

1986 April 26

[DEMETRIADES. J.]

IN THE MATTER OF ARTICLE 146  
OF THE CONSTITUTION

KYROS DEMOSTHENOUS AND ANOTHER.

*Applicants,*

THE REPUBLIC OF CYPRUS, THROUGH  
THE EDUCATIONAL SERVICE COMMISSION.

*Respondents*

*(Cases Nos. 505/83 and 545/83).*

5 *Educational Officers—Promotions—Non-recommendation of applicants by the appropriate Department—Head of Department not in a position to express an opinion as to their abilities—His decision not to recommend them misdirected the respondents who, therefore, laboured under a misconception of fact.*

*Administrative Law—Misconception of fact.*

10 The applicants challenge the promotions of the interested parties to the post of Inspector B Elementary Education, which is a first entry and promotion post. The applicants were not selected because they had not been recommended by the appropriate Department, which at the material time, was headed by rotation, that is for fifteen days each, by Mr. A. Papadopoulos and Mr. G. Papaleontiou, who were both present at the relevant interviews of the candidates for the post. Mr. A. Papadopoulos gave evidence before the Court.

15 The applicants were superior in qualifications and senior to a number of interested parties.

20 *Held*, annulling the sub judice promotions: (1) In the

light of the evidence by Mr. Papadopoulos the conclusion is that he was not in a position to express an opinion as to the abilities of applicants and that his decision not to recommend them for promotion misdirected the respondents in reaching their decision not to promote the applicants. 5

(2) It follows that the respondents laboured under a misconception of fact, namely that they were not worthy to be recommended by the appropriate Department, despite the fact that they were superior in qualifications and senior to a number of the interested parties. 10

*Sub judice decision annulled.  
Costs against respondents.*

Cases referred to:

*Theodossiou v. The Republic*, 2 R.S.C.C. 44: 15

*Georghiou v. The Republic* (1983) 3 C.L.R. 17.

**Recourses.**

Recourses against the decision of the respondents to promote the interested parties to the post of Inspector B Elementary Education in preference and instead of the applicants. 20

*A. S. Angelides*, for applicant in Case No. 505/83.

*A. Triantafyllides*, for applicant in Case No. 545/83.

*M. Florentzos*, Senior Counsel of the Republic, for the respondents. 25

*Cur. adv. vult.*

DEMETRIADES J. read the following judgment. By these two recourses the applicants challenge the decision of the respondents by which the interested parties Andreas Polydorou, Lefkios Papanicolaou, Christos Christodoulides and Klitos Soteriades were promoted to the post of Inspector B Elementary Education as from the 16th September, 1983, instead of them. 30

The applicants and all interested parties were, at the material time, Elementary School teachers holding the post of Elementary Education Headmaster A'.

5 As there were four vacancies in the post of Inspector B' Elementary Education, the Director-General of the Ministry of Education, by letter dated the 14th March, 1983, requested the respondents to proceed with the filling of the said posts.

10 The respondents are by the Public Educational Service Law, 1969 (Law 10/69), as later amended, entrusted with the appointment, promotion and transfer of educationalists.

The post of Inspector B' Elementary Education is a first entry and promotion post.

15 The applicants base their application on a number of legal grounds but their main cause of complaint is that the respondents in choosing the interested parties were acting under a misconception of fact in that the recommendations for their promotion, which were made to them, were given by a person or persons who had never come in contact with  
20 the applicants and who knew nothing of their abilities and merit.

Counsel for the respondents submitted that the respondents in reaching their decision are by Law 10/69, as amended by the Public Educational Service (Amendment)  
25 Law, 1979 (Law 53/79), bound to take into consideration the "service reports" and the recommendations of the appropriate Department of Education and that in the light of the case-law of this Court the respondents could not easily circumvent nor upset the recommendations that were  
30 given by such Department. In support of his argument he relied on a number of precedents of the Supreme Constitutional Court of the Republic and the present Supreme Court. In particular, he relied on certain passages from the following cases: *Theodossiou v. The Republic*, 2 R.S.C.C. 44,  
35 in which, at p. 48, it was decided:

"In the opinion of the Court the recommendation of a Head of Department or other senior responsible officer, and especially so in cases where specialized

knowledge and ability are required for the performance of certain duties, is a most vital consideration which should weigh with the Public Service Commission in coming to a decision in a particular case and such recommendation should not be lightly disregarded.”

