

1987 July 30

(TRIANAFYLIDES, P.,MALACHTOS, LORIS,
STYLIANIDES, KOURIS, JJ.)

THE REPUBLIC OF CYPRUS. THROUGH
1. THE PUBLIC SERVICE COMMISSION,
2. THE MINISTER OF INTERIOR.

Appellants.

v.

NICOS ROUSSOS,

Respondent.

(Revisional Jurisdiction Appeals Nos. 581, 582).

5 *Public Officers — Promotions — Merit, qualifications, seniority (The three statutory criteria laid down by section 44(2) of the Public Service Law 33/67) — Principles applicable — They should be weighed together and the appointing organ may attribute such significance to them as may be deemed proper in the correct exercise of its discretion — This principle is not inconsistent with dicta that «Merit should carry the most weight», so long as this is not misunderstood as implying that merit is invariably in an inflexible manner the decisive factor — Cogent reasons should be given why in a particular case merit was not treated as carrying the most weight.*

10 *Public Officers — Promotions — Merit — Evaluation of, on the basis of confidential reports — What matters is the overall picture (grade) presented by a report — Whole career of candidates should be taken into account, but it is not wrong to rely more on recent than on older confidential reports.*

15 These are appeals from a Judgment of a Judge of this Court, whereby the promotion of the interested party in the relevant recourse to the post of Lands Officer, 1st Grade, was annulled.

It appears that the trial Judge approached the issue of the validity of the sub-judice decision from the premises that both the Head of the Department and the Commission were bound to rely on the three statutory criteria — merit, qualifications and seniority — in the order they are set out in the relevant section of the law (Section 44(2) of Law 33/67). The assumption of the trial Judge was that by statutory edict merit had to be treated invariably as the decisive criterion.

The trial Judge also, found that there were other grounds justifying annulment of the sub-judice decision, namely failure by the Commission to attach to the confidential reports regarding the interested party the weight objectively due to them, justification of the selection of the interested party by reference to the fact that when the applicant and the interested party were candidates in 1982 for a lower post, the latter was preferred to the former, and failure by the Commission to evaluate the recommendations of the Head of Department in their proper perspective and consequently, failure to notice the error inherent to such recommendations

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Held, allowing the appeal (1) The three statutory criteria namely merit, qualifications and seniority, are to be weighed together and such significance is to be attributed to them as may be deemed proper in the course of the exercise correctly of the discretionary powers of the appointing organ (*Georgiou v The Republic* (1976) 3 C L R 74, *Jendes v The Republic* (1980) 3 C L R 165 *Christou v The Republic* (1980) 3 C L R 437 and the *Republic v Zachanades* (1986) 3 C L R 852 followed) None of the aforesaid criteria is accorded by statutory provision greater importance than the other two To hold otherwise would amount to amending section 44(2), not by legislation, but by judicial pronouncement (*Republic v Zachanades*, supra) The aforesaid approach is not inconsistent with the dictum in *Menelaou v The Republic* (1969) 3 C L R 36, followed in the *Republic v Hans* (1985) 3 C L R 106, that «merit should carry the most weight», provided it is not misunderstood as implying that merit should be treated invariably in an inflexible manner as the decisive factor Indeed, there may exist situations, in the special circumstances of which a criterion other than merit may be found to be more important than the other criteria, however, cogent reasons should be given why merit has not been treated as carrying the most weight

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(2) The appellant Commission did in fact attribute to the confidential reports of the respondent (applicant in the recourse) the significance objectively due to them As regards the evaluation of the merits of the candidates, as emanating from the confidential reports, it must be stressed that what matters is the general picture presented by the overall grade in the report and that, though the whole career of the candidates should be taken into account, it is not wrong, if recent reports are more relied upon than older ones

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(3) The purpose of the passage referring to the promotions of 1982 was to explain why the respondent (applicant in the recourse) after 1982 held a post lower than that of the interested party in the recourse It was not relied upon to justify the sub judice selection

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(4) There was nothing really wrong in the way the Head of the Department made his recommendations and, moreover, as the Commission reached its own conclusion, and only after having reached such conclusion, it decided to accept the recommendations, the recommendations did not affect in a

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decisive manner the final outcome and, therefore, even assuming that such recommendations were wrongly made, the irregularity is not a material one.

Appeal allowed.

No order as to costs.

