

1986 November 15

[LORIS. J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ZACHARIAS KOUNTOUROS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Case No. 350/84).

Educational Officers—Promotions—Scheme of service—Interpretation and application of—The province of the appointing organ—Judicial control—Principles applicable.

Educational Officers —Promotions —The Public Educational Service Law 10/69, section 35 (2) (3) as amended by s. 5 (b) and 5(c) of Law 53/79—Recommendations “of the respective Department of Education”—The recommendations of the Head of the Department are the recommendations of the Department—Unless applicant succeeds in proving the contrary or in creating a doubt. 5 10

By means of this recourse the applicant impugns the promotion of the interested party to the post of Inspector A, Secondary Education instead of him, complaining, inter alia, that the interested party did not possess the qualifications required under the scheme of service and that the recommendations of candidates were made in violation of section 35(3) of Law 10/69 as amended by section 5(c) of Law 53/79. 15

Held, dismissing the recourse: (1) The interpretation and application of a scheme of service is up to the appointing organ and this Court does not interfere with an 20

5 appointment, if satisfied that it was reasonably open to it to interpret and apply the scheme of service in the way it did. In the light of all the material before the Court the interpretation placed on the scheme of service in question was reasonably open to the respondent Commission.

10 (2) As regards the second of the main complaints of the applicant and as it has been held in *Georghiou and Others v. The Republic* (1985) 3 C.L.R. 2105 at pp. 2114-2115 in respect of a similar complaint for violation of s. 35 (2) (3) of Law 10/69 as amended by s. 5(b) and 5(c) of Law 15 53/79, the Department as such cannot submit a recommendation, which must be submitted on behalf of the Department by a living entity; the best possible representative of the Department is his Head and his recommendations are the recommendations of the Department, unless the contrary is proved or a doubt created by the applicant.

20 (3) In this case and in the light of all material placed before the Court the applicant not only failed to prove striking superiority over the interested party, but on the contrary the latter emerges from the comparison as superior.

Recourse dismissed.
No order as to costs.

25 Cases referred to:

Papapetrou v. The Republic 2 R.S.C.C. 61;

Neofytou v. The Republic, 1964 C.L.R. 280;

Georghiades and Others v. The Republic (1967) 3 C.L.R. 653;

30 *Kyriakou and Others v. The Republic* (1975) 3 C.L.R. 37;

Makrides v. The Republic (1983) 3 C.L.R. 622;

Republic v. Xinari and Others (1985) 3 C.L.R. 1922;

Georghiou and Others v. The Republic (1985) 3 C.L.R. 2105;

Loizidou-Papaphoti v. Educational Service Commission
(1984) 3 C.L.R. 933;

Hji Ioannou v. The Republic (1983) 3 C.L.R. 1041.

Recourse.

Recourse against the decision of the respondent to promote the interested party to the post of Inspector A in the Secondary Education in preference and instead of the applicant. 5

M. Papapetrou, for the applicant.

R. Vrahimi (Mrs.), for the respondent. 10

G. Triantafyllides, for the interested party.

Cur. adv. vult.

LORIS J. read the following judgment. The applicant by means of the present recourse impugns the decision of the respondent Public Service Commission published in the Official Gazette of the Republic on 4.5.1984, whereby the interested party namely Antonis Michaelides was promoted to the post of Inspector A, Secondary Education as from 1.7.84, in preference to and instead of the applicant. 15

The grounds of Law on which the present recourse relies are twofold: 20

1. Failure to carry out due inquiry which resulted to a misconception of material facts.

2. *Sub judice decision taken in excess and or abuse of power.* 25

The complaints of the applicant as elaborated in his written address are confined:

(a) To the allegation that the interested party does not possess the required qualification under paragraph 1 of the relevant scheme of service. 30

(b) To a general complaint as regards the recommendation of candidates by the respective Department of Education with a particular emphasis on the alleged contravention

of the provisions of s.35(3) of Law 10/69 as amended by s. 5(c) of Law 53/79.

