

1986 June 11

[LORIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ANDREAS HADJIDAS,

Applicant,

v.

THE REPUBLIC OF CYPRUS THROUGH
1. THE EDUCATIONAL SERVICE COMMISSION,
2. THE MINISTRY OF EDUCATION,

Respondents.

(Case No. 309/84).

Educational Officers—Promotions—Confidential reports, ratings in—Constitute acts preparatory to the final act of promotion—Their validity can be examined incidentally when the final act is being examined—Qualifications—Due inquiry into the matter of qualifications—Seniority—Governed by s. 37 of The Public Educational Service Law 10/69—Reasoning—Absence of direct comparison between the candidates—It can be supplemented from the material in the file—Applicant should establish “striking superiority” over the interested party. 5
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Administrative Law—Administrative act—Irregularity—Only a material one leads to any annulment of the administrative process—Promotions of Educational Officers—Reg. 16(3) of the Regulations 223/76—Non-compliance with its provision that Confidential Reports “are submitted within the period May/June”—It does not constitute illegality, but it constitutes irregularity—In the circumstances of this case such irregularity was not a material one. 15

The applicant, by means of the present recourse, challenges the validity of the following decisions, namely: 20
(a) The refusal of respondent 1 to promote him to the

5 post of Inspector A in Secondary Education for Mathematics, a first entry and promotion post, (b) The decision of respondent 1 to promote to the said post the interested party, and (c) The evaluation and/or confidential reports of the applicant and/or the interested party.

10 The complaint of the applicant as regards sub judice decision (c) is twofold, namely that the respondent Commission confined itself in considering only the two most recent confidential reports of the applicant and the interested party and that the confidential report of the applicant for 1983-1984 was prepared on the basis of an inspection made on 2.2.84 in direct violation of Reg. 16(3) of the relevant Regulations 223/76, which provides that the reports "..... are submitted within the period May/ 15 June....".

20 The complaints of the applicant as regards sub judice decisions (a) and (b) above are that the Commission failed to carry out a due inquiry, that it failed to examine whether the candidates had the qualification envisaged by paragraph 5 of the scheme of service, requiring candidates "to be up-to-date with current developments in relation to the field of their specialization and the tendencies and problems of Secondary Education generally", and that there is lack of due reasoning.

25 In respect of the issue of qualification it should be noted that in the relevant minutes of the Commission it is stated that the Commission examined the applications and "called the applicants possessed with the qualifications required by the scheme of service" to a personal interview and further down that "The E.E.C. after studying... and 30 the Schemes of Service, decides as follows....". Moreover, it is stated in the first written address of the applicant that "The applicant as well as the interested party had the required by the schemes of service qualifications". The applicant attempted to raise the issue of qualifications for 35 the first time "en passant" in his written address in reply to the address of the respondents.

Held, dismissing the recourse as regards sub judice decision (c):

(1) Although the respondent Commission laid emphasis on the last two confidential reports, it has also considered the confidential reports for the past years as well. This examination is consonant with the principle in *HjiGregoriou v. The Republic* (1975) 3 C.L.R. 447 at p. 483 that "...it is necessary, in deciding on the merits of candidates, to look at past annual confidential reports, and especially at the most recent ones in order to evaluate the performance of the candidates during their careers as a whole".

(2) Although the rating of an officer in a confidential report is an act preparatory to the act of promotion and, therefore, not in itself justiciable, yet, the ascertainment of invalidity in such reports brings about the invalidity of the final act. It follows that the validity of a confidential report can be examined incidentally when the final act is being examined.

The violation of Reg. 16(3) does not constitute illegality, but only irregularity. It is not any irregularity that may lead to the annulment of the relevant process, but only a material one (*Ierides v. The Republic* (1980) 3 C.L.R. 165 followed). As in the present case the irregularity in question did not affect the guarantees envisaged for the legality of the act, it was not a material one.

Held, further, dismissing the recourse as regards sub judice decisions (a) and (b): (1) It is abundantly clear that the respondent Commission directed its mind properly to the relevant scheme of service and conducted a proper inquiry in respect of the matter of qualifications of the candidates, leaving no margin for any misconception.

(2) As it emanates from the material before the Court the interested party is equal with the applicant in merit and qualifications, but he is senior to the applicant by almost 4 years. In such circumstances seniority can have a decisive effect. The applicant failed to establish that he is strikingly superior to the interested party.