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*Georghiou v. The Republic*, (1983) 3 C.L.R. 17, where (at pp. 32 - 33) the following are stated:

“These four teachers, however, had the additional advantage over the applicant in that they had been recommended for promotion, whereas the applicant had not been recommended. Irrespective, however, of any recommendations, once there was not any superiority of the applicant over them, it was reasonably open to the Commission to prefer any one of them instead of the applicant. Therefore, the recourse against them fails.

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.....  
Though applicant has shown a slight superiority as to the marks over such interested parties, a difference of one or two marks in one report, is not such as to amount to a striking superiority of the applicant (the onus of which was upon him) over such interested parties, as to lead to the annulment of the sub judice decision (vide *Evangelou v. The Republic* (supra) and *Panayidou v. The Republic* (supra)).

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Before concluding as to whether all other factors are more or less equal, I have to consider the recommendations of the Department as they appear in exhibit 2, as well as the results of the interviews, since these form part of the overall picture of the parties concerned and they go to the merits of the parties. If in this respect the interested parties are superior to the applicant, then the question of his seniority does not arise. Certain of such interested parties were recommended for promotion and their names were included in the list of the persons so recommended

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In any case, the recommendation

is a subjective criterion and one cannot say that applicant should have been recommended or not. Therefore, special reasons should have been given by respondent why it chose to promote 16 interested parties who were not recommended for promotion as against the 49 who were specially recommended for promotion out of the 74 in exhibit 2, and who were not promoted. On account of this, I would say that with regard to those of the interested parties who were recommended for promotion, that is interested parties 14, 15, 18, 22, 23, 27, 28, 29, 33, 34, 36, 37, 38, 39, 40 and 41 this factor goes to their credit and, therefore, all factors are not equal so as to let the seniority of the applicant prevail even though in some cases such seniority is four years. (*Antoniou v. The Republic (supra)*). With regard however, to interested parties 13, 16, 17, 24, 25, 26, 30, 31, 32 and 35, they were not amongst those recommended for promotion. Therefore, such factor does not operate in their favour and a comparison of those parties with the applicant shows that all factors are more or less equal. That being so, cogent reasons should have been given why applicant's seniority was disregarded. This is addition to what I have already said, that cogent reasons should have been given why such parties were preferred to others recommended for promotion. (See, *Ioannides v. The Republic (supra)*). This goes to the reasoning of the decision and makes it void for lack of due reasoning."

At the material time the appropriate Department was headed by rotation, that is for fifteen days each, by Mr. Papadopoulos and Mr. G. Papaleontiou, who held the post of General Inspector Elementary Education. This arrangement was made by the Director-General of the Ministry of Education as the post of Head of Department of Elementary Education had not been filled after the retirement of Mr. Papaxenophontos in July 1982.

After all candidates, including the two applicants, were interviewed by the respondents in the presence of Mr. Papadopoulos and Mr. Papaleontiou, the two applicants were

disqualified by the respondents for promotion on the ground that they had not been recommended by the appropriate Department. To this effect see the relevant minutes of the respondents which are Appendices "ΣΤ" attached to the Oppositions in both cases. 5

With regard to applicant in Case No. 505/83, the respondents found that despite his superiority in qualifications over two of those selected and his seniority over three, he was not selected because he was not recommended by the appropriate Department and his performance during the interview was rated as "average". 10

The same reasons were given by the respondents in not selecting the applicant in Case No. 545/83, with the exception that his performance during the interview was rated as "good". 15

From the contents of the said minutes of the respondents it is clear that one of the factors that made them decide against their promotion, although they were superior in qualifications over two and senior to three of the interested parties, was their non-recommendation by the appropriate Department. 20

In support of his submissions on this issue counsel for the respondents filed an affidavit sworn by Mr. A. Papadopoulos in which he states the following:

«1. Είμαι ο Διευθυντής Δημοτικής Εκπαίδευσης, έχω προσωπική γνώση των γεγονότων αυτής της υπόθεσης και έχω εξουσία να προβώ στην παρούσα Ένορκη Δήλωση. 25

