

1986 October 25

[DEMETRIADES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

RENOS ARGYRIDES.

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF HEALTH,
2. THE PUBLIC SERVICE COMMISSION,

Respondents.

(Case No. 342/83).

Public Officers—Promotions— Principles applicable—Summing up of such principles.

Public Officers—Promotions—Confidential reports— Counter-signing Officer amending a report in contravention of the provisions of the relevant regulatory order, i.e. without consulting the reporting officer—The irregularity is of a material nature.

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Administrative Law—Irregularity—Administrative act or decision is vitiated only if the irregularity is of a material nature.

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By means of this recourse the applicant challenges the promotion of the interested party to the post of Senior Analyst in the General Government Laboratory. The applicant is by two years senior to the interested party, but he had in general inferior confidential reports compared to the interested party. The Head of the Department stated before the Commission that the best candidates were the interested party and one Michael. It should, however, be noted that, though the reporting officer for the interested party was not the same with the reporting

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officer on the applicant, the countersigning officer, namely the Head of the Department was the same and that the latter had amended the confidential reports on the parties without consulting the reporting officer concerned and, thus, contravened the relevant provision of the regulatory order concerning confidential reports.

Counsel for the applicant submitted, inter alia, that the Diploma of the interested party does not entitle her to work in a Government laboratory, but only in the private sector.

Held, annulling the sub judice decision: (1) The submission as regards the Diploma of the interested party is unfounded.

(2) The principles relating to matters of promotion can be summed up as follows, namely that the applicant in order to succeed must establish striking superiority over the interested party, that the merits, qualifications and seniority of the candidates must be duly taken into account in that order, that recommendations by the Head of the Department, going to merit, count in favour of the candidate recommended by him and that such recommendations should not be disregarded without giving reasons for doing so.

(3) An irregularity will only vitiate an administrative act or decision if it is a material one.

(4) Failure by a countersigning officer to follow the provisions of the Regulatory Order relating to the preparation of confidential reports is of a material nature. The amendments made in this case of the confidential reports resulted in the upgrading of the interested party vis a vis the applicant. This fact, coupled with the fact that the Head of the Department was one of the referees in the application of the interested party for appointment

in the service, materially affected the evaluation made by the Commission of the parties' merits.

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

Cases referred to:

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Themistocleous v. The Republic (1985) 3 C.L.R. 2652;

HadjiSavva v. The Republic (1982) 3 C.L.R. 76;

Ioannou v. The Republic (1983) 3 C.L.R. 75;

Soteriadou v. The Republic (1983) 3 C.L.R. 921;

Larkos v. The Republic (1982) 3 C.L.R. 513;

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Constantinou v. The Republic (1983) 3 C.L.R. 136;

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

Christou v. The Republic (1980) 3 C.L.R. 437;

Livadas v. The Republic (1985) 3 C.L.R. 506.

Recourse.

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Recourse against the decision of the respondents to promote the interested party to the post of Senior Analyst in the General Government Laboratory in preference and instead of the applicant.

S. & A. Spyridakis, for the applicant.

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E. Papadopoulou, (Mrs.), for the respondents.

M. Papapetrou, for the interested party.

Cur. adv. vult.

DEMETRIADES J. read the following judgment. By means of this recourse the applicant challenges the decision of the respondents, which was published in the Official Gazette of the Republic on the 10th June, 1983, and by which Mrs. Constantia Akkelidou, the interested party, was promoted to the post of Senior Analyst in the General Government Laboratory instead of him.

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The applicant was first appointed as an Analyst, grade II, on the 15th January, 1972, and was promoted to the post of Analyst grade I, on the 15th March, 1982. He is the holder of a Diploma in Chemistry, of the University of Athens. After his graduation he attended a one-year course in Food Chemistry at the Laboratory of Food Chemistry of the University of Athens and a three-months course in the Bacteriological Examination of Food and Drugs in the United Kingdom.

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15 The interested party was first appointed as an Analyst, grade II, on the 1st March, 1974 and was promoted to the post of Analyst, grade I, on the 15th March, 1982. She is the holder of a degree of Master of Science in Chemistry, of Patrice Lumumba Peoples' Friendship University of Moscow.

20 After the approval of the Ministry of Finance for the filling of the post was obtained, the Director-General of the Ministry of Health, by letter dated the 1st November, 1982, requested the second respondent for the filling of a vacancy in the post of Senior Analyst in the General Laboratory.

25 As the post of Senior Analyst is a promotion post, the second respondent, at its meeting of the 11th November, 1982, decided to forward to the Chairman of the Departmental Committee of the Ministry of Health, a body which is set up under the provisions of section 36 of the Public Service Law (Law 33/67), a list of the candidates, five in number, who were eligible for promotion to the post in question, together with their confidential reports and
30 copies of the scheme of service of the post.

