

1986 September 25

[A. LOIZOU. J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

PLATON TRAPFLIDÉS.

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION.

Respondent.

(Case No. 557/84).

Public Officers—Promotions—Head of Department—Recommendations of—Head of Department entitled to compare between those candidates he is recommending for promotion.

5 *Public Officers—Promotions—Merit—Confidential reports, absence of, not due to candidate's fault—Candidate not precluded from being considered for promotion.*

10 *Public Officers—Seniority—Applicant senior to interested party by six and a half years, but latter more highly recommended for promotion by Head of Department—Seniority does not prevail as by reason of such recommendations other things were not more or less equal.*

15 By means of this recourse the applicant impugns the validity of the promotion of the interested party to the post of Co-operative Officer, 1st Grade. The applicant is senior to the interested party by six and a half years, but, though both the applicant and the interested party were recommended by the Head of the Department, the interested party was more highly so. The applicant was rated
20 as very good for both years 1982 and 1983. There are no reports on the interested party as at the time he was serving on probation and the report on him was due to

be prepared in August, 1984 in the form of a six monthly confidential report in accordance with section 45(2) of the Public Service Law 33/67.

Held, dismissing the recourse: (1) The Head of Department was perfectly entitled to compare between candidates who are recommended and suggest whom he considers as more suitable for promotion. His recommendations in this case were not inconsistent with the material in the files. 5

(2) The absence of a report on the interested party, which was not due to his fault, was not a factor that precluded him from being considered for promotion. 10

(3) The seniority of the applicant was not a decisive factor because other things were not more or less equal due to the existence of the said recommendations of the Head of the Department. 15

(4) There is no provision in the Public Service Law 33/67 precluding an officer serving on probation from being considered for promotion.

(5) The scheme of service for the sub judge post provides as a requirement for promotion thereto "at least three years service in the post of Co-operative Officer 2nd grade". The interested party completed such period of service, but not continuously. As, however, the scheme of service in question does not provide for a continuous service to the said post, the interested party satisfied the said requirement. 20
25

Recourse dismissed.

No order as to costs.

Cases referred to: 30

Frangos v. The Republic (1970) 3 C.L.R. 312;

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

Gavriel v. The Republic (1971) 3 C.L.R. 185;

Michael v. The Republic (1971) 3 C.L.R. 405;

Theodossiou v. The Republic, 2 R.S.C.C. 48;

Morphis v. The Republic (1975) 3 C.L.R. 255.

Recourse.

5 Recourse against the decision of the respondent to promote and/or post the interested party to the post of Co-operative Officer, 1st Grade in the Department of Co-operative Development in preference and instead of the applicant.

10 *G. Triantafyllides*, for the applicant.

A. Vlaïmirou, for the respondent.

Cur. adv. vult.

15 A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks a declaration of the Court that the decision of the respondent Commission to promote and/or post the interested party, Kyriakos Neophytou to the post of Co-operative Officer, 1st grade, in the department of Co-operative Development as from 1st August 1984, in preference and/or instead of the applicant is null
20 and void and of no effect whatsoever.

The present recourse was in the beginning heard together with recourse No. 556/84, but on the 8th June, 1985, a direction was made by this Court on the application of counsel for applicant that the two recourses be
25 tried separately. For the sake of brevity I shall not go into the facts leading to the sub judice decision except when and so far as relevant in the course of this judgment, as I have already dealt with them in extenso in the judgment of this Court in the said case No. 556/84 dated 25th
30 September, 1986 (unreported),* to which reference should be made whenever necessary.

This recourse was originally filed against all eleven officers promoted to the post of Co-operative Officer 1st grade as a result of the sub judice decision, but it was subsequently withdrawn as against all except interested party
35 Kyriakos Neophytou.

* Reported in (1986) 3 C.L.R. 1647.

In the circumstances I shall proceed directly to deal with the arguments put forward on behalf of the applicant in this recourse.

It has been argued that the respondent Commission acted erroneously and in excess and/or abuse of power in selecting the said Neophytou instead of him. In comparing the applicant to the interested party, the applicant has claimed that he is senior to the interested party by about six and a half years having been appointed to the post of Co-operative Officer 2nd grade on the 15th September, 1977, whereas the interested party was so appointed on the 15th February 1984. As regards qualifications they are more or less the same. As regards merit, it is claimed that the applicant is superior to the interested party having been rated as "very good" for both years 1983 and 1982, whereas the interested party had no confidential reports having served for only five months.

Finally he claims that though both were recommended, the recommendations of the Head of Department as regards the interested party were erroneously taken into account but should have been ignored in that they were made arbitrarily in the sense that the Head of Department was able to give such recommendations with regard to the interested party who had served for only five months, but not for another candidate, L. Leonidou, who had been serving since November 1984, having been absent before then on educational leave.

