

1987 November 4

[PIKIS J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ARGYRO A PAPTTRYPHONOS

Applicant

v

THE REPUBLIC OF CYPRUS THROUGH
THE PUBLIC SERVICE COMMISSION

Respondent

(Case No 702/86)

Public Officers — Promotions — Confidential reports — Circular 491/79 governing their preparation — Rules 3(1) and 9 — Head of Department acting as a countersigning officer, failed to fill part V of the report, but filled Part VI thereof — Part VI should only be filled by the Head of the Department if he is not the countersigning officer — As the Head of the Department disagreed with the reporting officer there has been a breach of Reg 9. Therefore the report is tainted with illegality and is contrary to Art. 28 of the Constitution — In the absence of an indication to the contrary the possibility that the report was in fact taken into consideration cannot be excluded. Whether taking into account a report prepared in breach of Reg 9 inevitably leads to the annulment of the final act of promotion — Question answered in the negative — In each case the Court should consider the impact of the impropriety on the final decision

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By means of this recourse the applicant challenges the promotion of the interested party to the post of Industrial Officer A

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The applicant was not among those recommended by the Departmental Board. She complains that the decision of the Board is not duly reasoned, and that her confidential report for 1979 was prepared in a manner contrary to Circular 491/79

The countersigning officer, who was, also, the Head of the Department did not fill part V of the report for that year, but he made observations in part VI, expressing the view that applicant should have been rated as «good» instead of «very good» a rate given to her by the reporting officer

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The Court having found that the decision of the Board was duly reasoned

Held, *dismissing the recourse* (1) Rule 3(1) of Circular 491 of 1979 governing the preparation and submission of confidential reports, requires that every confidential report should be filled by the reporting and the countersigning officer. As the specimen form of confidential reports attached to the circular specifically states, column VI should only be filled by the Head of the Department if he does not happen to be the countersigning officer. The inevitable inference is that the relevant provisions of the circular were not heeded.

The omission of the countersigning officer to make an assessment in his such capacity coupled with his comments in Part VI resulted in breach of Reg 9, laying down a strict procedure to be followed in case of disagreement between the countersigning and the reporting officer.

(2) It follows that the report for 1979 is tainted with illegality and contravenes the provisions of Art 28 of the Constitution (*Republic v Argyndes* (1987) 3 C L R 1092).

(3) In the absence of a specific record to the contrary the possibility that the Departmental Board or the Public Service Commission were influenced by the comments of the countersigning officer cannot be ruled out.

(4) However on the totality of the material before the Court, the inference is that the taking into account of the said report was immaterial in view of the overall effect of the record of the applicant and that of the interested party.

The decision in *Argyndes* (supra) does not compel the Court to set aside every decision of the Public Service Commission, where a confidential report was improperly prepared, independently of the impact of that impropriety on the final decision. So to hold would lead the Court to annulling every decision of the appointing body irrespective of the remoteness in point of time, of an irregularity that occurred in the preparation of a confidential report.

Recourse dismissed

Cases referred to

Republic v Argyndes (1987) 3 C L R 1092.

Papantoniou and Another v The Republic (1983) 3 C L R 64.

P S C v Papaonisiiforou (1984) 3 C L R 370

Recourse.

Recourse against the decision of the respondents to promote the interested party to the post of Industrial Officer A in preference and instead of the applicant.

K. Stavrinou, for the interested party.

P. Hadjidemetriou, for the respondent.

G. Triantafyllides, for the interested party.

Cur. adv. vult.

PIKIS J. read the following judgment. The applicant, the interested party and four other Industrial Officers were candidates for promotion to the post of Industrial Officer 'A'. The Departmental Committee, chaired by the Director-General of the Ministry and manned by senior officers of the Department of Industry, recommended the interested party Y. Kontos and V. Lambrou as the candidates best qualified for appointment. Two of the six candidates were excluded as ineligible for promotion for lack of the necessary qualifications, whereas the applicant and one other candidate, though qualified, were not recommended upon consideration of the relative merits of the four candidates.

The Public Service Commission adopted the recommendations of the Departmental Committee on review of the data bearing on the worth of the candidates and thereafter confined the selection process to the interested party and V. Lambrou. Ultimately, they chose the interested party whose service record was, on an objective view, better than that of the other contestant.

Applicant challenges the promotion of the interested party for two reasons:

- (a) Lack of due reasoning of the decision of the Departmental Committee pertaining to the recommendation of the interested party and the exclusion of the applicant; and
- (b) Impropriety or illegality attendant to the preparation of the confidential report on the applicant for the year 1979 vitiating the decision of both the Departmental Committee and that following thereon of the Public Service Commission.

On the initiative of counsel for the Republic an ambiguity relevant to the confidential report on the interested party for the year 1983 was clarified by the evidence of Mr. Paschalis who countersigned the report on Y. Kontos for that year. He testified that before expressing his disagreement to the evaluation of the services of the reportee by the reporting officer and making the comments appearing under column V of the confidential report, he had a consultation with the reporting officer, an exchange that did not bridge differences in the assessment of the two officers. Differences in the assessment of the two officers persisted and

were duly reflected in the confidential report I accept that the events narrated by Mr Paschalis represent an accurate account of what had preceded the report of the countersigning officer

5 In their report the Departmental Committee minuted the reasons that led to the recommendation of the interested party and V Lambrou They turned on an evaluation of their service record and the statutory criteria for the evaluation of the suitability of candidates for promotion They had personal knowledge too of the performance of the candidates at work, a view that coincided
10 with the objective data bearing on the candidates In my judgment their recommendation cannot be faulted for lack of due reasoning

