

1985 February 9

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

PAVLOS MICHAEL SERAPHIM,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION.

Respondents.

(Case No. 351/82).

*Public Officers—Promotions—“Combined establishment” Offices
—Promotions to, not made after comparison of the various
candidates but only on the basis of whether officer con-
cerned satisfies the requirements of the general directions
given by the Council of Ministers—One such requirement
being satisfactory performance of his duties and recom- 5
mendation for promotion by Head of Department—Appli-
cant not recommended for promotion because his per-
formance during 1981 was described by the reporting
Officer in the confidential report as “average”—Grounds 10
on which such description was based the subject of dis-
ciplinary charges on which applicant was acquitted by the
respondent—Decision of the respondent Commission not
to promote the applicant, which was taken before the
acquittal of applicant annulled as having been taken 15
without an inquiry and because material factors were not
within the knowledge of the Commission.*

*Administrative Law—Discretionary powers—Defective exercise—
Absence of inquiry—Non existence of factual situation on
which the sub judice decision was based—Tantamount to 20
misconception of fact—Public Officers—Promotions—
Decision not to promote applicant based on allegations as
to acts or omissions of applicant in the performance of*

his duties which were non-existent—Sub judice decision taken without knowledge of such non-existence—Thus material factors not within the knowledge of the respondent at the material time—And they were not and could not have been taken into consideration—Respondent's discretionary powers exercised in a defective manner.

Equality—Principle of equality—Public Officers—Promotions—Principle of equality applies when promotion is result of comparison between candidates.

10 The applicant a Forest Ranger was a candidate for promotion to the post of Assistant Forest Officer. Under the relevant scheme of service the two offices are offices with a combined establishment. By virtue of the proviso to section 44(1)(a) of the Public Service Law, 1967 (Law 15 33/67) promotion in cases of offices with a combined establishment may be made irrespectively of whether there is a vacancy in the higher office or grade or not, and in accordance with any general directions given by the Council of Ministers in this respect; and by virtue of these 20 general directions promotion to the higher office is possible after the completion by the officer of the period of service required by the scheme of service in the lower office and the Head of Department certifies that the officer performed his duties satisfactorily and he recom- 25 mends him for promotion. The Head of Department did not recommend applicant for promotion because the reporting officer in the confidential report for the year 1981 described applicant as an average officer and that he performed his duties in a non-satisfactory way. The grading 30 of applicant as average in the confidential report for 1981 was based on certain grounds which became the subject of disciplinary charges against the applicant; but by means of a decision of the Public Service Commission, which was taken on 2.2.1984, the applicant was acquitted on all 35 such charges. The respondent Commission by its decision, which was taken on 11.3.82, after taking into consideration that applicant was not recommended for promotion by the Head of Department and that his performance during 1981, was "average" found applicant unsuitable 40 for promotion; and hence this recourse.

Held, (1) that the report of the Director and the non-

recommendation of the applicant for promotion were solely based on the confidential report prepared by the reporting officer and the grounds set out therein; that those grounds were under investigation at the time; that neither the Head of the Department nor the Commission carried out an inquiry into those allegations of fact which later formed the particulars of the five counts preferred against the applicant before the Commission in the disciplinary proceedings that ensued; that since the findings and the decision of the Commission on the disciplinary charges exonerated the applicant and proved that the reporting officer was not a reliable witness, the sub judice decision was based on charges and allegations which were not investigated into and which later on, after investigation, were not substantiated; that, thus, the rating in the confidential report for 1981 and the report of the Head of the Department were tainted; that they were invalid and could not be relied upon; that had the Commission, before taking the sub judice decision, carried out an inquiry, they might have taken a completely different decision with regard to the promotion of this applicant.

(2) That the non-existence of the factual situation on which the sub judice decision is based is tantamount to misconception of fact (see Decision of Greek Council of State 2134/52); that both the confidential report for 1981 and the report of the Director were based on allegations as to acts and/or omissions of the applicant in the performance of his duties in 1981; that the accusations for these were placed before the Commission without having been first investigated and the Commission, relying on them, reached the decision not to promote the applicant; that the investigation in the disciplinary proceedings proved the non-existence of the factual situation on which the confidential report and the non-recommendation by the Director were based; that the Commission at the time took the sub judice decision without knowledge of the non-existence of these factors; that the Court is thus faced with a situation in which material factors were not within the knowledge of the respondent Public Service Commission at the material time and, therefore, they were not and could not have been taken into consideration; and

that, consequently, the exercise of its discretionary powers was for that reason, also defective.

