

1986 October 31

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146  
OF THE CONSTITUTION

CHRISTAKIS KARPASITIS.

*Applicant.*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE PUBLIC SERVICE COMMISSION,

*Respondents.*

(Case No. 1053/85).

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5 *Public Officers—Promotions—Confidential reports—The Regu-*  
*lations governing their preparation and submission, Regu-*  
*lation 9—Failure of countersigning officer to have a prior*  
*consultation with reporting officer before effecting changes*  
*in the report—Failure of countersigning officer to give*  
*reasons for such changes—Said omissions constitute ma-*  
*terial irregularities invalidating the assessment made by the*  
*countersigning officer—Commission taking into considera-*  
*tion such assessments by the countersigning officer—Sub*  
10 *judice promotions annulled.*

*Administrative Law —General Principles —Formalities pres-*  
*cribed by statutes of administrative regulation—Presum-*  
*tion that they are of a material nature.*

15 *Administrative Law—General Principles—Doubt as to factual*  
*background—It should be resolved in favour of the*  
*subject.*

20 The applicant, who by means of this recourse challenges  
the promotion of the interested party to the post of au-  
ditor, complains that his confidential reports for the  
years 1983 and 1984 were downgraded, whilst the con-  
fidential reports of the interested parties for the same

years were upgraded, by the countersigning officer, namely the Auditor-General, in a manner inconsistent with regulation 9 of the Regulations governing the preparation and submission of confidential reports\*, that is without prior consultation with the reporting officer and without giving reasons for his assessments. The applicant further complains of an inaccurate statement about his performance in 1985 made by the Auditor-General to the respondent Commission. 5

*Held, annulling the sub judice decision:* (1) There is a doubt as to whether the countersigning officer had a prior consultation with the reporting officer with regard to the changes, which he intended to make. The doubt should on principle and on authority be resolved in favour of the subject. 10 15

(2) The Regulations under consideration were made in exercise of the rule making power of the Council of Ministers to give effect to and ensure the proper enforcement of the Public Service Law, 33/67. The confidential reports provide the prime pointer of a candidate's merit. Formalities prescribed by statute or administrative regulation must as a rule be observed as a condition for the validity of the act. Any effort on the part of the Court to ignore such formalities would constitute a usurpation of the administrative process. It is presumed that such formalities are essential in nature and it is only in the clearest of cases that the Court can otherwise hold. 20 25

(3) The failure of the countersigning officer to have a prior consultation with the reporting officer constitutes a breach of an essential formality (*Argyrides v. The Republic* (1986) 3 C.L.R. 1488 cited with approval). Modification of the assessment made by a reporting officer, i.e. a person who ordinarily is the officer supervising the officer on whom the report is made, is a serious matter and prior consultation is an essential safeguard for the avoidance of errors or misconceptions about the worth of public officers. Equally consequential was the failure of the counter- 30 35

\* Circular 491 dated 26.3.79, supplemented by circular dated 11.11.83.

signing officer to give his reasons or the modifications he effected in the reports. Non compliance with the provisions of regulation 9 invalidated the assessment of the countersigning officer.

5 (4) There is substance in the complaint as to the inaccuracy of the statement made in respect of the performance of the applicant in 1985 by the Auditor-General.

10 (5) In the light of the above the sub judice decision has to be annulled because the Commission exceeded their powers by taking into consideration the views of the countersigning officer expressed in breach of regulation 9. In consequence the Commission took into consideration matters extraneous to their task and that is another  
15 ground of annulment. Lastly, by taking into consideration the said views, they misconceived the facts relevant to the candidates.

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

20 Cases referred to:

*Sosilos v. The Republic* (1984) 3 C.L.R. 1133;

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

*Philotheou and Others v. The Republic* (1985) 3 C.L.R. 662;

25 *National Bank of Greece S.A. v. The Republic* (1970) 3 C.L.R. 430;

*Stavrou v. The Republic* (1976) 3 C.L.R. 73;

*S. A. Engineering Marketing Co. v. The Republic* (1984) 3 C.L.R. 393;

30 *Papantoniou and Another v. Public Service Commission* (1983) 3 C.L.R. 64;

*Alvanis v. C.Y.T.A.* (1985) 3 C.L.R. 2695;

*Papadopoulos v. The Republic* (1985) 3 C.L.R. 154;

*J.N. Christophides Trading Ltd. v. The Republic* (1985)  
3 C.L.R. 546;

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

*Argyrides v. The Republic* (1986) 3 C.L.R. 1488.

**Recourse.**

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Recourse against the decision of the respondents to promote the interested parties to the post of Auditor in the Audit Department in preference and instead of the applicant.

*A. S. Angelides*, for the applicant.

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*A. Papasavvas*, Senior Counsel of the Republic, for the respondents.