From the personal files and the files of the confidential reports of the parties, it transpires that applicant is indeed senior to the interested party by six and a half years, but as regards qualifications they have more or less the same.

As regards merit applicant is rated as very good for both years 1982 and 1983. On the other hand there are no reports for interested party Neophytou which, however, is due to no fault of the interested party, as such were due to be prepared in accordance to section 45(2) of the Public Service Law 1967, (Law No. 33 of 1967) in August 1984 in the form of six-monthly confidential reports which are required to be submitted on every officer serving on pro-

bation as Neophytou was. See *Frangos v. Republic* (1970) 3 C.L.R. 312 at p. 325 where the absence of a confidential report was considered to be not a factor precluding an officer from being considered for promotion.

5 In the minutes of the respondent Commission of its meeting of the 17th July 1984, appendix 7, when the sub-
 judice promotions were considered, there are contained the
 recommendations of the head of Department from which
 it is borne out that though in fact both parties were re-
 10 commended nonetheless the interested party was more
 highly so. It is stated, *inter alia* therein:

“On the basis of all that I have in mind and the
 criteria of the law, I recommend without hesitation
 the following officers:

15

10. Neophytou Kyriacos who is a very good officer
 and serves in Nicosia.

20 Nicos Nicolaides, Nicos Voskos and Platon
 Trapelides are all of the same level. He distinguishes,
 however, as better Nicolaides and Trapelides and he
 recommends that one of them be promoted to the
 11th post.”

I consider that the Head of Department was perfectly
 entitled to compare between candidates who are recom-
 25 mended and suggest whom he considers as more suitable
 for the post. (See *Evangelou v. Republic* (1965) 3 C.L.R.
 292 at p. 297; *Gavriel v. Republic* (1971) 3 C.L.R. 185
 at p. 199; *Michael v. Republic* (1971) 3 C.L.R. 405 at
 p. 408). And such recommendations are either expected
 30 to be followed so reasons must be given for not doing so.
 See *Evangelou* (supra) at p. 297; *Theodossiou v. Republic*,
 2 R.S.C.C. 48.

In *Gavriel* (supra) extensive reference is made to the
 relevant case law on the matter, and the Court concludes
 35 at p. 200:

“I have no doubt in my mind that a head of de-
 partment inevitably has to make a comparison of

the merits of candidates as to who is more suitable for a post when there are more than one candidates for promotion."

In view of the above I consider that though the applicant was undoubtedly senior to the interested party, nonetheless this seniority of his cannot be a decisive factor in his favour because all other factors were not more or less equal due to the existence of the recommendations of the Head of Department in favour of the interested party (See *M. Morphis v. Republic* (1975) 3 C.L.R. 255 at 260), which recommendations were not inconsistent with the material of the files and which are the result of the knowledge of the performance of the interested party not only during the five months he served as Co-operative Officer, 2nd grade, but also during the years he served as Auditor of Co-operative Societies in the Audit and Supervision Fund (which is administered and controlled by the Registrar of Co-Operative Societies, who is now his Head of Department), enabling him thus to properly evaluate his work and abilities.

It was therefore within the limits of the discretion of the respondent Commission having due regard to all relevant factors including the recommendations of the Head of Department and in reaching the sub judice decision which was in the circumstances reasonably open to them, they did not act in excess or abuse of power.

As regards the remaining grounds put forward by the applicant though same have been extensively dealt with in the judgment in recourse No. 556/84, I shall nonetheless dispose of them briefly.

It was argued that the interested party who was serving on a temporary basis, was wrongly preferred to the applicant who was serving on a permanent basis. It may be that a permanent officer should be preferred to an unestablished officer serving on a temporary basis but interested party Neophytou was neither an unestablished officer nor was he serving in a temporary capacity. He was in fact, before the sub judice decision, the holder of a permanent post (Ordinary Budget) in the public service.

He was, however, serving on probation but there is no provision in the Public Service Law 1967 (Law No. 33 of 1967) precluding such an officer from being eligible to promotion under Section 44 thereof. Such argument must
5 therefore fail.

Finally it was contended that the interested party did not satisfy the requirement of the scheme of service of "at least three years service in the post of Co-operative Officer, 2nd grade," because his prior service from 1st
10 February 1969 to 10th September 1972, was wrongly taken into account.

I find that this argument must also fail because what is provided by the relevant scheme of service is not for continuous service. I consider therefore that it was reason-
15 ably open to the respondent Commission to interpret the scheme of service as requiring service which could be the total of more than one period of service in the particular post.

For the reasons stated above I find that the applicant
20 has failed to establish any striking superiority which is necessary in order that the Court may interfere with the sub judice decision which was in the circumstances reason- ably open to the respondent Commission was duly reasoned and was taken in accordance with the law that includes
25 the general principles of Administrative Law. The recourse must therefore fail and is hereby dismissed with no order as to costs.

*Recourse dismissed.
No order as to costs.*