5 *Held, further*, that since each one of the candidates was considered separately by the Commission and not in comparison with others, the principle of equality is inapplicable because such principle is applicable when there is a comparison but it does not apply when the decision is the result of an independent judgment with no comparison with others.

10 *Sub judice decision annulled.*

Cases referred to:

Soteriadou v. Republic (1985) 3 C.L.R. 300;

Decisions of the Greek Council of State
Nos. 325/55 and 2134/52.

15 **Recourse.**

Recourse against the decision of the respondent not to promote the applicant to the post of Assistant Forest Officer.

K. Michaelides, for the applicant.

20 *G. Erotokritou (Mrs.)*, Counsel of the Republic,
for the respondent.

Cur. adv. vult.

25 STYLIANIDES J. read the following judgment. The applicant by this recourse seeks annulment of the decision of the Public Service Commission "published in the Official Gazette of the Republic on 18.6.82 not to promote and/or emplace the applicant to the permanent post of Assistant Forest Officer as from 15.3.82".

30 The applicant entered the Government service on 19.8.41 as Forest Labourer. From 1.6.42-30.9.47 he held the post of Forest Foreman; from 1.10.47-30.3.64 the post of Forester. On 1.4.64 he became Forest Ranger and on 15.4.78 he was seconded to the post of Assistant Forest Officer though he continues to hold the substantial post of Forest
35 Ranger.

On 17.12.81 the Council of Ministers approved a new scheme of service of Assistant Forest Officers and thereby the post of Forest Ranger and Assistant Forest Officer became offices with a combined establishment.

The duties and responsibilities of the post of Assistant Forest Officer are "the same as those of a Forest Ranger but of an increased degree of responsibility. Furthermore he supervises and trains lower staff and co-ordinates its work. He acts as a link between the lower staff and the immediately superior officer, effects payments and collects money"—(See Appendix 1). 5 10

Promotion in case of offices with a combined establishment is governed by the proviso to s. 44(1)(a) of the Civil Service Law, No. 33/67, that reads as follows:-

"44.-(1) No officer shall be promoted to another office, unless- 15

(a) a vacancy exists in that office:

Provided that in the case of offices with a combined establishment, promotion from the lower to the higher office or grade of that office may be made irrespectively of whether there is a vacancy in the higher office or grade or not, and in accordance with any general directions given by the Council of Ministers in this respect." 20

The Council of Ministers by its decision 21.311 of 21.1.82 issued new general directions for promotion of officers in a combined establishment. The material part of these directions for the present case runs as follows:- 25

"(1) Μετά την υπό του υπαλλήλου συμπλήρωσιν της περιόδου υπηρεσίας την οποίαν απαιτεί το οικείον Σχέδιον Υπηρεσίας εις την κατωτέραν τάξιν ή θέσιν, ο Τμηματάρχης θα αποστέλλη εις την Επιτροπήν Δημοσίας Υπηρεσίας θεβαίωσιν κατά πόσον:- 30

(a) ο υπάλληλος εξετέλεσεν ικανοποιητικώς τα καθήκοντα της θέσεώς του' 35

(β) συνεπλήρωσε την περίοδο υπηρεσίας την οποίαν απαιτεί το Σχέδιον Υπηρεσίας'

(γ) ικανοποιεί τας οιασδήποτε άλλας απαιτήσεις του σχεδίου Υπηρεσίας' και

5 (δ) συνιστά αυτόν δια προαγωγήν:

.....

Η διαδικασία αυτή θα ισχύη δι' όλους τους υπαλλήλους, δι' εκείνους όμως δια τους οποίους δεν γίνεται σύστασις δια προαγωγήν ο Τμηματάρχης θα δίδη πλήρη δικαιολογίαν.

10

.....

(3) Η τελική απόφασις δια προαγωγήν του υπαλλήλου εναπόκειται εις την Επιτροπήν Δημοσίας Υπηρεσίας συμφώνως προς τους περί Δημοσίας Υπηρεσίας Νόμους 1967-1981.

15

(4) Οι οικείοι Τμηματάρχαι δέον όπως προβαίνουν εις συστάσεις δι' όλους τους υπαλλήλους οι οποίοι πληρούν τα Σχέδια Υπηρεσίας, είτε αυτοί κρίνονται κατάλληλοι δια προαγωγήν είτε όχι".

