

1985 April 8

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

PANTELIS PHILOTHEOU AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondents.

(Case No. 485/82).

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- Public Officers—Promotions—Confidential reports—Weight—Commission should not confine itself to consideration of the two last annual confidential reports but should give due weight to past confidential reports, though more weight should be given to recent ones—Section 44(1)(c) of the Public Service Law, 1967 (Law 33/67)—An exclusionary provision—Seniority—When does it prevail—Qualifications additional to those provided by the scheme of service and which are not specified therein as an advantage—Weight—Recommendations of Head of Department—Principles applicable—Sufficient reasons given by the Commission for not following them—Applicants failed to establish that they were strikingly superior over the interested parties.* 5
 - Public Officers—Promotions—Judicial control—An applicant in order to succeed he has to establish that he is strikingly superior over the interested parties.* 10
 - Public Officers—Promotions—Judicial control—An applicant in order to succeed he has to establish that he is strikingly superior over the interested parties.* 15

The applicants in the above recourse sought the annulment of the promotion by the respondent Commission of the nine interested parties to the post of Nursing Sister/Charge nurse, a promotion post. Applicant No. 1 was senior by 20-27 months to all interested parties. The Head of Department recommended applicants 2 and 3 for pro-

motion but the Commission did not follow such recommendation and gave as a reason for so doing the fact that the recommendations were not born out by the contents of the confidential reports.

5 Counsel for the applicants mainly contended:

- 10 (a) That the respondent Commission took into consideration the last three annual confidential reports of the candidates whereas the proper interpretation of the relevant statutory provision* is that it should have confined itself to consideration of only the two last annual confidential reports;
- (b) That it disregarded the seniority and the additional qualifications of applicant No. 1;
- 15 (c) That it disregarded the recommendations of the Head of the Department for the promotion of applicants No. 2 and 3.

20 *Held*, (1) that section 44(1)(c) of Law 33/67 is an exclusionary provision; that it debars a public servant from being considered for promotion if he has been reported upon in the last annual confidential reports as unsuitable for promotion or if he has been punished during the preceding two years for any disciplinary offence of a serious nature; that the two years' limit refers only to the aforesaid two elements and no more; that the whole
25 career of the candidate concerned had to be taken into account though it is not wrong to give due weight to the more recent confidential reports; that the confidential reports must be regarded only as constituting part of the overall picture of the merits of each candidate which the
30 Commission has to weigh as a whole; that the Commission should not confine itself to consideration of the two last annual confidential reports but should give due regard to past confidential reports, though more weight should be given to recent ones, as a civil servant may
35 either improve or deteriorate at the time nearest to the material time for promotion.

* The relevant statutory provision is section 44(1)(c) of the Public Service Law, 1967, (Law 33/67) which is quoted at p. 668 post.

(2) That the seniority and the length of service with the experience that goes with it, is one of the factors to be taken into consideration; that seniority, however, is not the decisive factor which governs promotions but one that should be duly taken into consideration and it should only prevail if all other things were more or less equal. 5

(3) That qualifications additional to those provided by the scheme of service, which are not specified in the scheme of service as an advantage, should not weigh greatly in the mind of the Commission, who should decide in selecting the best candidate on the totality of the circumstances before them; and that additional qualifications to those provided by the scheme of service do not indicate by themselves a striking superiority. 10

(4) That the Public Service Commission is under a duty to pay special regard to the recommendations of the Head of Department and is normally either expected to follow them or give reasons for not doing so; and that in this case sufficient reasons were given for not following the recommendations of the Head of Department. 15 20

(5) That it is not necessary for the Commission to satisfy this Court that the promotees were strikingly superior to the applicant; that applicant, however, in order to succeed, he has to establish that he is strikingly superior over the interested parties or any of them as to lead a Court to the conclusion that the subject decision was taken in excess or abuse of power; that on the totality of the material before this Court the applicants failed to establish that they or any of them are strikingly superior over the interested parties or any of them; and that, accordingly, the recourse must fail. 25 30

Recourse dismissed.

