

1987 October 6

[LORIS, J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PANAYIOTA B. KOKKINOY,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 256/86).

Administrative Law — Misconception of fact — Promotion of Public Officers — Misconception as to applicant's seniority — A material one — Especially as in this case it was the reason for not following the recommendations of the Head of the Department.

5 *Public Officers — Promotions — Seniority — The Public Service Law 33/67, section 46(1) as amended by section 5(a) of Law 10/83.*

The applicant challenges by means of this recourse the validity of the promotion of the interested party to the post of Senior Pharmacist.

10 The interested party was appointed for the first time as a Pharmacist 2nd Grade on 1.2.69 and was promoted to Pharmacist 1st Grade on 15.4.72. The applicant was appointed for the first time in the service to the post of Pharmacist 1st Grade on 1.3.73. It follows that the interested party is senior to the applicant by about 10 1/2 months.

15 The applicant is slightly better in merit than the interested party. She is, also, better qualified and had been recommended for promotion by the Head of the Department.

20 The respondent Commission «on the basis of all material before it» did not adopt the recommendation for the promotion of the applicant and instead selected the interested party, «who precedes both of them» (the applicant and another candidate) «in seniority». The Commission defined the seniority of the interested party vis a vis the applicant as being «more than a year».

Held, *annulling the sub judice decision*: (1) According to the provisions of s. 46(1) Law 33/67 as amended by s. 5(a) of Law 10/83 the seniority of the

interested party over the applicant is only 10 1/2 months exactly - not a single day more.

(2) The respondent Commission acted under a misconception of fact, which has to be treated as a material one, in view of the importance of seniority in the selection process, and as such apt to invalidate the decision. Moreover, in this case the misconception was the substantial reason for not following the recommendations of the Head of the Department.

*Sub judice decision annulled
with £30.- costs in favour of
applicant.*

Cases referred to:

Theodossiou v. The Republic, 2 R.S.C.C. 44;

Christodoulides v. The Republic (1986) 3 C.L.R. 283.

Recourse.

Recourse against the decision of the respondent to promote the interested party to the post of Senior Pharmacist in the Pharmaceutical Services in preference and instead of the applicant.

A. Pandelides, for the applicant.

A. Papasavvas, Senior Counsel of the Republic, for the respondent. *Cur. adv. vult.*

LORIS J. read the following judgment. The applicant by means of the present recourse impugns the decision of the respondent P.S.C. dated 10.2.86, whereby the interested party namely Charalambos Vassiliou was promoted to the post of Senior Pharmacist in the Pharmaceutical Services as from 15.2.86, in preference to, and instead of the applicant.

Before proceeding to examine the sub-judice decision I consider it pertinent at this stage to refer to the undisputed facts concerning the merit, qualifications and seniority of the applicant and the interested party.

The interested party who was appointed for first time as a Pharmacist 2nd Grade (P) on 1.2.69, was promoted to the permanent post of Pharmacist 1st Grade on 15.4.1972.

The applicant was appointed for first time in the permanent post of Pharmacist 1st Grade on 1.3.73.

According to the Scheme of Service for the post of Senior Pharmacist (which is a promotion post), University diploma and/or

postgraduate studies in Pharmacy «will be considered as an additional advantage».

The interested party possesses a Diploma in Pharmacy of Athens University.)

- 5 The applicant possesses (1) A Diploma of Athens University (2) the degree of Master of Science in Pharmaceutical Analysis and Quality Control of Chelsea College of the University of London.

10 The merit of the applicant as it transpires from the relevant confidential reports for the last 10 years is better than that of the interested party; in particular for the last 3 years (1983), (1984), (1985) the applicant is rated «excellent» (12-0-0) for each one of the aforesaid years whilst the interested party was rated «very good» (8-4-0) for 1983 and «excellent» (12-0-0) for the years 1984 and 1985.

- 15 Furthermore the applicant was recommended for promotion by the Head of the Department whilst the interested party was not so recommended (vide Appendix 13 attached to the opposition).

20 Thus the overall picture indicates that the applicant if not slightly better merited than the interested party she was at least more or less equal to him; as regards qualifications she was undoubtedly better qualified; and the interested party had only 10 1/2 months seniority over the applicant, the interested party having been promoted to the permanent post of Pharmacist 1st Grade on 15.4.72 and the applicant having been appointed to the same post
25 on 1.3.73. (In this connection vide s. 46(1) of the Public Service Law No. 33/67 as amended by s. 5(a) of Law 10/83.)

Furthermore the applicant was recommended for promotion by the Head of the Department whilst the interested party was not recommended.

- 30 In spite of the overall picture set out above, the respondent P.S.C. proceeded to promote the interested party acting contrary to the recommendations of the Head of the Department.

35 Under s. 44(3) of the Public Service Law (Law No. 33/67) «In making a promotion, the Commission shall have due regard to the annual confidential reports on the candidates and to the recommendations made in this respect by the Head of Department in which the vacancy exists.»

As early as 1961 it was held in *Theodossiou v The Republic*, 2 R.S.C.C. 44 at p. 48 that if the P.S.C. is of the opinion that for certain reasons the recommendation of the Head of the Department cannot be adopted then «the reasons for taking such an exceptional course would be clearly recorded in the relevant minutes of the Public Service Commission. Failure to do so would not only render the work of this Court more difficult in examining the validity of the relevant decision of the Public Service Commission but it might deprive such Commission of a factor militating against the inference that it has acted in excess or abuse of power.» 5 10

As already stated the respondent P.S.C. did not adopt the commendation of the Head of the Department in favour of the applicant; the reasons given by the respondent for following such course are stated in the relevant minutes of the P.S.C. of 10.2.86 (vide pages 11 and 12 of appendix 13 attached to the opposition). 15

They say at p. 11 of Appendix 13: «The Commission on the basis of all the material before it, has not adopted the commendations of the Head of the Department for promotion of Aspros (another candidate not connected with the present course) or Kokkinou (the applicant in the present recourse) and instead selected Vassiliou, (the interested party in this case), who precedes both of them in seniority...» 20

At p. 12 of Appendix 13, the respondent P.S.C. proceeds to define such seniority of the interested party over the applicant only, this time stating clearly that the interested party is senior to the applicant «for more than a year». With respect to the respondent P.S.C. the aforesaid statement is wrong. As already stated earlier on in the present judgment the interested party was promoted to the permanent post of Pharmacist 1st Grade on 5.4.1972 and the applicant was appointed to the same post on 3.3.1973; thus according to the provisions of s. 46(1) of the Public Service Law (Law No. 33/67) as amended by s. 5(a) of Law 10/83 the seniority of the interested party over the applicant is only 10 1/2 months exactly - not a single day more. Instead the respondent P.S.C. speaks clearly of seniority «ενός και πλέον έτους» of the interested party over the applicant in the present post (that of Pharmacist 1st Grade.) 25 30 35

Such a statement in the minutes of the respondent P S C indicates clearly that the P S C at the material time acted under a misconception of fact, which has to be treated as a material one, in view of the importance of seniority in the selection process, and as such apt to invalidate the decision (vide *Christodoulides v The Republic* (1986) 3 C L R 283 at p 288) And we should not lose sight of the fact that in the case under consideration the material misconception in question was the substantial reason for the non adoption by the P S C of the relevant recommendation of the Head of the Department who has recommended the applicant for promotion and did not so recommend the interested party

In the result the present recourse succeeds and the sub-judice decision is hereby annulled Respondent to pay £30 - against the costs of the applicant

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*Sub judice decision
annulled with £30 - costs
in favour of applicant*