20

"(1) After the completion by the officer of the period of service required by the relevant scheme of service of the lower class or post, the Head of Department will forward to the Public Service Commission a certificate as to whether:-

25

(a) the officer performed satisfactorily the duties of his post;

(b) has completed the period of service which is required by the scheme of service;

30

(c) satisfies any other requirements of the scheme of service; and

(d) recommends him for promotion:

.....

This procedure will be applicable to all officers, but

for those for whom no recommendation for promotion is made the Head of Department will give a full reasoning.

(3) The final decision for the promotion of an officer rests on the Public Service Commission in accordance with the Public Service Laws, 1967-1981. 5

(4) The respective Heads of Department must make recommendations for all the officers who satisfy the schemes of service, whether they are considered suitable for promotion or not"). 10

Thus a promotion in respect of combined establishment is not made after comparison of the merit, qualifications, etc., of the various candidates in respect of an existing vacancy but only on the basis of whether the officer concerned satisfies the requirements of the general directions given by the Council of Ministers. 15

On 11.2.82 the Director of the Department of Forests, pursuant to the general directions of the Council of Ministers, hereinabove referred to, recommended 145 Forest Rangers for promotion to the post of Assistant Forest Officer, five of whom were on secondment holding the post of Assistant Forest Officer; only the applicant was not recommended. The report about him is that he completed the period of service required by the scheme of service in the lower office; he satisfied the other requirements but he was not recommended for the following reason:- 20 25

«Ο Προϊστάμενος του ο οποίος είναι ο Διευθυντής του Δασικού Κολλεγίου εκθέτει ως Αξιολογών Λειτουργός στην Ετήσια Εμπιστευτική Έκθεση για τον πιο πάνω υπάλληλο για το 1981, πως είναι μέτριος υπάλληλος και πως εξετέλεσε τα καθήκοντα του κατά τρόπον μη ικανοποιητικών. Συνεφώνησα με την πιο πάνω αξιολόγηση. Περαιτέρω εδιωρίσθη Ερευνών Λειτουργός από την Αρμοδιαν Αρχή για καταγγελίες εναντίον του κ. Π. Μιχαήλ, ο οποίος υπέβαλεν σχετική έκθεση στην Αρμοδιαν Αρχήν η οποία ευρίσκεται ακόμα υπό μελέτην». 30 35

5 (“His superior who is the Director of the Forestry College states as the Reporting Officer in the Annual Confidential Report for the above Officer for 1981, that he is an average officer and that he performed his duties in a manner not satisfactory. I agreed with the above evaluation. Further an investigating officer was appointed by the appropriate authority for accusations against Mr. P. Michael, who submitted a relative report to the appropriate authority, which is still under
10 consideration”).

15 In the confidential report for the year 1981 the applicant was rated by the reporting officer, Director of Forestry College, G. Pattichis, as average. The reporting officer notified by letter dated 22.12.81 the applicant of such assessment. The second paragraph of this letter reads as follows:-

«Στήριξα την πιο πάνω βαθμολογία στα ακόλουθα στοιχεία:

20 Κατά την διάρκεια της ανάπτυξης του εκδρομικού χώρου Χερσαρκάκας ενώ σας εδόθησαν οδηγίες να υπολογίσετε τα υλικά που εχρειάζοντο για την εγκατάσταση θρύσης και διασωλήνωσης νερού, εσείς απετύχατε δύο φορές να παρουσιάσετε ολοκληρωμένο υπολογισμό και χρειάστηκε η επέμβαση μας από το Δασικό Κολλέγιο για να γίνει ο σχετικός υπολογισμός, υποβάλλοντας σε πλέον έξοδα το Δημόσιο.

30 Κατά την 6/11/81 όταν θα αρχίζατε την σφράγιση δένδρων στο δάσος του Δασικού Κολλεγίου προσήλθατε στην εργασία σας χωρίς τα απαραίτητα εφόδια (βουρτσι και μπογιά).

35 Επανειλημμένως έχετε υποβάλει διημερεύσεις που δεν δικαιούστε σύμφωνα με τους ισχύοντες κανονισμούς. Τον Οκτώβριο σας είχαν απορριφθή 7 διημερεύσεις (γεύματα) και στις 3 Νοεμβρίου διεκδικήσατε γεύμα ενώ ευρίσκεσθε στην οικία σας πριν τις 2 μ.μ.

