biased and I, therefore, need not deal with such contention any further.

It has been further argued that in view of the seniority of the applicant over the interested parties he should have been preferred for promotion instead of them. But seniority is only one of the factors to be considered when promotions are made and it could only have prevailed in favour of the applicant if he was more or less equal in other respects with the interested parties; but he was not (see, inter alia, *Kakaitzis v. The Republic*, (1984) 3 C.L.R. 839, 843, *Kokkinos v. The Republic*, (1984) 3 C.L.R. 588, 592, *Constantinides v. The Republic*, (1984) 3 C.L.R. 567, 572, 573).

\* Reported in (1985) 3 C.L.R. 300

As regards the qualifications of the applicant and of the interested parties it appears, from a comparative table which has been produced in the present proceedings, that with the exception of interested party Chrysafinis all other interested parties are either better qualified than the applicant or have at least qualifications equal to him; and it must be borne in mind that the decision to promote the interested parties instead of the applicant was not, and could not have been, based only on the criterion of qualifications but in the light of all relevant considerations, one of which was the confidential reports about the candidates; and it is significant to note that such reports in respect of the interested parties were on the whole better than those in respect of the applicant.

It has been contended by counsel for the applicant that the views expressed about him before the Commission by the Acting Director of the Department of Lands and Surveys amounted to charging the applicant with the commission of disciplinary offences and that the disciplinary process envisaged by Law 33/67 ought to have been set in motion and, also, that, in any event, such views had to be communicated to the applicant in order to afford to him an opportunity to be heard in relation to them.

I do not think that it is necessary or proper to initiate disciplinary proceedings against a candidate for promotion whenever his Head of Department states anything unfavourable about him when expressing his views to the Public Service Commission about the candidates for promotion.

As regards the need to communicate to the candidate concerned an unfavourable view expressed about him by his Head of Department it appears, in the light of relevant case-law, such as *Iordanou v. The Republic*, (1967) 3 C.L.R. 245, 257, *Frangides v. The Republic*, (1968) 3 C.L.R. 90, 102, *Karamichalis v. The Republic*, (1972) 3 C.L.R. 37, 40-42 and *Christophides v. The Republic*, (1982) 3 C.L.R. 763, 772, 773, that this Court, as an administrative Court, has to examine, in the context of the circumstances of each particular case, whether or not the failure to bring to the notice of a candidate for promotion an un-

favourable view expressed about him by his Head of Department has deprived the Public Service Commission of the opportunity to conduct a due inquiry into a material aspect of the matter before it.

In the present instance the unfavourable view expressed about the applicant by his Head of Department was substantially borne out by the contents of confidential reports about the applicant over a period of years and thus it cannot be said that such view had to be communicated to the applicant for the purpose of conducting a due inquiry, just as the contents of the confidential reports, which were unfavourable, but not "adverse" in the sense of section 45(4) of Law 33/67, did not have to be communicated to the applicant. 5 10

It cannot be said that the rules of natural justice rendered it necessary for the applicant to be informed about either the views of his Head of Department or the contents of the confidential reports about him, because at the material time the process before the Commission was not a disciplinary one but only an administrative evaluation of candidates for promotion. 15 20

Having examined all the material before the Court I have reached the conclusion that it was reasonably open to the respondent Commission to select the interested parties as being more suitable for promotion than the applicant and I have not been able to detect any defect in the manner in which the Commission has exercised its discretionary powers in this respect. 25

Consequently, the present recourse must fail and it is dismissed, but with no order as to its costs. 30

*Recourse dismissed.  
No order as to costs.*