2. Μέχρι τις 14 Μαΐου, 1984, κατείχα τη θέση του Γενικού Επιθεωρητή Δημοτικής Εκπαίδευσης. Με τον κύριο Γ. Παπαλεοντίου, επίσης τότε Γενικό Επιθεωρητή Δημοτικής Εκπαίδευσης, δώσαμε τις συστάσεις του Τμήματός μας για τους υποψήφιους για προαγωγή, στην Επιτροπή Εκπαιδευτικής Υπηρεσίας, όπως φαίνεται στο πρακτικό της Επιτροπής με ημερ. 15.9.1983 (Παράρτημα 'ΣΤ' στην Ένσταση). 30 35

3. Δώσαμε τις συστάσεις με βάση τις προσωπικές μας γνώσεις, τις συστάσεις και απόψεις των οικείων

Ἐπιθεωρητῶν, τις υπηρεσιακῆς ἐκθέσεις καὶ ὅλα τὰ  
στοιχεῖα τῶν σχετικῶν φακέλλων.»

5 (“1. I am the Director of Elementary Education, I  
have personal knowledge of the facts of this case and  
I am authorised to swear this affidavit.

10 2. Till the 14th May, 1984, I held the post of Ge-  
neral Inspector Elementary Education. Together with  
Mr. G. Papaleontiou who was then also a General  
Inspector of Elementary Education, we gave the re-  
commendations of our Department for the candidates  
for promotion, to the Educational Service Commission,  
as it appears in the minutes of the Commission dated  
15.9.1983 (Appendix ‘ΣΤ’ to the Opposition).

15 (3) We gave the recommendations on the basis of  
our personal knowledge, the recommendations and views  
of the appropriate Inspectors, the service reports and  
all material in the relevant files.”)

20 After this affidavit was filed, counsel for the applicants  
asked that Mr. Papadopoulos be made available for cross-  
examination. Mr. Papaleontiou was not asked by any of the  
parties to give evidence, either by affidavit or orally.

As Mr. Papadopoulos’ evidence in cross-examination is  
a lengthy one, I shall refer only to the gist of it, which can  
be summarised as follows:

25 1. At the material time, i.e. immediately before he was  
due to appear before the respondents or when the relevant  
posts were advertised, no formal meeting for the exchange  
of views, between himself and Mr. Papaleontiou on the  
one part and the Inspectors supervising the work of Ele-  
30 mentary School Teachers of the other part, regarding the  
qualities of the candidates for the post concerned, was ever  
held.

35 2. As far as he was concerned, he had exchanged views  
about the ability of the candidates long before the post were  
advertised, at a time that it was not foreseeable when the  
posts were to be filled. He further said that at the time the  
scheme of service of the post had not been decided, nor  
was it known how many posts were to be filled.

3. The said informal exchange of views took place whilst he was travelling with Inspectors in a car. And

4. He had never himself inspected applicant Yiannakou.

Before Mr. Papadopoulos completed his evidence an affidavit was filed in support of the case of applicant Demosthenous, which was sworn by Mr. Theodossios Karydas, an Inspector of Elementary Education. In this affidavit the affiant states that he had knowledge of the services rendered by this applicant because he was inspecting him and that Mr. Papadopoulos had never asked him for his views and recommendations with regard to the promotion of this applicant.

In view of the fact that Mr. Papadopoulos was not asked by counsel for respondents whether he had anything to say in reply to the contents of this affidavit, I take it that they are correct.

Considering now the evidence given by Mr. Papadopoulos, I have come to the conclusion that he was not in a position to express an opinion as to the abilities of the two applicants and that his decision not to recommend them for promotion misdirected the respondents in reaching their decision not to promote the two applicants.

In the result, the sub judice decision is annulled on the ground that the respondents, in taking their decision, acted under a misconception of fact, namely that the two applicants were not worthy to be recommended by the appropriate Department, despite the fact that they were superior in qualifications and senior to a number of candidates promoted.

In view of my above findings, I do not propose to deal with the other issues raised in the present cases.

In the circumstances, I feel that it will be proper for me to make an order that the respondents pay the costs of the applicants.

*Sub judice decision annulled.*  
*Respondents to pay costs.*