What remains to decide is whether their recommendation and subsequently the decision of the Public Service Commission is
15 liable to be set aside for the evident irregularity in the preparation of the confidential report of the applicant for the year 1979 The reporting officer made an overall assessment of the services of the applicant as «very good» The countersigning officer, namely, Mr Eliades, the then Director-General of the Ministry of Commerce and Industry, omitted to fill the column reserved for the
20 countersigning officer which remained blank Instead he made certain comments and signed part VI of the report reserved for the Head of the Department Mr Trantafyllides for the interested party submitted that as Mr Eliades was both the countersigning officer and the Head of the Department, he was under no
25 obligation to fill column V of the report I disagree Rule 3(1) of Circular 491 of 1979, governing the preparation and submission of confidential reports, requires that every confidential report should be filled by the reporting and the countersigning officer Subsequent provisions of the circular indicate who those officers
30 should be The Head of the Department may, if he is not the countersigning officer make a supplementary report, though one would expect that such report would normally be of a general character reflecting circumstances of work in his department and the contribution of the particular section to the attainment of the
35 objectives of the Ministry As the specimen form of confidential reports attached to the circular specifically states, column VI should only be filled by the Head of the Department if he does not happen to be the countersigning officer The inevitable inference is that the relevant provisions of the circular were not heeded Of
40 still greater significance are the comments made by the countersigning officer under column VI He expressed the view

that the assessment of the applicant was lenient and that in his view his work should be graded as «good», not «very good». The omission of Mr. Eliades to make an assessment of the applicant in the capacity of a countersigning officer, coupled with the comments made under column VI inevitably resulted in breach of Regulation 9 of the circular laying down an inflexible procedure to be followed in every case where the countersigning officer disagrees with the assessment made by the reporting officer concerning the value of the services of the person reported upon. In *Republic v. Argyrides** the Full Bench decided that strict observance of the provisions of Regulation 9 of the circular pertaining to confidential reports is a condition precedent to their validity and that any departure therefrom taints the report with illegality and results in breach of the provisions of Art. 28 safeguarding equality before the administration. And inasmuch as the confidential report was a material factor for the decision of the appointing body, the decision was annulled for misconception of the facts recorded in the confidential report.

Time and again Courts took pains to stress that confidential reports are a principal source of information about the merits of a candidate and devotion to duty and are in many respects definitive of the claims of a candidate to promotion. As I explained in a separate concurring judgment in the case of *Argyrides* (supra) the invalidity of a confidential report must invariably be correlated to the impact the invalid report had on the decision of the appointing body. Mr. Hadjidemetriou suggested that in this case it could have had no impact considering that the evaluation of the reporting officer was not formally modified. I cannot agree with that for in the absence of a specific record that this is the view taken of the confidential report on the applicant for the year 1979, either by the Departmental Committee or the Public Service Commission, I cannot rule out the possibility that they were influenced by the comments of the countersigning officer. Likewise I consider the decision in *Papantoniou and Another v. Republic*** and the decision affirming it on appeal *P.S.C. v. Papaonisiforou****, as having no bearing on the outcome of this case. In that case the countersigning officer instead of recording his evaluation of the services of the person reported upon, he made a comment to the effect that the reporting officer had a tendency to be lenient in his

* (1987) 3 C.L.R. 1092.

** (1983) 3 C.L.R. 64.

*** (1984) 3 C.L.R. 370.

evaluations. In this case the effect of the comment of Mr. Eliades was wholly different. He voiced disagreement with the assessment of the reporting officer, taking the view that it was lenient and proceeded to record his own assessment differing from that of the reporting officer.

The ultimate question, not an easy one, turns on the implications stemming from breach of Reg. 9 of the circular governing the preparation of confidential reports (Circular 491 of 1979). In the light of our caselaw, the report had been improperly prepared and on that account ought to have been ignored, at least that part of it that disclosed the views of the countersigning officer. In the absence of any indication to that end in the minutes of the Departmental Committee and later in those of the Public Service Commission, I cannot presume that they ignored the comments of Mr. Eliades. Therefore, the report was tainted with illegality and as such ought to have been ignored.

The next question we must resolve concerns the implications stemming from taking into account the confidential report of the applicant for the year 1979. On a consideration of the material before me, the inevitable answer is that it was immaterial in view of the overall effect of the record of the applicant and that of the interested party. The Public Service Commission founded its decision on a consideration of the service record of the candidates for the post. Assuming that the report for the year 1979 was not fraught with illegality and the rating of the applicant was not diminished by the remarks of the Director-General, the picture with regard to the applicant as compared to the interested party would remain unaffected. The interested party was overwhelmingly better in terms of merit and enjoyed seniority over her in the service as well. A comparison of the assessment of the services of the applicant for the years following her appointment to the position immediately preceding that to which she was seeking promotion with the corresponding reports of the interested party, leaves no doubt that the interested party performed considerably better than her at work. It is clear from the decision of the respondents that they attached, as they were entitled to, particular importance to recent reports on the parties, a fact that made their decision to promote the interested party inevitable.

The decision in *Argyrides (supra)* does not compel the Court to set aside every decision of the Public Service Commission where a confidential report was improperly prepared independently of

the impact of that impropriety on the final decision. So to hold would lead the Court to annulling every decision of the appointing body irrespective of the remoteness in point of time, of an irregularity that occurred in the preparation of a confidential report. That is not the spirit of the effect of the decision in *Argyrides*. The misconception of the facts relevant to the performance of the applicant in the year 1979 was in the event an inconsequential factor for the decision of the respondents and on that account the misconception of the relevant facts on the part of the P.S.C. was immaterial.

The recourse is dismissed. The sub judice decision is confirmed pursuant to the provisions of Art. 146.4(a) of the Constitution.

Recourse dismissed.

No order as to costs.