*Cur. adv. vult.*

PIKIS J. read the following judgment. The implications of non compliance with r. 9 of the Regulations governing the preparation and submission of confidential reports<sup>1</sup> is the foremost question we must resolve in these proceedings. Rule 9 provides in mandatory terms that the countersigning officer of a confidential report should, before making any modifications to the rating and assessment of the reporting officer, first discuss the matter with the latter. It further provides that if the countersigning officer, after such consultation with the reporting officer, still holds the view that changes should be made to the evaluation of the services of the officer reported upon, he should do so by using red ink, no doubt to make the changes conspicuous and, more important still, furnish his reasons for his assessment and rating in a specified column of the report.

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Applicant and the interested parties were candidates for the position of Auditor, a promotion post in the department of the Auditor-General. He complains that the Auditor-General, in his capacity as countersigning officer of his confidential reports, made modifications to the assessment

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<sup>1</sup> (Circular 491, issued on 26/3/79 — supplemented by Circular Letter dated 11/11/83).

of the reporting officer (downgrading him) without adhering to the provisions of r. 9, in particular without prior consultation with the reporting officer and without giving reasons for his assessment. The omission of the Auditor-General sapped, in the submission of applicant, the confidential reports on the applicant of their value and rendered them, at the least the part fraught with irregularity, inadmissible material for consideration by the Public Service Commission. And inasmuch as the decision of the respondents was founded, *inter alia*, on the confidential reports on the parties, the prime source of information respecting the value of the services of public officers, it is vulnerable to be set aside as premised on extraneous material or upon a misconception of facts.

15 A similar irregularity affected the confidential reports on the interested parties. In their case too, the countersigning officer failed or omitted to give his reasons for the changes (upgrading them) and there is no note either evidencing a prior consultation with the reporting officer.

20 Applicant contends the decision is liable to be set aside for other reasons too, the most consequential of which is that the Auditor-General made an inaccurate statement about the performance of the applicant in 1985, the year in which the decision of the Public Service Commission was taken (12.9.85), an inaccuracy of a kind apt to mislead the deciding body about the merits of the applicant and suitability for promotion. The legitimacy of the action of the respondents to seek up-to-date information on the performance of the candidates cannot be doubted<sup>1</sup>. Another

30 challenge to the decision is mounted by reference to the career of the three parties in its entirety—a subject to which the respondents allegedly had no proper regard. Our caselaw establishes that the merits of a public officer should be seen through the light and perspective of his

35 entire career in the interest of objectivity; though greater importance may be attached to performance in recent years<sup>2</sup>.

<sup>1</sup> *Sosilos v The Republic* (1984) 3 CLR 1133

<sup>2</sup> See, *inter alia*, *Georghiou v. The Republic* (1976) 3 CLR 74  
*Philotheou and Others v Republic* (1985) 3 CLR 662

Now, to the details of the facts of our case: The three candidates, Examiners of Accounts first grade, were qualified for promotion to the post of Auditor and were among those recommended as suitable for appointment by the departmental committee who screened, at a preliminary stage, applicants for the post. The criteria to which the respondents had regard in making their choice cannot be faulted. They had before them the personal files of the candidates, as well as their confidential reports and, as minuted in their decision, they had regard to this documentary material in its entirety. Moreover, their selection was reinforced by the views of the head of the department who recommended the interested parties for promotion. Had the matter ended there we would have been duty-bound to rule that the sub judice decision was at the least reasonably open to them; but, as explained, part of the material before them, namely the confidential reports for the years 1983 and 1984 had, allegedly, been prepared in a manner contrary to and in breach of the Regulations governing the compilation of confidential reports; and that the head of the department made a misleading statement to the respondents with regard to the performance of the parties during the year 1985.

In face of the conflicting submissions made with regard to the procedure followed by the countersigning officer in making changes to the rating of the applicant, I sought to elicit the matter in order to appreciate the factual background in its true light; more so, as no note was made on the confidential reports indicating that the countersigning officer consulted the reporting officer before amending the latter's assessment. Counsel for the Republic informed the Court after a communication with Auditor-General that though he does, as a rule, hold such a consultation before making amendments to reporting officers' assessments, he was unable to confirm in this case whether such a consultation did take place or not. Inevitably a doubt arises whether the requirement for a consultation, laid down in r. 9 was, in point of fact, observed, a doubt that is magnified by the absence of any note in the reports themselves or anywhere else signifying compliance with the provisions of the rule. In consequence, I entertain real doubt whether

such a consultation did take place preliminary to the changes made by the countersigning officer—a doubt that I must resolve on principle and on authority in favour of the subject<sup>1</sup>. What must be decided next are the implications of the breach of r. 9 on the confidential reports and, the decision of the respondents.