(3) The sub judice decision, in spite of its wording which is laconic on occasions, conveys the reasoning why the

interested party was preferred to the applicant. The absence of direct comparison between the applicant and the interested party can and is supplemented from the material in the file.

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Recourse dismissed. No order as to costs.

Cases referred to:

HjiGregoriou v. The Republic (1975) 3 C.L.R. 447;

Pavlidis v. The Republic (1977) 3 C.L.R. 421;

10 *Tanis v. The Republic* (1978) 3 C.L.R. 314;

Agrotis v. E.A.C. (1981) 3 C.L.R. 503;

Georghiades v. The Republic (1982) 3 C.L.R. 16;

Christofides v. The Republic (1985) 3 C.L.R. 1127;

Ierides v. The Republic (1980) 3 C.L.R. 165;

15 *HjiIoannou v. The Republic* (1983) 3 C.L.R. 1041;

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

Makris v. The Republic (1986) 3 C.L.R. 10;

Partellides v. The Republic (1969) 3 C.L.R. 480.

Recourse.

20 Recourse against the decision of the respondents to promote the interested party to the post of Inspector A for Mathematics in the Secondary Education in preference and instead of the applicant.

A. S. Angelides, for the applicant.

25 *R. Vrahimi (Mrs)*, for the respondents.

Ph. Valiantis for *L. Papaphilippou*, 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 Educational Service Commission published in the Official Gazette of the Republic on 4.5.1984, whereby the interested party was promoted to the post of Inspector A in Secondary Education (for Mathematics) in preference to, and instead of the applicant. 5

The applicant was one of the candidates for the aforesaid post, which is a first entry and promotion post.

After the publication of the post in question in the Official Gazette of 29.10.1983, the respondent Commission interviewed all the applicants which were possessed with the qualifications envisaged by the relevant Scheme of Service (vide Appendix "IB" attached to the opposition) and bearing in mind the recommendations in respect of the candidates submitted on behalf of the respective Department of Education (vide Appendix "H" attached to the opposition), as well as the material in the personal files and the confidential reports of the candidates reached at the sub judice decision on 6.4.1984 (vide appendix "IA" attached to the opposition) whereby the interested party was promoted to the post in question in preference to and instead of the applicant. 10
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The applicant impugns the aforesaid decision of the E.S.C. praying for: 25

"1. A Declaratory judgment to the effect that the refusal of respondent No. 1 to promote the applicant to the post of Inspector A in Secondary Education for Mathematics is null and devoid of any legal effect.

2. A Declaratory judgment to the effect that the decision of respondent No. 1, published in the Official Gazette of 4.5.84, whereby Michael Filippou (the interested party) was promoted to the post of Inspector A in Secondary Education (for Mathematics) instead of the applicant is null and devoid of any legal effect. 30
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3. Declaratory judgment to the effect that the evaluation and/or confidential report of the applicant and/or the interested party is illegal, void and without any

legal effect, and that what was omitted ought to be performed.”

5 Before proceeding to examine the present recourse as a whole, in the light of the grounds of law advanced by the applicant, I feel that I should dispose of first, the motion for relief under 3 above.

The complaint of the applicant in this connection, as I was able to comprehend it, going thoroughly through his written address, is twofold:

10 (a) The respondent E.S.C. confined itself in considering only the two most recent confidential reports of the applicant and the interested party;

15 (b) The confidential report of the applicant for 1983-84 was prepared on the basis of an inspection of the applicant effected on 2.2.1984 in direct violation of the relevant regulations (vide Not. 223/76 of 5.11.1976) in connection with reports and in particular regulation 16(3) which provides that the reports “... are submitted within the period May/June...”.

20 As regards the complaint in (a) above it must be noted that the E.S.C. say in the sub judge decision that they have examined and considered all the personal files and confidential reports of all candidates which means that they have considered the confidential reports of the applicant and the
25 interested party for the past years as well although I have noted that the E.S.C. have laid emphasis in the last two confidential reports (vide page 2 of the sub judge decision Appendix “IA” attached to the opposition).

30 I hold the view that this examination was quite consonant with what was stated by the learned President of this Court in delivering the judgment of the Full Bench in *HjiGregoriou v. The Republic*, (1975) 3 C.L.R. 447, at p. 483:

35 “...it is necessary, in deciding on the merits of candidates, to look at past annual confidential reports, and especially at the most recent ones in order to evaluate the performance of the candidates during their careers as a whole.”