5 *Cases referred to:*

Menelaou v. The Republic (1969) 3 C.L.R. 36;

Theocharous v. The Republic (1969) 3 C.L.R. 318;

Mintzides v. The Republic (1973) 3 C.L.R. 521;

Vourkos v. The Republic, (1983) 3 C.L.R. 1442;

10 *Constantinou v. The Republic* (1984) 3 C.L.R. 498;

Constantinides v. The Republic (1984) 3 C.L.R. 567;

Pсарas v. The Public Service Commission (1985) 3 C.L.R. 229;

Yenakritou v. The Republic (1985) 3 C.L.R. 2731;

Georghiou v. The Republic (1976) 3 C.L.R. 74;

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

Christou v. The Republic (1980) 3 C.L.R. 437;

Soteriades v. The Republic (1983) 3 C.L.R. 921;

The Republic v. Haris (1985) 3 C.L.R. 106;

The Republic v. Zachariades (1986) 3 C.L.R. 852;

20 *Republic v. Safirides* (1985) 3 C.L.R. 163.

Appeals.

Appeals against the judgment of a Judge of the Supreme Court of Cyprus (Pikis, J.) given on the 28th February, 1986 (Revisional Jurisdiction Case No. 538/84)* whereby the promotion of A. Koufettas to the post of Lands Officer 1st Grade was annulled.

25 *R. Gavrielides, Senior Counsel of the Republic*, for appellant in R.A. 581.

C. Loizou, for appellant in R.A. 582.

A.S. Angelides, for respondent in both appeals.

Cur. adv. vult.

* Reported in (1986) 3 C.L.R. 723.

TRIANAFYLLIDES P. read the following judgment of the Court. These appeals have been made against the first instance judgment of a Judge of the Supreme Court in case No. 538/84, by means of which there was annulled the promotion of A Koufettas to the post of Lands Officer, 1st Grade (Survey).

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Appeal 581 was filed by the respondents in case 538/84 and appeal 582 was filed by the said Koufettas who has been all along an interested party in the present proceedings.

Case 538/84 was filed as a recourse, under Article 146 of the Constitution, by the respondent in these appeals.

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The first instance judgment of the learned trial Judge, against which the appeals have been made, is reported as *Rousos v. The Republic*, (1986) 3 C.L.R. 723, and in it there are set out the salient facts of this case, which need not, therefore, be repeated in the present judgment.

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From the judgment of the trial Judge it appears that he approached the validity of the sub judge decision of the appellant Public Service Commission as if the Commission, as well as the Head of the Department concerned when he made his recommendations to the Commission, ought to have acted by relying on the statutory criteria which are laid down in section 44(2) of the Public Service Law, 1967 (Law 33/67) - namely merit, qualifications and seniority- in the order in which such criteria are set out in the said section 44(2); and the trial Judge consequently proceeded on the basis that merit was the foremost criterion for the evaluation of the suitability of the candidates for promotion to the post in question.

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That merit is the most weighty factor has been established by case-law over a period of many years (see, inter alia, *Menelaou v. The Republic*, (1969) 3 C.L.R. 36, 41, *Theocharous v. The Republic*, (1969) 3 C.L.R. 318, 323, *Mintzides v. The Republic*, (1973) 3 C.L.R. 521, 526, *Vourkos v. The Republic*, (1983) 3 C.L.R. 1442, 1449, *Constantinou v. The Republic*, (1984) 3 C.L.R. 498, 502, *Constantinides v. The Republic*, (1984) 3 C.L.R. 567, 573, *Psaras v. The Public Service Commission*, (1985) 3 C.L.R. 229, 241 and *Yenakritou v. The Republic*, (1985) 3 C.L.R. 2731, 2741).

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All the case-law referred to hereinabove consists, indeed, of judgments at the first instance level of the jurisdiction of this Court

under Article 146, but this does not detract from their usefulness and importance.

5 It is to be noted, however, that in *Georghiou v. The Republic*, (1976) 3 C.L.R. 74, the following were stated in the judgment of the Full Bench of this Court (at p. 82):

10 «Furthermore, we do accept as quite correct the proposition that it is open to the Commission, in trying to select the most suitable candidate, to weigh together all relevant considerations and to attribute more significance to one factor than to another, in the course of doing so, provided, however, that it exercises properly its relevant discretion (see the decision of the Greek Council of State in case 635/1950); and this Court will not interfere with a decision of the Commission when it appears that it was reasonably open to it to select a particular officer, instead of another, for promotion (see, inter alia, *Evangelou v. The Republic*, (1965) 3 C.L.R. 292, 299).»

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20 The approach adopted in the above-quoted passage from the judgment in the *Georghiou* case, *supra*, was followed by the Full Bench in, inter alia, *Ierides v. The Republic*, (1980) 3 C.L.R. 165, 180 and *Christou v. The Republic*, (1980) 3 C.L.R. 437, 445, and was also used at the first instance level (see, for example, *Soteriadou v. The Republic*, (1983) 3 C.L.R. 921, 932, 933).

