

1987 March 21

[DEMETRIADES J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

STAVROS OTHONOS AND ANOTHER,

*Applicants,*

v

THE REPUBLIC OF CYPRUS, THROUGH  
THE PUBLIC SERVICE COMMISSION,

*Respondents*

*(Cases Nos 335/82 and 347/82)*

*Public Officers — Promotions — Confidential reports — Instances where the reporting and countersigning officer can be one and the same person — The administrative Circular 491/79*

*Public Officers — Promotions — Bias — Allegation in respect of, on part of superior officer — Must be established with certainty to the satisfaction of the Court and must emanate from facts in official records or inferences drawn from such facts*

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*Public Officers — Promotions — Confidential reports — «Adverse» — Non communication to officer concerned — Effect*

*Public Officers — Promotions — Head of Department — Recommendations of — Head of Department acting both as a reporting and as a countersigning officer — Still entitled to make his recommendation to the respondent Commission*

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*Public Officers — Promotions — Departmental Committee — Recommended in alphabetical order both applicants and the interested parties — Allegation of failure to take into account whole career of candidates — Even, if accepted, the irregularity is in the circumstances of an immaterial nature*

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*Public officers — Promotions — Qualifications — Higher qualifications not required by scheme of service — In the circumstances do not outweigh seniority of interested party*

*Public Officers — Promotions — Seniority — Six months' seniority — Not sufficient by itself to lead to annulment*

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*Public Officers — Promotions — Judicial control — Principles applicable*

The two applicants in this recourse challenge the promotions of the two interested parties to the post of Senior Electrical Engineer in the Electrical and

5 Mechanical Service of the Ministry of Communications and Works on the following grounds, namely (a) Invalidity of the confidential reports in that the reporting and countersigning officer was one and the same person, having no direct or indirect knowledge of their performance and being prejudiced against them and who, also, as Head of the Department recommended to the respondents the promotion of the interested parties, (b) Failure on the part of the same officer to communicate to the applicants an «adverse» view in respect of their performance. (c) Failure on the part of the Departmental Board to take into consideration the whole career of the candidates, and (d) 10 Superonity of the applicants over the interested parties, in particular on account of higher qualifications than interested party Chnstodoulides and six months' seniority to interested party Savvides

15 Held, *dismissing the recourses* (1) It is clear that paragraph 3 of the administrative circular 491/79, governing the preparation of confidential reports, envisages instances where either by reason of the structure of a Ministry, Department or Office or by reason of particular circumstances at a given time, the reporting and countersigning officer may be one and the same person In the circumstances of this case, where there was no immediate superior to the applicants and there could not be such one, the Head of the Department acted properly and in accordance with para 4 of the said circular He had general supervision of the service and sufficient knowledge of applicants' performance Interested party Chnstodoulides, who, at the 20 maternal time, was exercising higher duties assigned to him by the Head of the Department, could not have acted as reporting officer as he was himself a candidate for promotion to the sub judge post

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(2) The Head of the Department was entitled to appear and make his recommendations before the respondents

30 (3) An allegation of lack of impartiality and bias on the part of a superior officer must be established with sufficient certainty to the satisfaction of the Court from facts emanating from official records or by safe inferences drawn from such facts The allegations of the applicants in respect of bias were not thus substantiated

35 (4) Non communication to the officer concerned of an «adverse» report cannot lead to the annulment of promotions As stated in *Christou v The Republic* (1985) 3 C L R 2237 the question in each case is whether such failure deprived the Commission from conducting a due inquiry This is not the case here

(5) The Departmental Committee recommended both the applicants and the interested parties in alphabetical order, and, therefore, any irregularity in

not taking, as alleged, the whole career of the candidates into account is not of a maternal nature

(6) The possession of higher qualifications, which, however, were not required under the scheme of service, could not outweigh the seniority of interested party Chnstodoulides over the applicants

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(7) The seniority of applicants to interested party Savvides was comparatively short and cannot lead to annulment, the more so because of Savvides' seniority in the last two confidential reports and the recommendations of the Head of the Department in his favour