Coming now to the complaint under (b) above:

As it was maintained in this connection by the respondent that complaints of this nature are not justiciable, I feel dutybound to state, summing-up the legal position as it emerges from our case law, that although the rating of a public officer contained in a confidential report made by virtue of regulations is an act preparatory to the actual act or decision for promotion, producing no direct legal consequences and therefore not itself justiciable, (*Pavlidis v. Republic*, (1977) 3 C.L.R. 421; *Tanis v. Republic*, (1978) 3 C.L.R. 314), yet, the ascertainment of invalidity in the confidential reports brings about the invalidity of the final act or decision (*Stavros Agrotis v. E.A.C.*, (1981) 3 C.L.R. 503, at p. 513, *Georghiades v. Republic*, (1982) 3 C.L.R. 16 at p. 28; *Christofides v. Republic*, (1985) 3 C.L.R. 1127 at p. 1135)

The issue is therefore settled that an invalidity in a confidential report can be examined incidentally when the final act or decision is being examined.

The substance of the complaint under (b) above is whether the confidential report of the applicant which was submitted some time in February is illegal, as alleged by the applicant, as submitted, in violation of the relevant regulations and in particular regulation 16(3) of Not. 223/76 which requires such reports to be submitted within the period May/June.

I am unable to subscribe to the view that the aforesaid violation of the rule constitutes illegality although it must be stated at the outset that it definitely constitutes an irregularity.

In delivering the judgment of the Full Bench in *Ierides v. Republic*, (1980) 3 C.L.R. 165, the learned President of this Court stated the following at page 182:

“...As regards administrative formalities, it is not any irregularity which may lead to the annulment of the relevant administrative process, but only a material one (see inter alia, *Stassinopoulos* on the Law of Administrative Acts—1951, pp. 229-230).

In the instant case, having considered the facts and the particular circumstances of this case, the fact that the applicant as Headmaster—Secondary Education has only one confidential report—the one of 1983-84 (the same applies to the interested party as well) and the fact that the irregularity in question did not in fact affect the guarantees envisaged for the legality of the act, I hold the view that the irregularity in question was not a material one and therefore it cannot lead to annulment of the relevant administrative process.

For all the above reasons, I hold the view that the motion for relief under 3 above is doomed to failure and is accordingly dismissed.

Independently of the specific complaints in connection with the confidential reports the sub judice decision of the respondent Commission is challenged by the applicant as ill-founded, and therefore liable to be set aside, for abuse of power. The Commission is charged with failure to carry out a proper inquiry into the suitability of the candidates which allegedly resulted to misconception of material facts in connection with applicants' merits, qualifications and seniority. The Commission is further charged with failure to examine whether the candidates had the qualification envisaged by paragraph 5 of the relevant Scheme of Service which requires candidates "to be up-to-date with current developments in relation to the field of their specialization and the tendencies and problems of Secondary Education generally."

The sub judice decision is also impugned for lack of due reasoning.

Before examining the aforesaid complaints of the applicant, I feel that I should repeat here what has been repeatedly emphasized and recently reiterated by the Full Bench of this Court in *HjiIoannou 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..." 5

Let us examine then whether the applicant has discharged the heavy burden of establishing striking superiority as aforesaid over the interested party. 10

Merit:

It is apparent from the sub judice decision that respondent Commission took into consideration in this respect the confidential reports, the performance of the candidates at the interview before the respondent Commission, and the recommendations of the appropriate Department of Education as envisaged by s. 35(3) of Law 10/69 as amended by s. 5(c) of Law 53/79. 15 20

As already explained earlier on in the present judgment, the respondent Commission considered the confidential reports of the applicant and the interested party for the past years laying emphasis on their last two confidential reports whereby they were both rated with 39 and 38 for the respective years. 25

The applicant as well as the interested party were recommended by the appropriate Department of Education (vide Appendix "H" attached to the opposition).

Both the applicant and the interested party were rated "excellent" for their performance at the interview (vide p. 2 of exh. "Z" attached to the opposition). 30

Qualifications:

The relevant Scheme of Service (vide Appendix "IB") requires: (1) University degree, or title etc... The applicant as well as the interested party have the same diploma in Mathematics from "Pantios Scholi", Athens. 35

(2) Post-graduate studies abroad in Pedagogics or in a subject related to the duties of the post, of a duration of at least one academic year. The applicant has a post-graduate diploma in Statistics (University of London), whilst the interested party has a diploma in Educational Administration of the University of Reading.