Cases referred to:

Republic v. Pericleous (1984) 3 C.L.R. 577;

Georghiades v. Republic (1975) 3 C.L.R. 143 at p. 151; 35

Hji Gregoriou v. Republic (1975) 3 C.L.R. 477 at p. 483;

Georghiou v. Republic (1976) 3 C.L.R. 74;

3 C.L.R. **Philotheou and Others v. Republic**

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

Smyrnios v. Republic (1983) 3 C.L.R. 124;

Korai and Another v. C.B.C (1973) 3 C.L.R. 546;

Georghakis v. Republic (1977) 3 C.L.R. 1;

5 *Hji Georghiou v. Republic* (1977) 3 C.L.R. 35;

Cleanthous v. Republic (1978) 3 C.L.R. 320;

Hjiloannou v. Republic (1983) 3 C.L.R. 1041;

Theodossiou v. Republic, 2 R.S.C.C. 44 at p. 48;

Evangelou v. Republic (1965) 3 C.L.R. 292;

10 *Lardis v. Republic* (1967) 3 C.L.R. 64;

HjiConstantinou v. Republic (1973) 3 C.L.R. 65;

Petris v. Public Service Commission (1983) 3 C.L.R. 1096;

Protopapas v. Republic (1981) 3 C.L.R. 456;

Republic v. Haris (1985) 3 C.L.R. 106.

15 **Recourse.**

Recourse against the decision of the respondents to promote the interested parties to the post of Nursing Sister/Charge Nurse in preference and instead of the applicants.

E. Lemonaris, for the applicants.

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

X. Xenopoulos, for interested parties 5 and 6.

Cur. adv. vult.

25 STYLIANIDES J. read the following judgment. The applicants by this recourse seek the annulment of the promotion by the respondent Commission to the post of Nursing Sister/Charge Nurse of the nine interested parties.

30 The post of Nursing Sister/Charge Nurse is a promotion post and the immediately lower post is that of Staff Nurse. By letters dated 8.3.82, 22.3.82 and 3.5.82 the Director-

General of the Ministry of Health requested the filling of 20 vacancies of Nursing/Charge Nurses.

A Departmental Board was constituted to whom the names of the 153 Staff Nurses with their relevant administrative files were transmitted. The Departmental Board after considering the required qualifications, as set out in the relevant scheme of service, concluded that 48 possessed the required qualifications and having regard to their qualifications, experience, merit and suitability for the vacant posts, recommended all 48 for promotion.

The respondent Commission at its meeting of 27.7.82, after hearing the recommendations of the Head of the Department—the Director of Medical and Public Health Services—promoted 20 of them, including the 9 interested parties.

The applicants challenge the validity of the aforesaid decision with regard to the interested parties on the following grounds:-

- (a) That interested party Nitsa Eliadou did not possess the required qualification as she was not the holder of a certificate of post graduate in «νοσηλευτική» (nursing) or «νοσηλευτική διοίκηση» (nursing administration);
- (b) That the respondent Commission took into consideration the last three annual confidential reports of the candidates whereas the proper interpretation of the relevant statutory provision is that it should have confined itself to consideration of only the two last annual confidential reports;
- (c) That it disregarded the seniority and the additional qualifications of applicant No. 1;
- (d) That it disregarded the recommendations of the Head of the Department for the promotion of applicants No. 2 and 3;
- (e) That these applicants are better rated in the confidential reports than two interested parties, i.e. Philokypros Christodoulou and Salomi Panayiotou; and, lastly,

(f) That the Commission failed in its paramount duty to select the best suitable candidates, contrary to s. 44(2) of Law No. 33/67, and thus acted contrary to Law and in abuse of power.

5 The Law and the principles of administrative Law applicable to promotions relating to the points of Law raised in this recourse are by now well settled. Twenty-five years of life of the Public Service Commissions envisaged by the Constitution and the Public Service Law and the plethora
10 of judgments of this Court have led to a certainty of the Law on the points raised.