25 More recently in *The Republic v. Haris*, (1985) 3 C.L.R. 106, the following were stated in the judgment of the Full Bench of this Court (at p. 110):

30 «The claim of officers to promotion should be considered on the basis of merit, qualifications and seniority. Merit should carry the most weight because the functions of a public office are better performed in the general interests of the public by a public officer better in merit than seniority or qualifications - (*Menelaou v. The Republic*, (1969) 3 C.L.R. 36, at p. 41).»

35 Subsequently, in *The Republic v. Zachariades*, (1986) 3 C.L.R. 852, the following were stated in the judgment of the Full Bench (at p. 856):

«Also, we are of the view that the three criteria which are set out in section 44(3) of the Public Service Law, 1967 (Law 33/

67), namely merit, qualifications and seniority, have to be weighed together, bearing in mind, too, the performance of the candidates when interviewed, which is a process helping in the evaluation of the candidates, mainly from the point of view of merit and, also, to a certain extent, of qualifications as well. 5

An appointing authority, such as the appellant Commission, when weighing together the said three criteria, in order to find the most suitable candidate, may attribute such significance to them as it may deem proper, provided that it exercises correctly, in the course of doing so, its relevant discretionary powers (see the *Georghiou* case, supra, 82); and it is not provided by section 44(3) that any one of the three criteria has, in any event, greater importance than the other two.» 10 15

The *Georghiou* case referred to in the above passage is *Georghiou v. The Republic*, (1976) 3 C.L.R. 74, supra.

We have no doubt that it was not intended by the judgment in the *Haris* case, supra, to overrule the judgments in the *Georghiou*, *Ierides* and *Christou* cases, supra. Nor was it intended by the judgment in the *Zachariades* case, supra, to overrule the judgment in the *Haris* case, supra. 20

In the *Zachariades* case, the essence of the judgment, in so far as it is relevant to the present case, was that the criteria set out in section 44(2) - (and there is a misprint in the report of that case referring to section 44(3) instead of section 44(2)) - of Law 33/67 are to be weighed together and such significance is to be attributed to them as may be deemed proper in the course of the exercise correctly of the relevant discretionary powers of the appointing authority, and that none of these criteria is accorded by statutory provision, namely section 44(2), greater importance than the other two. Because to hold otherwise would amount to amending section 44(2), not by legislation, but by judicial pronouncement, which would not be permissible. 25 30

On the other hand, there is nothing in the *Zachariades* case to prevent giving effect to the dictum in the *Menelaou* case, supra, which was adopted by the *Haris* case, that «merit should carry the most weight», so long this is not misunderstood to mean that merit should invariably be treated, in an inflexible way, as being exclusively the decisive criterion, because, in view of the 35 40

judgments in the *Georghiou, Ierides* and *Christou* cases, *supra*, there may exist situations in the special circumstances of which, and provided that there are not overstepped the limits of the proper exercise of the relevant discretionary powers, a criterion
5 other than merit may be found to be more important than the others. But it is, indeed, obvious that cogent reasons should be given in order to justify why merit has not been treated in a particular case, in view of the existence of special circumstances, as carrying the most weight.

10 On the present occasion it appears to us that the first instance judgment which is under appeal before us - (and which was delivered on 28 February 1986, apparently before the final text of the judgment in the *Zachariades* case, which was delivered on 13
15 January 1986 had become available to the learned trial Judge, because he does not refer to it at all)- was based on the assumption that practically by statutory edict merit had to be treated invariably as the decisive criterion and, in our view, this was an incorrect application of the relevant legislation, rendering it necessary for us to allow the present appeal.

20 We pass on next to deal with the other reasons for which the trial Judge found that the sub judge decision should be annulled:

It was found by him that the appellant Public Service Commission failed to attach to the confidential reports regarding the interested party the weight objectively due to them. We do not
25 think that this finding is borne out by the relevant minutes of the Commission, dated 12 July 1984, which show that, after the Commission had rejected the contention of the interested party that some confidential reports regarding him were unjust, it went on to record that it had decided to approach such reports with
30 special care («ιδιαιτέρη προσοχή»), bearing in mind a clear statement of the Head of the Department concerned that the interested party had been showing considerable improvement and that in 1984 he was excellent. In our view the Commission has attributed to the confidential reports regarding the interested party

the weight objectively due to them and it appears to have been very careful in doing so.

We think that it is advisable, because of certain side-issues raised in this case, to deal further with the matter of the evaluation of the merits of candidates on the basis of confidential reports, as they are prepared according to the forms currently in use:

Firstly, we should stress that what really matters is the general picture presented by the overall grade in the report, on the basis of the aggregate effect of the evaluations of a public officer regarding particular rateable items, and not the arithmetical formula of how many times as regards such items a candidate had been rated as «excellent» or «very good», or «good» etc.