The relevant scheme of service appears in Appendix "IB" attached to the opposition. Paragraph 1 of the required qualifications under the scheme reads as follows:

«Πανεπιστημιακό δίπλωμα ή τίτλος ή ισότιμο προσόν στο θέμα της ειδικότητας του, που να δίνει σ' αυτόν δικαίωμα κατάταξης στη θέση καθηγητή/εκπαιδευτή στις κλίμακες Α8-Α10.»

10 And in English:

"1. University diploma or title or equivalent qualification on the subject of his speciality entitling him to be classified in the post of Instructor on salary scales A8-A10."

15 It is a fact that the interested party does not possess a University diploma or title, but he possesses among other certificates which are attached to the written address on behalf of the respondent (marked A-H2), the following two certificates:

20 1. A teacher's certificate on technical subjects of the University of London acquired at Shoreditch College which was then a Constituent Member of the University of London (vide ex. A attached to the written address of the respondent). And

25 2. A diploma in handicraft at the same College—A third year supplementary course. (vide ex. B and "C" attached to the written address of the respondent.)

On the strength of the aforesaid two certificates the applicant was eligible for appointment and in fact he was
30 appointed as early as 1.9.1963 to the post of Instructor A; (vide ex. 1 attached to the written address of the interested party) and he served as such at the Technical School of Nicosia up to 1984 (vide ex. 4 attached to the written address on behalf of the interested party). The post of Instructor A which is being held by the interested party ever
35 since 1963 corresponds with to-days salary scales A8-A10.

It is clearly stated in the sub judice decision (vide appendix IA attached to the opposition) that the respondent E.S.C. called at the interview all those applicants "who had the qualifications envisaged by the Scheme of Service." And it is apparent from the sub judice decision and the material in the file that respondent Commission was satisfied that the interested party had an equivalent qualification on the subject of his speciality which is entitling him to be classified to the post of Instructor on salary scales A8-A10.

In connection with Schemes of Service it was laid down as early as 1961 by the then Supreme Constitutional Court in the case of *Papapetrou v. The Republic*, 2 R.S.C.C. 61 and reiterated thereafter in a great number of cases (vide *Neofytou v. Republic*, 1964 C.L.R. 280, *Georghiades and others v. Republic* (1967) 3 C.L.R. 653, *Kyriakou & others v. Republic* (1975) 3 C.L.R. 37, *Makrides v. Republic* (1983) 3 C.L.R. 622) and recently by the Full Bench of this Court *Republic v. Xinari & others* (1985) 3 C.L.R. 1922. that it is up to the appointing authority—in the present case the E.S.C.—to interpret and apply the relevant Scheme of Service in the circumstances of each particular case, and this Court will not interfere with an appointment made by such authority, if satisfied that it was reasonably open to it to interpret and apply the Scheme of Service in the way it has done.

In the present case having examined the Scheme of Service set out in Appendix "IB" attached to the opposition and having carefully gone through the sub judice decision and the material before me, I am satisfied that the interpretation placed upon this Scheme of Service by the respondent E.S.C. was reasonably open to it; in the circumstances the interested party was rightly held as possessing the qualification required under paragraph 1 of the scheme of service.

Turning now to the complaint as regards the recommendation of candidates by the respective Department of Education and the alleged contravention of the provisions of s. 35(3) of Law 10/69 as amended by s. 5(c) of Law 53/79 I shall confine myself in repeating verbatim what I

have stated on the occasion of a similar submission in the case of *Georgiou & Others v. Republic* (1985) 3 C.L.R. 2105 at pp. 2114-2115:

5 “The relevant law is the Public Educational Service Law 1969 (Law No. 10/69) and the material section is s. 35(2) (3); the aforesaid sub-sections were amended by s. 5(b) and 5(c) respectively of Law 53/79. Sub-sections (2) and (3) of section 35, as amended read as follows:

10 ‘(2) In examining the claims of educational officers for promotion, merit, qualifications and seniority are being duly taken into consideration in accordance with the procedure defined.

15 (3) In effecting a promotion, the Commission shall have due regard of the service reports of the candidates and the recommendations of the respective Department of Education.’