It is well settled that for a candidate to be eligible for promotion he must possess the qualifications laid down in the scheme of service for that office—(Section 44(1) (b)
15 of the Public Service Law, No. 33/67).

The Supreme Court in its revisional jurisdiction in *The Republic of Cyprus v. Pericleous and Others*, (1984) 3 C.L.R. 577, held that the material date at which a candidate for promotion must possess the required, under the relevant scheme of service, qualifications is the date on
20 which the request for the filling of a vacancy under section 17 of the Public Service Law, 1967 (Law No. 33/67) is received by the Commission.

The scheme of service for the Nursing Sisters'/Charge
25 Nurses' post comprises certificate of post graduate in a branch of «νοσηλευτική» (nursing) or in «νοσηλευτική διοίκηση» (nursing administration) besides registration as a "General Nurse" under the Nursing and Midwifery Law.

Some of the interested parties, including Nitsa Eliadou,
30 and applicants No. 2 and 3, besides their registration as General Nurses, passed the midwifery examinations of the Government of Cyprus and their name was duly entered in the register of midwives kept under the Law and a certificate to that effect was issued to them on 13.6.73. It
35 is correct that in the list of officers holding the post of Staff Nurse to be considered for promotion to the post of Nursing Sister/Charge Nurse (General Nursing), Medical and Public Health Services, attached to the opposition, this qualification does not appear in the column of qualifica-
40 tions of interested party Nitsa Eliadou.

Though counsel for the respondent submitted in her written address that this list was prepared, as usual, for the purpose of the opposition to the recourse only, I entertain serious doubts whether this was not the list which was sent to the Departmental Board and in some way also before the Commission. I entertain this doubt because of the inclusion of the names and all relevant particulars of all 153 who were holding the post of Staff Nurse in 1982. 5

The certificate of registration as a midwife of Nitsa Eliadou was placed in her personal file on 13.7.82. This is plain from the rubber-stamp date on it “Ελήφθη 13 Ιουλίου, 1982—Επιτροπή Δημόσιας Υγείας” (Received 13th July, 1982—Public Service Commission). Red 25 in the personal file of applicant No. 3 refers to the Midwifery State Final Examinations held at the School of Nursing and Midwifery on the 27th March and 12th April, 1973, and states that the successful candidates should be registered as midwives. The list of successful candidates set out in that document includes the names of applicant No. 3 (No. 2 on the list), applicant No. 2 (No. 3 on the list) and interested party Nitsa Eliadou (No. 8 on the list). She possesses exactly the same qualifications as applicants No. 2 and 3 and she satisfies the requirement laid down in the scheme of service. 10 15 20

Learned counsel for the applicants submitted that the correct construction of s.44 of the Public Service Law, No. 33/67, leads to the conclusion that the Commission should have due regard only to the two last annual confidential reports on the candidates. 25

The relevant parts of s. 44(1) and (3) read:- 30

“44. (1) No officer shall be promoted to another post, unless-

- (a)
- (b)
- (c) He has not been reported upon in the last two annual confidential reports as unsuitable for promotion; 35

(d) He has not been punished during the preceding two years for any disciplinary offence of a serious nature.

(2)

5 (3) In making a promotion, the Commission shall have due regard to the annual confidential reports on candidates...".

10 Subsection (1) is an exclusionary provision. It debars he has been reported upon in the last annual confidential reports as unsuitable for promotion or if he has been punished during the preceding two years for any disciplinary offence of a serious nature. The two years' limit refers only to the aforesaid two elements and no more. They are grouped
15 in subsection (1) and they are not connected with the provision in subsection (3) that refers to the annual confidential reports as an element of the picture of the merits of a candidate to which the Commission should have due regard.

20 . Some time in the past the Commission was taking into consideration only the two last annual confidential reports.