In connection with qualifications, it must be made clear that neither the applicant nor the interested party had additional qualifications in the ordinary sense of the word: their post-graduate qualifications were a sine qua non prerequisite envisaged by paragraph 2 of the relevant scheme of service for their eligibility in contesting the post of Inspector A in Secondary Education for Mathematics. And it is abundantly clear from the sub judge decision that the respondent Commission has examined the matter (In the second paragraph of their decision— Appendix “IA”— they say that they examined the applications and “called the applicants possessed with the qualifications required by the Scheme of Service” to a personal interview. And further down in the first page of the sub judge decision the respondent Commission states “The E.S.C. after studying... and the Schemes of Service, decides as follows...” and has decided that the applicant as well as the interested party were possessed with the qualifications envisaged by the relevant Scheme of Service.

This fact is admitted by the applicant himself who states in the first page of his written address (para. 1.2): «Τόσο ο αιτητής όσο και το ενδιαφερόμενο πρόσωπο είχαν τα υπό των Σχεδίων Ύληρεσίας απαιτούμενα προσόντα». (The applicant as well as the interested party had the required, by the Schemes of Service qualifications). And it is only in his written address in reply that the applicant attempts to raise for the first time, “en passant”, the issue that the interested party does not possess the required qualifications envisaged by the Scheme of Service. Such an issue was never raised by the recourse but on the contrary, as above stated the applicant admitted in his written address that the interested party had the qualifications required by the relevant Scheme of Service.

I repeat I am satisfied that the respondent Commission

inquired into this issue and having held that both the interested party and the applicant had the required by the Schemes of Service qualifications reached at the sub judge decision. In this connection it must be borne in mind that it is up to the appointing authority to interpret and apply the relevant Scheme of Service in the circumstances of each particular case (*Republic v. Xinari and Others* (1985) 3 C.L.R. 1922—*Andreas Makris v. Republic* (Case No. 568/83 judgment delivered on 15.2.86—still unreported),* and in the present case I am satisfied that it was reasonably open to the E.S.C. to interpret and apply the Scheme of Service as they did.

So no question of additional qualifications arises either for the applicant or the interested party; but even in cases where the question of additional academic qualifications to those provided by the scheme of service exists—which is not the present case—such qualifications do not by themselves indicate striking superiority (vide *Hjiloannou v. Republic*, (1983) 3 C.L.R. 1041).

Seniority.

Seniority in the Educational Service is regulated by s. 37 of the Public Educational Service Law 1969 (Law 10/69).

The interested party was holding the post of Headmaster in the Secondary Education since the 1.1.1978 whilst the applicant was promoted to the same post as late as 9.11.81; thus the interested party has a substantial seniority consisting of more than 3 years and 11 months over the applicant.

It is clear from the above that the interested party is equal with the applicant in merit and qualifications, whilst he is substantially superior in seniority as aforesaid; and as the merits and qualifications of the parties are evenly balanced such a substantial seniority of the interested party over the applicant can have a decisive effect (*Partellides v. The Republic*, (1969) 3 C.L.R. 480).

In connection with the complaint of the applicant in respect of the alleged failure of the E.S.C. to examine whether

* Reported in (1986) 3 C.L.R. 10.

the candidates had the qualifications envisaged by paragraph 5 of the Scheme of Service, it may be repeated here that it is abundantly clear from the sub judge decision that the E.S.C. directed its mind properly to the relevant Scheme of Service and conducted a proper inquiry in that respect as well, leaving no margin for any misconception.

In the light of the above, I am satisfied that the respondent carried out due inquiry, taking into consideration all relevant criteria and material facts and applied properly the law to the facts in reaching the sub judge decision which was reasonably open to it.

In connection with the complaint as to the reasoning of the sub judge decision, I shall confine myself in saying this much: having examined the sub judge decision, I hold the view that it conveys the reasoning why the interested party was preferred for the said promotion instead of the applicant, in spite of its wording which is quite laconic on occasions; and the absence of direct comparison between the interested party and the applicant can be legitimately supplemented from the material contained in the extracts from the administrative file appended to the application and the opposition (contained in the file of the present recourse), to which extensive reference was made in this judgment which were before the respondent at all material times; such extracts contain more than the required material which can support the sub judge decision allowing at the same time an unhindered judicial scrutiny.

In the result, the present recourse fails and is accordingly dismissed; in the circumstances I shall make no order as to its costs.

*Recourse dismissed.
No order as to costs.*