20 It is the complaint of the applicants as expounded in their respective written addresses that the recommendations submitted to the respondent E.S.C. were the personal recommendations of the Heads of the Department of Secondary and Technical Education respectively and not those ‘of the respective Department of Education’ as envisaged by s. 5(3) of Law 10/69
25 as amended by s. 5(c) of Law 53/79.

30 With respect, I cannot agree with this submission of learned counsel for applicants; the Department as such cannot submit a recommendation. The recommendation must be submitted by a living entity on behalf of the Department and I fully agree with my brother Judge Stylianides who stated in the case of *Loizidou-Papaphoti v. The E.S.C.* (1984) 3 C.L.R. 933 that ‘the best possible representative as spokesman of a Department is no other than the Head
35 thereof. He represents his department and his recommendations, unless the contrary or a doubt is created by the applicant, are not his personal but the recommendations of the Department. It is presumed

that he conveys to the Commission the recommendations of the department...'

I have no doubt in my mind that the recommendations in question were submitted to the respondent commission by the two Heads of Departments on behalf of their respective Departments and there is no material whatever before me indicating that this presumption of regularity may be rebutted. On the other hand, it is clear that the respondent commission treated at all times the recommendations in question as emanating from the respective Department."

Having examined the main complaints of the applicant I feel that I should repeat what has been repeatedly emphasized and recently reiterated by the Full Bench of this Court in the case of *Hjiloannou v. The Republic* (1983) 3 C.L.R. 1041 at p. 1045:

"An administrative Court cannot intervene in order to set aside the decision... unless it is satisfied, by an applicant in a recourse before it, that he was an eligible candidate who was strikingly superior to the one who was selected, because only in such a case the organ which has made the selection for the purpose of an appointment or promotion is deemed to have exceeded the outer limits of its discretion and, therefore, to have acted in excess or abuse of its powers; also, in such a situation the complained of decision of the organ concerned is to be regarded as either lacking due reasoning or as based on unlawful or erroneous or otherwise invalid reasoning—(*Odysseas Georghiou v. The Republic* (1976) 3 C.L.R. 74 at p. 83)."

In the case under consideration the respondent Commission having held that the applicant as well as the interested party were eligible for promotion as possessing the qualifications envisaged by the Scheme of Service (and therefore the argument of counsel for respondent to the contrary as regards the applicant in connection with qualification under

para. 2 of the Scheme must be rejected as nullified by the view of the E.S.C.) proceeded to interview both of them together with the other eligible candidates.

5 The performance of both the applicant and the interested party at the interview were rated by the Commission as "very good" (vide appendix Z attached to the opposition— at page 2).

10 It is clear from the sub judice decision and the material in the file that the E.S.C. gave due regard to the service reports of the candidates and the recommendations of the respective Department of Education. The overall picture of the applicant and the interested party as regards merit, qualifications and seniority as presented by the relevant material before me, which was also before the E.S.C. at the material time, may be thus summed-up (vide in this connection Appendix "IΓ" attached to the opposition):

20 The interested party who had the recommendation of the respective Department of Education, was rated with 37 and 36 marks for the last two years whilst the applicant, who lacked such recommendation, was rated with 34 and 33 marks for the same period. The applicant had 21 years of service (up to 31.8.83) as against 23 of the interested party up to the same time; in this connection it must be noted that the interested party was promoted to the post of Assistant Headmaster on 15.9.73 whilst the applicant was promoted to the same post as late as the 15.11.1981.

30 Thus whilst the overall picture on merit was slightly in favour of the interested party, the position with regard to additional qualifications was more or less equal, the interested party had a seniority of 2 years over the applicant which in the circumstances it should prevail.

35 It is clear from the above that the applicant not only failed to prove striking superiority over the interested party but on the contrary the interested party emerges from the comparison superior. In the circumstances this Court cannot intervene in order to set aside the sub judice decision which was reached at after a due inquiry and cannot be faulted on any ground.

I hold the view that the sub judice decision is duly reasoned and the material in the file abundantly supplements all the required elements which are necessary to convey to all concerned the necessary certainty required for every administrative decision and safeguard judicial scrutiny as well. 5

In the result the present recourse fails; and is accordingly dismissed. Let there be no order as to costs.

Recourse dismissed.

No order as to costs. 10