1987 July 24

[SAVVIDES J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ZACHARIAS NICOLAOU,

Applicant,

v.

THE PORTS AUTHORITY OF CYPRUS,

Respondent

(Case No. 141/86)

Administrative Law — General principles — Collective organs — Need to keep proper minutes of their proceedings — Review of case law

Reasoning of an administrative act — Promotion of officers of public corporation — Absence of reasoning as to what was the material before the respondent and what matters were taken into consideration — Sub judice promotion annulled

By means of this recourse the applicant challenges the validity of the promotion of the interested party to the post of Boatman, 1st Grade.

The relevant part of the minutes of the meeting of the Board of the Authority reads as follows:

«Having considered all the material which was at its disposal, decided to offer promotion to the post of Boatman, 1st Grade to Mr. G. Theocharous, Boatman 2nd Grade»

The respondent met again on 28.1.86 and the following is a passage from its minutes:

«*Minutes of 266th meeting*

1.1 The minutes of the 266th meeting were approved by the Board and signed by the Chairman with the following amendments:

(c) Paragraph 14.1(a) to be replaced with the following:

(a) Having examined all material which was at its disposal it decided, by majority, to offer promotion to the post of Boatman, 1st Grade to Mr. G. Theocharous, Boatman 2nd Grade»

Nothing else is mentioned in the minutes of the Board of the respondent as to what was the material which was at its disposal or as to the majority decision

taken and no reasons were given for the disagreement of its members.

The Court, after referring to the case law, relating to the need for public collective organs to keep proper written records in respect of their proceedings,

Held, *annulling the sub judice decision*, that a perusal of the minutes of the respondent Commission shows no reasoning at all as to what was the material before it in making its assessment and what matters it has taken into consideration in reaching the sub judice decision

Sub judice decision annulled
Costs against respondents.

Cases referred to:

Medcon Construction and Others v. The Republic (1968) 3 C.L.R 535;

Kypnanou & Others (No. 2) v. The Republic (1975) 3 C L.R. 187,

Ellinas v. The Republic (1975) 3 C L.R. 248,

Iosif v. Cyprus Telecommunications Authority (1975) 3 C L.R. 261;

Republic v. Lefkos Georghiades (1972) 3 C.L.R. 594.

Recourse.

Recourse against the decision of the respondent to promote the interested party to the post of Boatman 1st Grade in preference and instead of the applicant.

A.S. Angelides, for the applicant.

N. Papaefstathiou, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant challenges the decision of the respondent dated 20.12.1985, to promote to the post of Boatman the interested party, namely George Theocharous, instead of and in preference to him.

The respondent is a public corporation exercising the powers vested in it by the Ports Authority Law (No. 38/73) as subsequently amended.

The applicant as from the 15th July, 1968 till the 1st October, 1977 was serving as a Boatman in the Department of Ports of the Republic. On the 1st October, 1977 as a result of an agreement and/or provisions of the Law he was seconded to the post of

Boatman 2nd Grade in the Ports Authority. In October, 1985, a vacancy occurred in the post of Boatman, 1st Grade in the respondent Authority. The appropriate Service Selection Committee found that 20 candidates were eligible for promotion to the post and selected four out of them whom it recommended as the best, amongst whom the applicant and the interested party. The respondent Authority met on 20.12.1985 and decided to promote the interested party to the vacant post in question. The minutes of the Authority read as follows:

«*The Board:*

(a) Having considered all the material which was at its disposal decided to offer promotion to the post of Boatman, 1st Grade to Mr. G. Theocharous, Boatman 2nd Grade.

..... »

The respondent met again on 28.1.1986 and the following is recorded in its minutes:

«*Minutes of 266th meeting.*

1.1. The minutes of the 266th meeting were approved by the Board and signed by the Chairman with the following amendments:

(c) Paragraph 14.1.(a) to be replaced with the following:

(a) Having examined all material which was at its disposal it decided, by majority, to offer promotion to the post of Boatman, 1st Grade to Mr. G. Theocharous, Boatman 2nd Grade.»

Nothing else is mentioned in the minutes of the Board of the respondent as to what was the material which was at its disposal or as to the majority decision taken or any reasons given for the disagreement between its members.

As a result, the applicant filed the present recourse challenging the said decision on the ground that it was taken contrary to the law, in violation of vested rights of the applicant, under a misconception of facts and law, contrary to the established criteria and that it lacks due reasoning and due inquiry.

By his opposition counsel for the respondent supported the decision of the respondent as lawful and correct, duly reasoned and within the proper exercise of the discretion of the respondent.

By his written address counsel for the applicant in expounding on his grounds of law submitted that-

(a) No reason whatsoever is given by the Board of the respondent as to how it evaluated the criteria set out by the law or

how it reached the conclusion that the interested party was the best candidate for promotion and also, as to how and why the first decision was subsequently amended. In counsel's submission the sub judice decision does not satisfy the minimum requirements of due reasoning so as to make judicial control possible.

(b) The respondent failed to carry out any inquiry as to whether the interested party possessed the required by the scheme of service knowledge of English, which cannot be inferred from the material in the file. Counsel also contended that the applicant is equal in merit, better qualified and senior to the interested party and should have been preferred.