In *Georghiades v. The Republic*, (1975) 3 C.L.R. 143, A. Loizou, J., said at p. 151:

25 "In determining the merits of civil servants, whether for the purpose of secondment on merit or promotion, the whole career of a candidate has to be examined and all the factors referring to the quality, ability and merits of a candidate as a civil servant, and not those of a certain period or of a certain category
30 have to be taken into consideration".

On appeal in that case sub nomine *Hji-Gregoriou v. The Republic*, (1975) 3 C.L.R. 477, Triantafyllides, P., in delivering the judgment of the Full Bench, said at p. 483:-

35 "We do agree with both the learned trial Judge and counsel for the appellant that it is necessary, in deciding on the merits of candidates, to look at past annual confidential reports, and especially at the most recent

ones, in order to evaluate the performance of the candidates during their careers as a whole.”

In *Georghiou v. The Republic*, (1976) 3 C.L.R. 74, it was repeated that the whole career of the candidate concerned had to be taken into account though it is not wrong to give due weight to the more recent confidential reports. 5

The confidential reports must be regarded only as constituting part of the overall picture of the merits of each candidate which the Commission has to weigh as a whole. The Commission should not confine itself to consideration of the two last annual confidential reports but should give due regard to past confidential reports, though more weight should be given to recent ones, as a civil servant may either improve or deteriorate at the time nearest to the material time for promotion. 10 15

Applicant No. 1 is senior by 20-27 months to all interested parties. Seniority and the length of service with the experience that goes with it, is one of the factors to be taken into consideration. Seniority, however, is not the decisive factor which governs promotions but one that should be duly taken into consideration and it should only prevail if all other things were more or less equal—*Partelides v. The Republic*, (1969) 3 C.L.R. 480; *Smyrnios v. The Republic*, (1983) 3 C.L.R. 124). 20

Qualifications additional to those provided by the scheme of service, which are not specified in the scheme of service as an advantage, should not weight greatly in the mind of the Commission, who should decide in selecting the best candidate on the totality of the circumstances before them. Additional qualifications to those provided by the scheme of service do not indicate by themselves a striking superiority—(*Korai and Another v. The Cyprus Broadcasting Corporation*, (1973) 3 C.L.R. 546; *Andreas D. Georghakis v. The Republic*, (1977) 3 C.L.R. 1; *Evangelos Hji-Georghiou v. The Republic*, (1977) 3 C.L.R. 35; *Cleanthous v. The Republic*, (1978) 3 C.L.R. 320; *Hji-Ioannou v. The Republic*, (1983) 3 C.L.R. 1041). 25 30 35

All the qualifications of this applicant were before the Commission. They appear both in his personal file and in

the list of candidates, which is attached to the opposition and to which reference was earlier made in this judgment.

5 The Head of the Department before attending the meeting of the respondent Commission formed a committee consisting of a number of persons superior to the candidates, who were posted at various places, as he did not have a personal knowledge of all the candidates. Basing himself on the advice of the aforementioned Committee, which was formed for convenience purposes and as an advisory body to him, he recommended 20 persons, including applicants No. 2 and 3. Applicant No. 1 was not recommended.

15 The Public Service Commission is under a duty to pay special regard to the recommendations of the Departmental Head. This principle was propounded in the early days of the administrative Law in Cyprus—(See *Michael Theodosiou v. The Republic*, 2 R.S.C.C. 44, at p. 48). It was consistently followed by the jurisprudence of this Court and it was given statutory authority by s. 44(3) of the Public Service Law, No. 33/67. The recommendations of the Head of a Department should not be lightly disregarded. The Commission is normally expected either to follow them or give reasons for not doing so—(*Theodossiou* (supra); *Evangeliou v. The Republic*, (1965) 3 C.L.R. 292; *Lardis v. The Republic*, (1967) 3 C.L.R. 64; *Hji-Constantinou v. The Republic*, (1973) 3 C.L.R. 65; *Petris v. Public Service Commission*, (1975) 3 C.L.R. 284; *Mytides v. The Republic*, (1983) 3 C.L.R. 1096; *Protopapas v. The Republic*, (1981) 3 C.L.R. 456; *The Republic v. Georghios Charis*, Revisional Appeal No. 334, unreported). *

The material part of the recommendations of the Director in the present case runs as follows:-

35 «Η κα Μερóη Λεμονιάτη, η οποία έχει εξαιρετικούς Εμπιστευτικούς Εκθέσεις κατά τα τελευταία έτη και η οποία διακρίνεται δια την ευσυνειδησίαν της και το συναίσθημα ευθύνης, συνιστάται.