(8) In the light of all circumstances the sub judice decision was reasonably open to the respondents. This Court cannot substitute its discretion to that of the respondents, unless the latter exceeded the outer limits of their discretion or wrongly exercised it

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*Recourse dismissed*  
*No order as to costs*

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*Cases referred to*

*Georghiades v The Republic* (1982) 3 C L R 16,

*Themistocleous v The Republic* (1985) 3 C L R 2652;

*Savva v The Republic* (1985) 3 C L R 694,

*Charalambides v The Republic* (1985) 3 C L R 992,

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*Chnstou v The Republic* (1980) 3 C L R 437,

*Kontemeniots v C B C* (1982) 3 C L R 1027,

*Tantas v The Republic* (1983) 3 C L R 1430,

*Chnstou v The Republic* (1985) 3 C L R 2237

**Recourses.**

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Recourses against the decision of the respondents to promote the interested parties to the post of Senior Electrical and Mechanical Engineer in preference and instead of the applicants.

A. S. Angelides, for the applicants.

G. Erotocritou (Mrs.), Senior Counsel of the Republic, for the respondents.

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*Cur. adv. vult.*

DEMETRIADES J. read the following judgment. By their above intitled recourses the two applicants are challenging the decision of the respondents by which Mr. G. Christodoulou and Mr. L. Savvides (hereinafter referred to as «the interested parties») were  
5 promoted, instead of them, to the post of Senior Electrical Engineer, in the Electrical and Mechanical Service of the Ministry of Communications and Works.

The post with which we are concerned is a promotion post.

As there were two vacant posts, for which the Ministry of  
10 Finance had given its approval for their filling, a Departmental Committee was set up in order to recommend to the Public Service Commission for promotion candidates that possessed the required, under the relevant scheme of service, qualifications. This Committee was set up in view of the provisions of section 36 of the  
15 Public Service Law, 1967 (Law 33/67).

The Committee met on the 10th June, 1982 and, after it examined the qualifications of the seven candidates that had applied for promotion to the post, decided that only the two applicants and the two interested parties possessed the required  
20 by the scheme of service qualifications. The Committee then, after evaluating the qualifications of the four candidates, their confidential reports for the previous two years and their seniority, recommended all four of them, in alphabetical order, for promotion.

25 On the 6th July, 1982, the respondent Commission met and after hearing the views and recommendations of Mr. Phedias Ectorides, the Director of the Electrical and Mechanical Service, proceeded to make, in his absence, their own assessment of the candidates. The Commission then, after they compared the  
30 candidates amongst them and evaluated them and after having considered all relevant material from the personal and confidential report files of the candidates, the report of the Departmental Committee, the views and recommendations of the Director of the Electrical and Mechanical Service, found that,  
35 the basis of the established criteria as a whole, namely merits, qualifications and seniority, the interested parties were superior to the applicants and decided to promote them to the permanent post of Senior Electrical Engineer as from the 15th July, 1982.

Counsel for the applicants contended that the confidential reports of the applicants were invalid as they were irregularly prepared and, therefore, the sub judice promotions which were based, amongst other criteria, on the contents of such confidential reports, should be annulled.

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It is well settled that the confidential reports are intermediate acts and that the ascertainment of their invalidity leads to the annulment of any subsequent administrative action of which they form a legal prerequisite (see, inter alia, *Georghiades v. The Republic*, (1982) 3 C.L.R. 16, 28 and *Themistocleous v. The Republic*, (1985) 3 C.L.R. 2652, 2664).

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The submissions of counsel for the applicants on this issue may be summarized as follows: That the Director of the Electrical and Mechanical Service Mr. Ectorides could not have prepared the confidential reports in that he did not have direct or indirect supervision of their work and, therefore, he could not possess direct knowledge of their performance; that besides being the reporting officer he was, also, the countersigning officer and the person who appeared before the Public Service Commission and made the recommendations about the candidates; and that there was, on his part, lack of impartiality and prejudice against the applicants. Counsel further submitted that Mr. Ectorides was biased against the applicants and that because of his bias the confidential reports prepared by him, as well as his recommendations before the Commission, should be disregarded (because they lead to the invalidity of the whole administrative process and the annulment of the sub judice promotions).