The Regulations here under consideration were made in exercise of the rule-making power of the Council of Ministers to give effect to and ensure the proper enforcement of the Public Service Law—33/67. They prescribed the procedure and formalities relevant to the preparation of confidential reports, the most essential source of information about the value of the services of public officers. Often, it has been stressed that confidential reports provide the prime pointer to a candidate's merits<sup>2</sup>. Confidential reports aim to provide an account of an officer's abilities, sense of responsibility and devotion to duty—most material factors reflecting on his suitability for promotion. Formalities prescribed by statute or administrative regulation must as a rule be observed as a condition for the validity of the act. If the genesis of the act is regulated by law or binding administrative regulations, observance of the formalities prescribed therein is a condition for their emergence in the realm of valid administrative acts. Unless the formality is by its nature of an inconsequential character, ordinarily the case with mere technicalities, it must be treated as an essential requisite for the validation of the act<sup>3</sup>. Any effort on the part of the Court to ignore the directives of the law, formalities prescribed by law or administrative regulations pertinent to the genesis of administrative action, would constitute a usurpation of the administrative process. It is presumed that every formality prescribed by law is essential for the validation of the act. Only in the clearest of cases could the Court conclude otherwise. Counsel for the

<sup>1</sup> See, inter alia, *National Bank of Greece SA v Republic* (1970) 3 C.L.R. 430; *Nicos Stavrou v Republic* (1976) 3 C.L.R. 73; *S. A. Engineering Marketing Co v. Republic* (1984) 3 C.L.R. 393

<sup>2</sup> See, inter alia, *Papantoniou and Another v. Public Service Commission* (1983) 3 C.L.R. 64, *Alvanis v CYTA* (1985) 3 C.L.R. 2695.

<sup>3</sup> See, inter alia, *Papadopoulos v Republic* (1985) 3 C.L.R. 154, *J N. Christophides Trading Ltd, v. Republic* (1965) 3 C.L.R. 546; *Alvanis v CYTA* (1985) 3 C.L.R. 2695

Republic submitted that the omission of the Auditor-General to consult the reporting officer before making changes to the confidential reports of the applicant amounted to no more than a breach of an inessential formality that left unaffected the assessment of the countersigning officer. The decision of A. Loizou, J. in *Themistocleous v. Republic* (1985) 3 C.L.R. 2652, lends support to this submission, though it must be stressed that the learned Judge did not purport to lay down a general proposition with regard to the effects of breach of the provisions of r. 9 confining his decision to the circumstances of that case. In a more recent decision of the Supreme Court, namely *Argyrides v. Republic*<sup>1</sup> Demetriades, J. took a contrary view. He put the matter thus:

“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 very dangerous ground.”

I find myself in agreement with the views of Demetriades, J. expressed in the above case and gladly adopt them as an expression of my own appreciation of the matter. The Regulations cast primary responsibility for the assessment of public officers on reporting officers (see, in particular, rules 4 and 6). This impression is strengthened by the 1983 Supplement to the Regulations laying down that a reporting officer must ordinarily be the officer supervising the officer on whom he reports. Being in that position the reporting officer is in an ideal situation to tell of the abilities, devotion to duty and sense of responsibility of those he supervises. Modification of such assessment is a serious matter. It is for this reason that a strict procedure must be adhered to in order to eliminate the possibility of error creeping through by a re-assessment made by a superior who may not have had the same opportunities of judging the person reported upon. In my judg-

<sup>1</sup> (1986) 3 C.L.R. 1488.



ment, a prior consultation is an essential safeguard for the avoidance of errors and misconceptions about the worth of public officers. As such it constitutes an essential formality that must be heeded in every case without exception.

5 Equally consequential, if not more so in this case, was the failure of the countersigning officer to furnish his reasons for the reassessment. Such reasoning must ordinarily indicate the reasons for disagreement with the assessment of the reporting officer and the opportunities the counter-  
10 signing officer had to form an opinion about the officer reported upon.

Non compliance by the countersigning officer with the provisions of r. 9 invalidated his assessment. Whether they  
15 invalidated the report in its entirety is a matter upon which I am not required to pronounce. It is clear from the minutes of the respondents that they were not alerted to the aforementioned defects in the confidential reports on the applicant nor did they inquire into similar irregularities affecting the confidential reports on the interested parties.  
20 On the contrary they treated the confidential reports as perfectly in order and attached to them such importance as they would ordinarily be entitled to had it not been for the above defects.

Also there is substance in the contention that the state  
25 ment of the Auditor-General before the Public Service Commission respecting the performance of the parties in the year 1985 was inaccurate. Applicant had performed better than in the previous year. In the case of the year 1985 too, the Auditor-General was dutybound to follow  
30 the requirements of r. 9 and apprise the respondents of the views of the reporting officer and those of himself, and his reasons for disagreeing with reporting officer. If the respondents were to ignore the alterations made by the countersigning officer applicant would emerge as a candi-  
35 date with superior merits to the interested parties—a view also reinforced by the cumulative effect of the confidential reports on the three of them for the preceding years 1979, 1980, 1981 and 1982. In the end, the decision of the respondents is liable to be set aside for the following  
40 reasons:

They exceeded their powers by taking into consideration the views of the countersigning officer expressed in breach of the provisions of r. 9. In consequence, they took into consideration material extraneous to their task and, that is another reason for annulling the decision. Lastly, by taking into consideration the improperly founded assessment of the countersigning officer, they misconceived the facts relevant to the candidates. 5

In the result the recourse succeeds and the sub judice decision is, in exercise of the powers vested in the Court by Article 146.4 (b), annulled and devoid of any legal effect. Let there be no order as to costs. 10

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