Η κα Δέσποινα Φιλοθέου είναι εξαιρετος κατά τα τελευταία δύο έτη, διακρίνεται δια την εργατικότητα, την ικανότητα και τον ζήλον της και συνιστάται».

* Now reported in (1985) 3 C.L.R. 106.

(“Mrs. Meropi Lemoniati who has excellent confidential reports for the last years and who is distinguished for her conscientiousness and her sense of responsibility is recommended.

Mrs. Despina Philotheou is excellent for the last two years, is distinguished as hard-working and for her ability and her zeal and is recommended”). 5

He referred to interested party Iphigenia Hji-Theodoulou. At page 5 we read: “Εύφημος μνεία γίνεται δια την κυρίαν Ιφιγένειαν Χατζηθεοδούλου, η οποία έχει εξαιρετικούς Εμπιστευτικές Εκθέσεις”. The Commission disregarded the aforesaid recommendations of the Head of the Department and preferred interested parties Hji-Theodoulou and Hji-Maltezou. The Commission in its decision noted the following:- 10 15

«Εν προκειμένω η Επιτροπή παρήγγειλεν ότι κατά τα τρία τελευταία έτη αι υπάλληλοι αύται έτυχον των ακολούθων βαθμολογιών εις τας περί αυτών Εμπιστευτικές Εκθέσεις:

Ιφιγένεια Χατζηθεοδούλου: 1979: Γενικώς «Εξαιρετος». («Εξαιρετος» εις όλας τας παραγράφους της επί μέρους βαθμολογίας). 1980: Γενικώς «Εξαιρετος». («Εξαιρετος» εις 9 παραγράφους της επί μέρους βαθμολογίας και «Λίαν Καλή» εις 3). 1981: Γενικώς «Εξαιρετος». (9-3-0). 20 25

Ελένη Χατζημαλτέζου: 1979: Γενικώς «Λίαν Καλή». (0-8-4). 1980: Γενικώς «Εξαιρετος». (8-4-0). 1981: Γενικώς «Εξαιρετος». (11-1-0).

Μερόπη Λεμονιάτη: 1979: Γενικώς «Καλή». (0-7-5). 1980: Γενικώς «Εξαιρετος». (8-4-0). 1981: Γενικώς «Εξαιρετος». (8-4-0). 30

Δέσποινα Φιλοθέου: 1979: Γενικώς «Καλή». (0-6-6). 1980: Γενικώς «Λίαν Καλή». (7-5-0). 1981: Γενικώς «Εξαιρετος». (8-4-0).

Η Επιτροπή εσημείωσε την δήλωσιν του Διευθυντού ότι η κα Χατζημαλτέζου υστερεί εις προσωπικότητα. Παρήγγειλεν όμως ότι εις τας σχετικές παραγράφους 35

της βαθμολογίας εις τας ως άνω περι αυτής Εμπιστευ-
 τικάς Εκθέσεις αύτη ηξιολογήθη ως «Λίαν Καλή» και
 «Εξαιρετος».