The Departmental Committee, by its report to the second respondent, dated the 14th January, 1983, recommended for promotion four of the candidates, amongst whom were the applicant and the interested party. In response to an
35 inquiry made by the second respondent, why the fifth candidate was not recommended, the Chairman of the Departmental Committee, who was the Director-General of the Ministry of Health, submitted, on the 14th February.

1983, a supplementary report, by which he explained the reason for not recommending the other candidate.

At its meeting of the 3rd March, 1983, the Public Service Commission, after considering the report of the Departmental Committee, decided to postpone the filling of the post to a later meeting, which had to be attended by the Director of the General Laboratory. It was, also, decided that at that meeting the fifth candidate, who was not recommended by the Departmental Committee, was to be taken into consideration for the filling of the post.

The second respondent met on the 6th April, 1983, to consider the filling of the post in question. During this meeting the Head of the Department, who was present at the meeting, stated that the best candidates were Constantia Akkelidou and Constantinos Michael, who were both excellent officers and almost equal to each other.

The Public Service Commission, after considering the material in the personal files and the confidential reports of the candidates and having, also, taken into consideration the report of the Departmental Committee and the views of the Head of the Department, appointed to the post the interested party.

The relevant extract from the minutes of the second respondent, which are attached to the Opposition as Appendix 8, reads:-

"The Commission, taking into consideration that Akkelidou has excellent Confidential Reports for the last years ('excellent' (10-2-0) the last three years), that she is by four years senior to Michael, who, also, has excellent Confidential Reports, and that Renos Argyrides who is by two years senior to Akkelidou has in general inferior Confidential Reports compared to her, selected Akkelidou for promotion.

In conclusion, the Commission, taking into consideration all the material before it, found, on the basis of the established criteria in general (merit, qualifications, seniority) that Constantia Akkelidou is superior

to the other candidates and decided to promote her as the most suitable to the permanent post of Senior Analyst in the General Laboratory as from 15.4.83."

5 As a result of the above decision the applicant filed the present recourse which was based on several grounds which may be summed up in that the Public Service Commission failed in its paramount duty to select the best candidate; and that the applicant was treated in a discriminatory manner vis a vis the interested party.

10 Counsel for the applicant submitted that his client has better qualifications than the interested party in that he, having worked in Government Laboratories in Greece before his employment with the Government of Cyprus, possesses experience which the interested party does not
15 have; that the applicant is superior to the interested party in merit and seniority and that the Public Service Commission acted under a misconception of facts and in excess or abuse of its powers in that it based its decision for selecting the interested party on the report of the Departmental Committee by which a candidate (not the applicant or the interested party), who did not possess the qualifications required by the schemes of service, was recommended for promotion although one who did possess the qualifications was not so recommended.

25 Counsel further argued that the grades given to the applicant by his reporting officer were altered by the countersigning officer in contravention of the procedure set out in regulatory orders approved by the Council of Ministers in relation to confidential reports, which provide
30 that if the countersigning officer disagrees with any of the marks given by the reporting officer, he has to discuss the matter with him and if he still disagrees, he has to give his own evaluation in red initialling same and give explanations for his evaluation.

35 Counsel lastly submitted that the Diploma of the interested party does not entitle her to work in a Government Laboratory but only in the private sector. In support of this submission counsel for the applicant made reference to an explanatory document from the Ministry of Educa-

tion of USSR which is red 2 in the personal file of the interested party, exhibit No. 3 before me, the relevant part of which reads:-

«Εἰς ὅσους τελειῶνουν τὴν φυσικομαθηματικὴν σχολὴν εἰς τὴν εἰδικότητα τῆς 'χημείας' ἀπονέμεται ἡ κατάρτισις (τίτλος) τοῦ 'χημικοῦ, διδάσκαλου τῆς χημείας'.

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Οἱ ἀπόφοιτοὶ τοῦ Πανεπιστημίου Φιλίας τῶν Λαῶν εἰς τὴν εἰδικότητα αὐτὴν δύνανται νὰ ἐργάζωνται εἰς Ἀνώτερα Ἐκπαιδευτήρια, εἰς σχολὰς Μέσης Ἐκπαίδευσεως, εἰς Ἐπιστημονικὰ-Ἐρευνητικὰ Ἰνστιτούτα καὶ εἰς ἐργαστήρια ἐργοστασίων.»

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("To those who graduate from the faculty of Physics-Mathematics in 'chemistry' it is awarded the degree of 'chemist, teacher in chemistry'.

