

1986 May 17

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ANDREAS IOANNIDES,

Applicant,

v.

THE PUBLIC SERVICE COMMISSION.

Respondents.

(Case No. 326/84).

Public Officers—Promotions—The Public Service Law 33/67—
Sections 44(1)(c) and 44(3)—The first is an exclusionary
provision not connected with the second which refers to
confidential reports as an element of merit of the candi-
5 dates—Whole career of officer should be taken into ac-
count—Seniority—Though not the decisive factor, it can-
not be disregarded—It should prevail, if all other things
are more or less equal—An Officer cannot be penalised for
performing the duties allocated to him by his superiors—
10 Striking superiority—It must emerge as an unquestionable
fact—Qualifications—Additional academic qualifications to
those provided in the scheme of service do not indicate by
themselves striking superiority.

15 Counsel for the applicant, who, by means of this re-
course, challenges the validity of the promotion of the
interested party, argued that the applicant was strikingly
superior to the interested party and he was performing
actually the duties of a Surgeon whereas the interested
party was not doing so and that only the two last confi-
20 dential reports should have been taken into consideration.

For a number of years the interested party was posted
and retained by his superiors in-charge of the Casualty

Department of the Nicosia General Hospital. Not only he did not elect to be so posted but, on the contrary, he was continuously asking to be transferred to the Surgery Department in order to perform the duties of his speciality.

It is not in dispute that the academic qualifications of the applicant were superior to those of the interested party. The picture of the interested party, as depicted in the confidential reports, was better than that of the applicant. The interested party was senior to the applicant by almost five years. 5

Held, dismissing the recourse: (1) The provision in s. 44(1)(c) of Law 33/67 is an exclusionary provision. It is not connected with sub-section (3) of s. 44, which refers to the annual confidential reports as an element of the merits of a candidate to which the Commission should have due regard. 15

The whole career of an officer should be taken into account in cases of promotion. The Commission has to look at past confidential reports though it is not wrong to give due weight to the more recent ones. 20

(2) The academic qualifications of the applicant which were not envisaged in the scheme of service could not, in this case, tip the scales in his favour, having regard to all other factors, including the long seniority of the interested party. 25

(3) The interested party could not be penalised for performing the duties allocated to him by his superiors.

(4) The applicant failed to discharge the burden cast on him of persuading the Court that he was strikingly superior to the interested party. 30

Recourse dismissed.
No order as to costs.

Cases referred to:

Georghiades v. The Republic (1975) 3 C.L.R. 143;

HjiGregoriou v. The Republic (1975) 3 C.L.R. 477; 35

- Georghiou v. The Republic* (1976) 3 C.L.R. 74;
Philotheou and Others v. The Republic (1985) 3 C.L.R. 662;
Partellides v. The Republic (1969) 3 C.L.R. 480;
- 5 *Smyrniotou v. The Republic* (1983) 3 C.L.R. 124;
Stylianou v. The Republic (1984) 3 C.L.R. 776;
Loizidou-Papaphoti v. The Educational Service Commission (1984) 3 C.L.R. 933;
Hijiloannou v. The Republic (1983) 3 C.L.R. 1041;
- 10 *Michael v. The Republic* (1982) 3 C.L.R. 1123;
Ioannou v. The Republic (1983) 3 C.L.R. 75.

Recourse.

- 15 Recourse against the decision of the respondent to promote the interested party to the post of Specialist in Surgery, in preference and instead of the applicant.

D. Papachrysostomou, for the applicant.

G. Erotocritou (Mrs.), Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

- 20 STYLIANIDES J. read the following judgment. By this recourse the applicant challenges the validity of the decision of the respondent Public Service Commission to promote *Andreas Costi* (the interested party) instead of him to the post of Specialist in Surgery as from 1.3.84.
- 25 Counsel for the applicant argued that the respondent Commission failed in its duty to select the best suitable candidate for the post; the applicant was strikingly superior to the interested party as he had better qualifications and he was performing actually the duties of a Surgeon whereas
- 30 the interested party was not doing so. Furthermore, that only the two last confidential reports should have been taken into consideration in which, though both are rated

equal, the reporting officer for the applicant, who is different from that of the interested party, wrote better remarks, for him. He submitted that the applicant was thus better evaluated than the interested party.

There is no quarrel that the duty of the Public Service Commission, entrusted to it by the Law, is to select the best suitable candidate. This serves the interests of the public and enhances the prestige of the service. A decision of the respondent Commission, if otherwise not faulty, will not be annulled by this Court if it was reasonably open to it and if it does not transgress the outer limits of its discretion. 5 10

The post in question is that of Specialist in Surgery. The applicant and the interested party were the only candidates recommended by the Departmental Board and the Commission had to select one of them. The Commission had before it the personal files and the files of the confidential reports of these two Registrars. 15

The meeting of the Commission at which the sub judge decision was taken, was attended by the Director of Medical and Health Services—the Head of the Department. He did not recommend any of the two but objectively stated the facts which are not in any way different from those emerging from the files: that the applicant was superior in academic qualifications; that the interested party was serving as a doctor in-charge of the Casualty Department of the Nicosia General Hospital and as a doctor and a civil servant was excellent and devoted to duty though he was not performing in that department the duties of a surgeon. About the applicant he stated that he was excellent in surgery and he specialized in paediatric surgery after a scholarship. 20 25 30

The Commission in the sub judge decision stated that, having taken into consideration from the material before it the merit, qualifications and seniority of the candidates, selected the interested party. They specifically mention the respective qualifications of the two candidates. This preferment by the Commission was due to the higher confidential reports and the seniority of the interested party. 35

The applicant was born on 9.1.40 and the interested party on 8.6.24. The interested party retired on 1.7.84 and after the prescribed procedure was observed, the applicant was promoted to this same post. This promotion has not deprived the applicant of the legitimate interest which must exist at the time of the filing of the recourse until its determination.