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Regarding the manner and the procedure which has to be followed by various departments, ministries and independent services in the preparation of the confidential reports, reference was made by counsel for the applicants to administrative circular 491/79, under the provisions of paragraph (4) of which the confidential reports must be prepared by a reporting officer who is superior in rank to the person concerned and who, because of his duties, is supervising his work and has, therefore, direct knowledge of the performance and the abilities of his subordinate officer and could express a responsible opinion about him in this

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respect Further that the countersigning officer must be the immediate superior of the reporting officer supervising officer, and that in ministries, independent offices or services in which the Head thereof has direct knowledge of the work of the officer  
5 concerned, the reporting officer may be the Head thereof

In accordance with paragraph (3) of the aforesaid circular, the confidential reports are prepared by reporting officers and are countersigned by countersigning officers except in cases in which the reporting officer and the countersigning officer is one and the  
10 same person

From the contents of paragraph (3) of this circular, it emerges clearly that there may be instances in government departments, ministries or independent offices where either because of their structure or of particular circumstances which may exist in the  
15 service during a given period, the reporting and countersigning officer may be one and the same person

What has, therefore, to be decided in the present case is whether the Head of the Electrical and Mechanical Service had acted properly and in accord with the provisions of paragraph (4)  
20 of the relevant circular

It appears from the evidence adduced, oral and affidavit, and from the addresses of counsel on both sides, that at the material time there was no immediate superior to the applicants in the service and, actually, there could not be such one because the  
25 applicants were holding the post of Electrical Engineer 1st Grade and they were candidates for the post of Senior Electrical Engineer, to which the immediate superior post is that of the Director of the Service

Interested party Chnstodoulides, who had direct knowledge of the work of the applicants, because, at the material time, he was exercising higher duties assigned to him by the Director, in that he was the co-ordinator of the Electrical Department and the liaison  
30 between the other three candidates and the Director, could not have prepared the confidential reports in respect of the other  
35 interested party and the two applicants, because he was holding the same post with them and he was himself too a candidate for promotion to such higher post

From all relevant material which was placed before me, I am of the opinion that the Director of the Service had a general

supervision of the service, that he must have sufficient knowledge about the performance of his immediate subordinate officers, that he was well acquainted, from various sources, about the manner in which the works in his service were executed and that he was in a position to prepare the confidential reports in respect of them. 5  
 Strict compliance with the provisions of paragraph (4) of the circular could not have been observed because of the structure of the Department and the position held, at the material time, by the applicants in the present case.

In this respect useful reference may be made to the cases of 10  
*Savva v. The Republic*, (1985) 3 C.L.R. 694, 707 and *Charalambides v. The Republic*, (1985) 3 C.L.R. 992, 1002-1005.

Mr. Ectorides, as the Director of the Service, was fully entitled to appear before the Public Service Commission, express his views and make his recommendations about the candidates concerned. 15  
 Therefore, I find that the confidential reports were rightly prepared by him, that he could, at the same time, act as a reporting and countersigning officer and that he was the person responsible to appear before the Commission as the Head of his Department.

Regarding now the allegation put forward by counsel for the 20  
 applicants that Mr. Ectorides was prejudiced and biased against them, it has been judicially established that the lack of impartiality and bias on the part of a superior officer against his subordinates must be established with sufficient certainty to the satisfaction of the Court from facts emanating from official records or by safe 25  
 inferences drawn from such facts (see, inter alia, *Christou v. The Republic*, (1980) 3 C.L.R. 437, 449, *Kontemeniotis v. The Cyprus Broadcasting Corporation*, (1982) 3 C.L.R. 1027, 1034 and the *Charalambides* case, supra, 1006).