By leave of the Court the parties also filed affidavit evidence. In the affidavit of Andreas Theofanous, Assistant Ports Inspector of the respondent Authority, dated 8.12.1986, it is stated that he was the person supervising the applicant and the interested party and responsible for assessing their work. In his opinion the applicant was superior in merit to the interested party and was giving him a higher assessment. He then goes on to explain that he used to deliver his assessment to the Port Manager who used to disagree partly. Regarding his assessment of the two parties during the last two years he stated that it was not accepted by the Port Master who ordered him to do it again. The affiant, according to his statement, again arrived at the same conclusion and his assessment was thereafter change to the advantage of the interested party and the disadvantage of the applicant.

By affidavit sworn on behalf of the respondent by I. Ghighis, the Port Manager of Limassol port, dated 30th April, 1987, the affiant states that he was, by decision of the Board of the Authority, appointed and was acting at the material time in question, as the reporting officer both of the applicant and the interested party, and that he was evaluating them in accordance with the Regulations governing the preparation of confidential reports of the employees of the Authority. He concluded his affidavit as follows:-

«By virtue of my above capacity and before proceeding to the evaluation of the applicant and the interested party in the preparation of the relevant reports I used to invite Mr. Theofanous to express his views in connection with the performance of the aforesaid employees but he was not personally the competent officer to make the assessment and in fact he never proceeded to such assessment.»

Before proceeding to deal with the various points raised by counsel for the applicant, I find it necessary to deal with the confidential reports of the applicant and the interested party in this case.

The confidential reports of the two candidates were, since 1979, prepared by Mr. Ghighis, as reporting officer and countersigned by Mr. G. Mavroyiangos as countersigning officer. In a number of these reports there appears to be a disagreement in the assessments on certain items between the reporting and the countersigning officer. On the items on which he did not agree with the reporting officer, the countersigning officer made his own evaluation in red and initialled same. The affiant Mr. Theofanous, does not appear to have taken any part in the preparation of the reports, except in giving orally his own opinion about the officers concerned.

I shall now proceed to consider the grounds raised by counsel for the applicant. In the Case of *Medcon Construction and Others v. The Republic* (1968) 3 C.L.R. 535 at p. 543, we read the following:-

> «It is essential for the propriety of proceedings of public collective organs that they should keep such written records of such proceedings as are required for purposes of good and proper administration. This was stressed in relation to the Tender Board in *Petri v. The Police* (1968) 2 C.L.R. 40 at p. 80); and in *Georghiades and the Republic* (1966) 3 C.L.R. 252 at p. 283 it was held that the total absence of any written record regarding a step in the handling of a matter by the Public Service Commission was 'so inconsistent with the minimum of essential requirement of proper proceedings before a public collective organ' that its relevant decision was vitiated by a basic defect and had to be annulled.»

In Kyprianou & Others (No. 2) v. The Republic (1975) 3 C.L.R. 187, Hadjianastassiou J. had this to say at pp. 193, 194:-

> «It seems that in the absence of any legislative provision regulating the matter, the non-keeping of minutes by a collective organ does not always (a question to be decided on the merits of each case) vitiate a particular administrative decision, except, I repeat, if the absence of such minutes or clarity in the minutes tends to deprive the decision of due

reasoning. Having gone into the decided cases, it appears that mainly the requirement of keeping written records is primarily for purposes of good administration. (See HadjiLouca v. The Republic (1969) 3 C.L.R. 570, at p. 574; and Korai and Another v. The Cyprus Broadcasting Corporation (1973) 3 C.L.R. 546 at pp. 564-565; also Kyriacopoullos on Greek Administrative Law, 4th ed. Vol. 2 p. 26, and Stassinopoullos on the Law of Administrative Acts, (1951) 223, as well as the Decisions of the Greek Council of State, in Cases 166/29 and 107/36.»

The above dictum was reiterated by A. Loizou, J. in *Ellinas v. The Republic* (1975) 3 C.L.R. 248 at pp. 253-254.

In *Iosif v. Cyprus Telecommunication Authority* (1975) 3 C.L.R. 261, *Hadjianastassiou J.* had this to say at p. 275:-

«..... I would like to make it quite clear that in the absence of sufficient material before this Court, this Court is left in the dark and is seriously handicapped in carrying out effectively its duties which is nothing more than carrying out effectively its judicial control over the administrative act of an appointing organ, in order to see whether they have exercised their discretionary powers properly and lawfully.»

In the *Republic v. Lefkos Georghiades* (1972) 3 C.L.R. 594 at p. 690, it was held that:

«The requirement of due reasoning in administrative decisions, has been stressed on more than one occasion by judgments of this Court (See inter alia, P.E.O. v. The Board of Cinematograph Films Censors & Another (1965) 3 C.L.R. 27 and Sofocleous (No. 1) v. The Republic (reported in this Part at p. 56, ante, at p. 60)). The philosophy behind the requirement of reasoning is that its presence excludes arbitrariness on the part of the administrative organ and protects the administration against itself by preventing it from taking a hasty decision. At the same time it protects the persons affected by such decision. The reasoning must be clear, that is to say, the concrete factors upon which the administration based its decision for the occasion under consideration must be specifically mentioned in such a manner as to render possible its judicial control. It must contain the way of thinking of the administrative organ on the relevant facts which constitute the foundation for the decision. A reasoning which does not satisfy these conditions cannot be considered as due reasoning.»

A perusal of the minutes of the respondent Commission shows no reasoning at all as to what was the material before it in making its assessment and what matters it has taken into consideration in reaching the sub judice decision. I find that this ground succeeds and that the sub judice decision has to be annulled on this ground.

Having found so, I find it unnecessary to deal with the other grounds raised by counsel for applicant.

In the result, this recourse succeeds and the sub judice decision is annulled with costs.

Sub judice decision annulled with costs.