Παρόλας τας επανειλημμένες προτροπές και συμβουλές τόσο του αμέσου προϊσταμένου σας όσο και εμού, δυστυχώς δεν δείξατε καμμίαν βελτίωση. Αν-

πιθέτως στις 9/12/81 μιλήσατε μέσω τηλεφώνου στον άμεσο προϊστάμενο σας κατά τρόπο όχι ευγενή.

Σας αποστέλλω φωτοαντίγραφο της σχετικής παραγράφου των κανονισμών που διέπουν τις εμπιστευτικές εκθέσεις (εγκύκλιος αρ. 491, ημερομηνίας 26/3/79 για ενημέρωση σας)». 5

("I based the above grading on the following facts:

During the improvement of the Xerarkaka excursion place, while you were instructed to estimate the materials required for the installation of a fountain and the placing of pipes for water, you failed twice to present a complete estimate and our intervention from the Forestry College was necessary in order to have the said estimate made, submitting thus the public to extra expense. 10 15

On the 6th November, 1981, when you would start sealing the trees at the forest of the Forestry College you came to your work without the necessary equipment (brush and paint).

Repeatedly you have submitted subsistence claims which you were not entitled according to the regulations in force. In October 7 subsistence claims (meals) were turned down and on 3rd November you claimed a meal while you were at your home before 2 p.m. 20

In spite of all the repeated instigations and advice by your immediate superior as well as by me unfortunately you did not show any improvement. On the contrary on 19/12/81 you spoke over the phone to your immediate superior in an unpolite manner. 25

I enclose a photocopy of the relative paragraph of the regulations which govern confidential reports (Circular No. 491 dated 26/3/79 for your information"). 30

The applicant by letter dated 29.12.81 objected to his such assessment and requested an examination in depth of the matter as the material on which the reporting officer relied was non-existent. The objection of the applicant was 35

referred to the reporting officer who, by letter of 12.1.82, addressed to the Head of the Department, stated:-

5 «Ο κ. Παύλος Μιχαήλ στην απαντητική του επιστολή απέτυχε, κατά την άποψή μου, να παρουσιάσει στοιχεία για να απορρίψει τα δικαιολογημένα σημεία όπου βαθμολογήθηκε 'μέτριος'. Περιορίζεται, απλώς, σε γενικότητες πράγμα που δείχνει την ορθότητα των συγκεκριμένων στοιχείων που παραθέτω στην έκθεση και στην προς αυτόν κοινοποίηση των σχετικών σημείων.

10 Γι' αυτό δεν προτίθεται να κάμω οποιανδήποτε αλλαγή στην αρχική μου έκθεση».

15 ("Mr. Pavlos Michael in his reply, failed in my view, to present facts to dismiss the justified points where he was graded 'average'. He confines himself, simply, in generalities, something which shows the correctness of the specific facts which I put forward in my report and to the notification to him of the relative points.

For this reason I do not propose to make any change in my original report").

20 Relying on this the Director of Forests, who is the countersigning officer, on 10.2.82 countersigned the confidential report, and on the same day he informed the applicant that he did not intend to change the assessment of the reporting officer. This was the fate of the objection.

25 The grounds on which he was rated "Average" became the subject of disciplinary proceedings. On 4.1.82 an investigating officer was appointed by the appropriate authority under the provisions of s. 80(b) of the Public Service Law pursuant to a report by the Director of the Forestry
30 College, the reporting officer, who made the assessment for the applicant in the confidential report—10.12.81—(See Red 14 in the Personal File, Volume 2).

The applicant was charged before the Commission on
35 five counts. Thus the grounds on which the applicant was rated "Average" in the confidential report for 1981 and was not recommended for promotion by the Head of his Department were under investigation in disciplinary pro-

ceedings at the material time before the same Public Service Commission.

The respondent Commission on 11.3.82 took the sub judice decision not to promote the applicant. It reads:-

«Εἰς ὅτι ἀφορὰ τὸν κ. Παύλον ΜΙΧΑΗΛ, ἡ Επιτροπὴ, λαβούσα ὑπ' ὄψιν ὅτι οὗτος δὲν συνιστάται ὑπὸ τοῦ Διευθυντοῦ τοῦ Τμήματος δια προαγωγὴν, καθὼς ἐπίσης καὶ τὴν μετρίαν ἀπόδοσίν του κατὰ τὸ 1981, ἐκρίνεν ὅτι οὗτος δὲν δύναται νὰ θεωρηθῆ ὡς κατάλληλος δια προαγωγὴν».

("As regards Mr. Pavlos Michael the Commission having in mind that he is not recommended by the Director of the Department for promotion, as well as his average performance during 1981, decided that he cannot be considered suitable for promotion").