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The graduates of the Peoples' Friendship University can be employed in Higher Educational Establishments, Secondary Educational Schools, Scientific-Research Institutes and factory laboratories.")

With respect, this submission of counsel cannot stand in view of the contents of red 2 of exhibit No. 3 which I have cited:

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Counsel for the respondents submitted that although the applicant is senior to the interested party, the latter is better in merit and thus the applicant's seniority cannot prevail and that the applicant failed to establish striking superiority over the interested party. On the point of alteration of the gradings of the applicant by the counter-signing officer, counsel made reference to the case of *Themistocleous v. The Republic*, (1985) 3 C.L.R. 2652 and argued that this irregularity is not of a material nature so as to nullify the sub judice decision. With reference to the other points raised by the applicant and, in particular, the issue regarding the report of the Departmental Committee, counsel for the respondents submitted that the applicant has no legitimate interest to raise it in these proceedings.

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Counsel appearing for the interested party adopted the address of counsel for the respondents.

5 Counsel for the respondents and the interested party have addressed me on the submission of the applicant on the standard of the degree received by the interested party from the Peoples' Friendship University. I have already expressed my views on the submission of counsel for the applicant on this issue and I do not propose to deal with the arguments put forward by them.

10 The principles governing recourses against promotions have repeatedly been laid down by this Court in a great number of its judgments and they can be summed up as follows: An applicant, in order to succeed, must establish striking superiority over the interested party (see *Hadji-Savva v. The Republic* (1982) 3 C.L.R. 76; *Ioannou v. The Republic* (1983) 3 C.L.R. p. 75); that the merits, qualifications and seniority of candidates must be duly taken into consideration in that order (seniority being the last to count and it only prevails where all other factors are equal) (see *HadjiSavva v. The Republic*, (supra) at p. 20 79; *Soteriadou v. The Republic* (1983) 3 C.L.R. 921 at p. 932); that recommendations by the Head of a Department, going to merit, count in favour of the candidate recommended by him (see *Larkos v. The Republic* (1982) 25 3 C.L.R. 513 at p. 519; *Constantinou v. The Republic*, (1983) 3 C.L.R. 136); and that the Public Service Commission should not disregard the recommendation of the Head of the Department without giving its reasons for doing so (see *Protopapas v. The Republic* (1981) 3 C.L.R. 456).

30 As I note from the files of the confidential reports of the applicant and the interested party, the reporting officer, who assessed the qualities of each of them, was not the same person, although the countersigning officer is the same, namely the Director of the Department, who apparently did not agree with the assessment of the reporting officers. In amending the assessment of the reporting officers the Director did not comply with the directives approved by the Council of Ministers regarding the pre-

paration of confidential reports, which directives provide that if the countersigning officer disagrees with the assessment made by the reporting officer, he has to discuss the matter with him and if the disagreement still continues to exist, he must give his own assessment in red, initialling same, and give explanations for his assessment instead. 5

The Director proceeded to make his own assessment, both of the applicant and the interested party, in complete disregard of the regulatory order of the Council of Ministers referred to above. That the Director did not consult one of the reporting officers, namely Mr. J. Lovarides, a Senior Government Analyst who was the reporting officer of the applicant for the years 1979, 1980 and 1981, is supported by that officer's affidavit which was filed in these proceedings and his evidence on oath which he gave after counsel for the respondents and the interested party asked that he attend the Court for cross-examination. As the Director did not come to the witness box, Mr. Lovarides' evidence stands before me uncontradicted. 10 15

In *Christou v. The Republic* (1980) 3 C.L.R. 437 at p. 448, *Livadas v. The Republic* (1985) 3 C.L.R. 506 at p. 510 (both decided by Triantafyllides, P.) and *Themistoleous v. The Republic* (1985) 3 C.L.R. 2652 at p. 2666 (decided by A. Loizou, J.), it was held that an irregularity will only vitiate an act or decision of an administrative organ if after examination it is found to be a material one. 20 25

Although I agree with the principle laid down in the above mentioned cases, I disagree that failure by a countersigning officer to comply with the directives is not a material irregularity. I feel that if the door is left open for countersigning officers to amend the assessment of reporting officers without giving reasons for doing so, we shall be treading on every dangerous ground. 30

In the present case the amendment made by the Director of the assessment of the reporting officers upgraded the interested party vis a vis the applicant. The amendment made, coupled with the fact that the Director was one of the referees in the application of the interested party for appointment in the service, something that apparently was 35

not considered by the respondents, has, in my view, materially affected the respondents' conclusion as to the merits of the applicant who is senior to the interested party and for this reason I feel that the sub judice decision must
5 be annulled.

Sub judice decision annulled.

No order as to costs.