5 Η Επιτροπή έλαβεν ωσαύτως υπ' όψιν τα προσόντα
 των υπαλλήλων και εσημείωσεν ότι από πλευράς αρ-
 χαιότητας αι Λεμονιάτη, Φιλοθέου και Χατζημαλτέζου
 ευρίσκονται εις την ιδίαν μοίραν, διορισθείσαι εις την
 10 θέσιν Νοσοκόμου επί του Προσωπικού από 2.4.73 (λό-
 γω ηλικίας πρώτη κατατάσσεται η Λεμονιάτη, δευτέρα
 η Φιλοθέου και τρίτη η Χατζημαλτέζου), και η Χατζη-
 θεοδούλου έπεται κατά δύο μόνον μήνας, διορισθείσα
 εις την ιδίαν θέσιν από 1.6.73».

15 (“In this respect the Commission observed that for
 the last three years these officers had the following
 grading in their confidential reports:

20 *Ifigenia Hadjitheodoulou:* 1979 Generally ‘Excel-
 lent’. (‘Excellent’ in all paragraphs of the grading).
 1980: Generally ‘Excellent’ (‘Excellent’ in 9 paragraphs
 of the grading and ‘very good’ in 3). 1981: Generally
 ‘Excellent’ (9-3-0).

Eleni Hadjimaltezou: 1979: Generally ‘Very good’
 (0-8-4), 1980: Generally ‘Excellent’ (8-4-0). 1981:
 Generally ‘Excellent’ (11-1-0).

25 *Meropi Lemoniati:* 1979: Generally ‘Good’ (0-7-5),
 1980: Generally ‘Excellent’ (8-4-0). 1981: Generally
 ‘Excellent’ (8-4-0).

Despina Philotheou: 1979: (Generally ‘Good’)
 (0-6-6). 1980: Generally ‘Very good’ (7-5-0). 1981:
 Generally ‘Excellent’ (8-4-0).

30 The Commission noted the statement of the Di-
 rector that Mrs. Hadjimaltezou lacks in personality.
 But it observed that in the relative items of the grading
 in her above confidential reports she was rated as
 ‘Very good’ and ‘Excellent’.

35 The Commission took also into consideration the
 qualifications and observed that from the seniority
 point of view Lemoniati, Philotheou and Hadjimalte-
 zou are in the same position, having been appointed
 to the post of staff nurse as from 2.4.73 (but due to

age Lemoniati ranks first, Philotheou second and Hadjimalteizou third) and Hadjitheodoulou follows by only two months, having been appointed to the same post as from 1.6.73”).

The statement of the Director that Hji-Malteizou lacked personality is not borne out by the confidential reports as for the items which depict the personality of the candidate she was rated “Very Good” and “Excellent”. The two aforesaid interested parties were better rated in general in the confidential reports and so far as the confidential reports spell out the merit of a candidate, these interested parties were superior to the two applicants. The Commission went meticulously into their confidential reports and made a very careful comparison thereto.

Sufficient reasons were given for not following the recommendations of the Head of the Department. We should not lose sight of the fact that the ultimate duty to select the best suitable candidate in the interests not only of the candidates but of the public service and the public in general is on the Commission.

All the material—confidential reports, personal files and recommendations of the Director—were before the Commission. The Commission on the totality of the material before it and having given due regard to all factors, arrived at the sub judice decision.

It is not necessary for the Commission to satisfy this Court that the promotees were strikingly superior to the applicants. An applicant, however, in order to succeed, he has to establish that he is strikingly superior over the interested parties or any of them as to lead a Court to the conclusion that the subject decision was taken in excess or abuse of power.

Striking superiority suggests a superiority that is self-evident and apparent from a perusal of the file of the candidates—superiority that emerges on any view of the combined effect of the merits, qualifications and seniority of the parties competing for promotion. It must be so telling as to strike one at first sight—(*Hji-Ioannou v. The Republic* (supra)).

On the totality of material before me, the applicants failed to establish that they or any of them are strikingly superior over the interested parties or any of them.

5 I find no merit in the submission that the sub judice decision was not duly reasoned. It was reasoned on the whole and reasonably open to the Public Service Commission in the light of the material before them.

For the aforesaid reasons this recourse fails and is hereby dismissed with no order as to costs.

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*Recourse dismissed with
no order as to costs.*