Thus the Commission relied exclusively on two grounds: (a) that the applicant was not recommended by the Head of the Department, and, (b) that his performance for 1981 was average.

The disciplinary charges against the applicant were, after hearing witnesses, including the reporting officer for 1981, finally determined by the Commission. The applicant was acquitted on Counts No. 2, 3 and 4. The particulars of these counts are the grounds for which he was assessed "Average" and was not recommended by the Head of his Department for promotion. (See decision of the Commission dated 2.2.84 attached to the written address of counsel for the applicant dated 16.3.84). The Commission finally imposed the punishment of severe reprimand on the counts he was found guilty.

The power and ultimate responsibility for promotion rest under the Law on the respondent Commission. The confidential reports and the report of the Head of the Department are intermediate acts. The invalidity of both or anyone of them renders invalid the subsequent composite act for the issue of which they constituted a prerequisite.

The applicant challenges the validity of the sub judice

decision on a number of grounds: that there was a breach of the rules of natural justice as no opportunity was afforded to him to be heard; that the confidential report for 1981 and the report of the Director of the Department of Forests
5 were tainted with bias; that the sub judice decision took into account facts which it should not have taken and thereby acted under a misconception of fact and exercised its powers in a defective manner; that the non-promotion of the applicant is a disciplinary act; that the decision is
10 not reasoned or duly reasoned as the recommendations of the Head of the Department in his report do not give full reasoning for not recommending the applicant; the Commission failed to carry out a due and proper inquiry at the material time they took the sub judice decision and that it
15 offends the principle of equality enshrined in Article 28.1 of the Constitution as all other 145 Forest Rangers were promoted.

The principle of equality is inapplicable in this case. Each one of the candidates was considered separately by
20 the Commission and not with comparison with others and the reason for his not being promoted is clearly set out by the Commission, that is to say, he did not perform satisfactorily the duties of his post and he was not recommended for promotion by the Head of his Department. The principle
25 of equality is applicable when there is a comparison but it does not apply when the decision is the result of an independent judgment with no comparison with others—*(See Conclusions of the Jurisprudence of the Greek Council of State, (1929-1959, p. 268, and Case No. 325/55 of the Greek Council of State).*
30

From all the material before me it is plain that the report of the Director and the non-recommendation of the applicant for promotion were solely based on the confidential report prepared by the reporting officer and the grounds
35 set out therein. Those grounds were under investigation at the time. Neither the Head of the Department nor the Commission carried out an inquiry into those allegations of fact which later formed the particulars of the five counts preferred against the applicant before the Commission in
40 the disciplinary proceedings that ensued. The findings and

the decision of the Commission on the disciplinary charges exonerated the applicant and proved that the reporting officer was not a reliable witness. Therefore, the sub judge decision was based on charges and allegations which were not investigated into and which later on, after investigation, were not substantiated. Thus the rating in the confidential report for 1981 and the report of the Head of the Department were tainted. They were invalid and could not be relied upon. Had the Commission, before taking the sub judge decision, carried out an inquiry, they might have taken a completely different decision with regard to the promotion of this applicant. 5 10

The non-existence of the factual situation on which the sub judge decision is based is tantamount to misconception of fact—(*Greek Council of State 2134/52*). 15

Both the confidential report for 1981 and the report of the Director were based on allegations as to acts and/or omissions of the applicant in the performance of his duties in 1981. The accusations for these were placed before the Commission without having been first investigated and the Commission, relying on them, reached the decision not to promote the applicant. The investigation in the disciplinary proceedings proved the non-existence of the factual situation on which the confidential report and the non-recommendation by the Director were based. The Commission at the time took the sub judge decision without knowledge of the non-existence of these factors. 20 25

The Court is thus faced with a situation in which material factors were not within the knowledge of the respondent Public Service Commission at the material time and, therefore, it was not and could not have been taken into consideration. Consequently, the exercise of its discretionary powers was for that reason also defective—(*Avgi Soteriadou v. The Republic*, Revisional Appeal No. 322—judgment of the President of this Court, still unreported, and the cases cited therein).* 30 35

In view of all the aforesaid this recourse should succeed. The sub judge decision should be annulled and it is upon the Commission, in the light of the aforesaid, to re-examine

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

the position of the applicant as at the time of the annulled decision.

5 Sub judice decision is hereby declared null and void and of no effect. In all the circumstances I make no order as to costs.

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