Both had the academic qualifications required by the scheme of service. The applicant had further a post-graduate training in Clinical and Operative Paediatric Surgery at the University of Liverpool. He acquired a Speciality in Paediatric Surgery. It is not in dispute that the academic qualifications of the applicant were superior to those of the interested party though the latter fully met the requirements of the scheme of service, as he had a diploma of Doctor in Medicine and a Speciality in Surgery. Actually he was registered by the Cyprus Medical Council as a Specialist in Surgery. The applicant was promoted to Registrar on 15.12.78 whereas the interested party preceded him by almost five years, having been promoted to the post of Registrar on 15.1.74. Thus, the interested party's seniority was overwhelming.

With respect to counsel for the applicant, the jurisprudence of this Court is to the effect that the whole career of an officer should be taken into account in case of promotion; in order to evaluate the merit of a candidate, the Commission has to look at past annual confidential reports though it is not wrong to give due weight to the more recent ones—(*Georghiades v. Republic*, (1975) 3 C.L.R. 143; *HjiGregoriou v. Republic*, (1975) 3 C.L.R. 477; *Georghiou v. Republic*, (1976) 3 C.L.R. 74).

The provision in s. 44(1)(c) of Law No. 33/67 is an exclusionary provision. 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. The two years' limit refers only to the aforesaid two elements and no more. This provision is not connected with 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—(*Philotheou and Others v. Republic*, (1985) 3 C.L.R. 662).

I have gone meticulously through the confidential reports of the candidates. The reporting officer for the applicant is Dr. Papanastassiou, in-charge of the Surgery Department of the Nicosia General Hospital, and the reporting officer of the interested party is Dr. Panayiotis Eliades, the Chief Medical Officer, who is responsible for the Nicosia General Hospital. Their rating in the confidential reports for the last three years is as follows:-

	1983	1982	1981
Applicant	10-0-0	8-2-0	0-11-0
Interested Party	11-1-0	10-2-0	11- 1-0

The two items, in one of which the interested party was rated "Very Good", do not apply in the case of the applicant as he was not in-charge of a department of the Hospital. The general evaluation of the applicant and of the interested party, though differently worded, do not depict a superiority of the applicant to the interested party, though the reports were, as earlier stated, prepared by two different reporting officers.

The Commission rightly found that the picture of the interested party, as depicted in the confidential reports, was better than that of the applicant.

For a number of years, as it appears from his personal file, the interested party was posted and retained by his superiors in-charge of the Casualty Department of the Nicosia General Hospital, a department with heavy responsibilities for rendering various medical services to the public. Not only he did not elect to be in-charge of the Casualty Department but, on the contrary, in the forms which he was filling for each of the last years for the confidential reports, he was continuously asking to be transferred to the Surgery Department in order to perform the duties of his speciality. The interested party could not be penalized for performing the duties allocated to him by his superiors—

Conclusions of the Case-Law of the Greek Council of State, 1929-1959, p. 357).

5 The academic qualifications of the applicant, which were not envisaged in the scheme of service, could not, in this case, tip the scales in his favour, having regard to all other factors, including the long seniority of the interested party. Seniority though is not the decisive factor, it could not be disregarded: it should be duly taken into consideration and it should prevail if all other things are more or less equal—
10 (*Partellides v. Republic*, (1969) 3 C.L.R. 480; *Smyrnios v. Republic*, (1983) 3 C.L.R. 124; *Stylianou v. Republic*, (1984) 3 C.L.R. 776; *Elli Loizidou - Papaphoti v. The Educational Service Commission*, (1984) 3 C.L.R. 933).

15 Striking superiority, as it was held by the Full Bench in *Hji-Ioannou v. The Republic*, (1983) 3 C.L.R. 1041, is such superiority that must be glaring, striking one at first sight. It must be as evident and apparent from a perusal of the files of the candidates; it must emerge as an unquestionable fact. Additional academic qualifications to those
20 provided in the scheme of service, though they have to be taken into consideration with all other elements, do not by themselves indicate a striking superiority.

The applicant did not discharge the burden cast on him of persuading the Court that he was strikingly superior to
25 the interested party. Consequently, I cannot interfere with the sub judice decision of the Commission. Further I have not been satisfied that such decision was not reasonably open to the Commission—*Michael v. Republic*, (1982) 3 C.L.R. 1123; *Ioannou v. Republic*, (1983) 3 C.L.R. 75).

30 In the light of the foregoing it follows that this recourse fails and it is hereby dismissed. Let there be no order as to costs.

*Recourse dismissed with
no order as to costs.*