In other words, if there are being compared the confidential reports regarding two public officers for the same year and the overall grade for that year for both of them is «excellent» we do not think much weight should be attached to whether this overall grade of «excellent» in respect of one of them has been reached through his having more «excellent» than «very goods» in relation to particular rateable items as compared to the other public officer who has, also, an overall grade of «excellent» but with less «excellent» and more «very good» ratings as regards particular items. Because it must not be lost sight of that it is dangerous to embark on these numerical comparisons independently of the nature of the items in respect of which an officer is rated as «excellent» or «very good» since such items do differ in significance depending on the qualities to which they relate.

Secondly, it is true that the whole career of an officer should be taken into account, so that a complete picture about him may be formed, but it cannot be said that there is being entailed a wrong exercise of the relevant discretionary powers if the recent reports are relied upon more than the older ones, because it cannot be denied that the recent reports present a picture which is more relevant on the date on which the selection of the candidate to be promoted or appointed is made.

The learned trial Judge has found that the preference for the selection of the interested party was justified by the appellant Public Service Commission by reference to the fact that in 1982, when the respondent and the interested party were again candidates for promotion to another lower post, that of Lands Officer, 2nd grade, the interested party was preferred to the

respondent; and the Judge held that this was an irrelevant matter to which no regard should be paid in view, in particular, of the judgment in *The Republic v. Safirides*, (1985) 3 C.L.R. 163.

- 5 In our view the relevant passage in the minutes of the Commission, dated 12 July 1984, was mainly intended to explain how it came to be that after 1982 the respondent continued to be in a lower post than the interested party; and this passage in the minutes in question of the Commission was not really relied on, in any way, decisively by the Commission in favour of the selection
10 of the interested party instead of the respondent.

- We are bound, therefore, to treat this passage as being at most only an irregularity which was not of a material nature and which cannot be regarded as vitiating the relevant administrative process leading up to the sub judge promotion of the interested party (see,
15 inter alia, in this respect, *Christou v. The Republic*, (1980) 3 C.L.R. 437, 448).

- The trial Judge has found, also, that the appellant Public Service Commission has failed to weigh the recommendation of the at the time Head of Department of Lands and Surveys, Mr. Rois
20 Nicolaides, in its proper perspective and that had the Commission done so it would have noticed the error inherent in the recommendation of Mr. Nicolaides, who recommended the interested party even though the respondent was superior in merit.

- 25 Mr. Nicolaides appeared before the Commission as Acting Director of the Department on 12 July 1984 and stated that the interested party was slightly inferior in merit to the respondent but superior to him in seniority by one year.

- He went on to say that in 1984 and till the time when he
30 appeared before the Commission the interested party was excellent, but not up to the level of the respondent, and that there continued to exist the difference which existed in the previous year between the respondent and the interested party. He stated that their qualifications were the same and that taking into account the
35 three relevant criteria he decided to recommend the interested party.

Mr. Nicolaides pointed out that the confidential report regarding the respondent for 1983 covered the period up to the month of

September; and he added that he had seen the confidential reports regarding the interested party, when they were forwarded to the Departmental Committee, and had evaluated the performance of this officer in 1983 and in 1984 till July 1984, when he appeared before the Commission, and he found that the interested party had improved considerably and that such improvement was continuing.

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We find nothing really wrong in the way in which the Head of Department made his recommendation to the appellant Public Service Commission and we are of the opinion that he presented the overall picture and justified his preference for the interested party in a manner that was reasonably open to him in the circumstances.

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From the remainder of the minutes of the Commission, of 12 July 1984, it is abundantly clear that the Commission proceeded to make its own comparison and evaluation of the two candidates concerned, namely the respondent and the interested party, and only after having reached its own conclusion in this respect, and for the reasons recorded in support of such conclusion in its minutes, it decided to accept the recommendation of the Head of the Department in support of the promotion of the interested party.

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Consequently, we are of the view that the said recommendation did not affect in a decisive manner the sub judice decision of the Commission and, therefore, even assuming that the recommendation of the Head of Department was wrongly made, in that he did not recommend the respondent who was slightly superior to the interested party in merit, we would not be prepared to find that the way in which such recommendation was made amounts to a material irregularity vitiating the administrative process which culminated in the promotion of the interested party.

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For all the foregoing reasons we have decided to set aside the annulment of the promotion of the interested party as ordered by the trial Judge; and since we are of the opinion, on the basis of all relevant considerations, that such promotion was reasonably open to the Commission in the proper exercise of its relevant discretionary powers; and as we cannot substitute our own selection of the most suitable candidate in the place of that of the Commission (see the *Zachariades* case, supra), we have to allow these appeals, dismiss the recourse of the respondent - as

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applicant - and confirm the promotion to the post concerned of the interested party.

In all the circumstances of this case we have decided to make no order as to costs of these appeals.

Appeals allowed.

No order as to costs.