In the present case the submission of counsel for the applicants 30  
 that Mr. Ectorides was prejudiced or biased against the applicants is not substantiated or established with the certainty required, nor can it be safely inferred from the facts and instances to which counsel has referred. Therefore, the allegation that the contents of the confidential reports, as well as his recommendations before 35  
 the Commission, should have been disregarded, fails. Nor can I accept that the alleged non communication to the applicants, by Mr. Ectorides of an adverse view, in respect of their performance, or his failure to caution them about possible omissions or defaults, 40  
 prejudiced the interests of the applicants to such an extent and

constituted on the part of him a violation of the provisions of the relevant circular with the result that the confidential reports prepared by him should have been ignored because of partiality and prejudice against them.

- 5 In a number of cases of this Court it has been decided that non communication of an «adverse» report cannot lead to the annulment of the sub judice decision (see, inter alia, *Kontemeniotis*, supra, 1033, 1034, *Tantas v. The Republic*, (1983) 3 C.L.R. 1430, 1436, 1437 and *Christou v. The Republic*, (1985) 10 3 C.L.R. 2237, 2242).

- In *Christou* case, supra, it is stated (at p. 2243) that what has to be examined by the Court in respect of the failure of a Head of Department to communicate to a candidate for promotion an adverse comment made about him, is whether or not such failure 15 deprived the Commission from conducting a due inquiry into a material aspect of the case.

This is not so in the present case and I dismiss the grounds for annulment of the sub judice decision based on the aforesaid allegations of counsel for the applicants.

- 20 Another complaint of counsel for the applicants is to the effect that the Departmental Committee, in preparing its report, wrongly took into account only the last two confidential reports and not the whole career of the candidates. Even if I accept that the complaint of counsel for the applicants is well founded, his argument could 25 not be driven any further because the Departmental Committee recommended the applicants as well and their interests, therefore, were not at all prejudiced by any irregularity which, in any event, is not a material one in the circumstances.

- Lastly, it was submitted that the conclusion of the respondent 30 Commission that the interested parties were, on the basis of the established criteria as a whole, superior to the applicants, is not supported by the report of the Departmental Committee and the material in the files and, therefore, the Commission acted under a misconception of fact, it failed to conduct a due inquiry and its sub 35 judice decision is not duly reasoned. In particular, counsel for the applicants pointed out that the applicants possess higher



qualifications than interested party Christodoulides and were, by six months, senior to interested party Savvides.

As regards qualifications, interested party Christodoulides possesses the required, under the relevant scheme of service, qualifications and the possession by the applicants of higher, but not required, under the scheme of service, qualifications, could not outweigh his seniority over them, his better rating in the last two confidential reports and the more favourable recommendations of the Director of the Service. 5

As far as their seniority to interested party Savvides is concerned, it is well settled that comparatively small seniority cannot lead to annulment, more so because this interested party had by far better confidential reports for the last two years than the applicants and was more favourably recommended by the Director of his Service. 10  
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The Public Service Commission, in the exercise of its discretionary power for the purpose of selecting the most suitable candidates for the post concerned, could have attributed more significance to one factor than to another, and this Court cannot substitute its own discretion to that of the Commission unless such discretion was wrongly exercised or the Commission, in reaching its decision, exceeded the outer limits of such discretion. 20

The onus of proof that the Commission acted under a misconception of fact or failed to carry out a due inquiry was on the applicants who have failed to discharge it. 25

On the material before it the sub judge decision was reasonably open to the respondent Commission and such material, together with the sub judge decision itself, constitute the reasoning for the sub judge promotions.

I have considered the basic issues raised by counsel for the applicants as grounds for the annulment of the sub judge decision and any other minor argument not referred to particularly has to be treated as not meriting specific consideration but as covered by what has already been stated above. 30

In view of the aforesaid, the present recourses fail and are accordingly dismissed with no order as to costs.

*Recourses dismissed.  
No order as to costs.*