

1987 April 27

[DEMETRIADES. J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS TAPAKIS AND ANOTHER,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondents

(Cases Nos 442/82 and 468/82).

Public Officers — Promotions — Seniority — Prevails, if the other factors are more or less equal

Public Officers — Promotions — Head of Department — Recommendations of — It is not necessary for the Head of the Department to express his views about each one of the candidates for promotion.

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Public Officers — Promotions — Confidential reports — Applicant rated as «good», «good» and «very good» for the last three years, whereas the interested party was rated as «very good» in all three years — Whether rating of interested party «clearly better» than that of the applicant — In the light of the fact that the reporting officer for the applicant was not the same as that for the interested party, the question was answered in the negative

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The applicants in both cases challenge the promotion of the interested party to the post of Auditor in the Audit Office instead of and in preference to them.

The applicant in Case No. 442/82 was one of the two candidates recommended for promotion by the Head of the Department. However, notwithstanding such recommendations, the fact that the said applicant was senior to the interested party by 7 years and the fact that he possessed better qualifications than those of the interested party, the respondent Commission decided to prefer the interested party on account of the latter's «clearly better confidential reports» As a matter of fact the said applicant was assessed, during the last three years, as «good», «good» and «very good», whilst the interested party was assessed as «very good» in all three years. The reports of the parties were prepared by different reporting officers.

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5 As far as applicant in Case No 486/82 is concerned it must be noted that the interested party was senior to the applicant. Neither the applicant nor the interested party was recommended for promotion by the Head of the Department. Counsel for the applicant contended, inter alia, that the respondents failed to obtain the recommendations of the Head of the Department regarding the applicant and the interested party, which led to a bad exercise of their discretion.

10 Held, *annulling the sub judice decision, but dismissing Recourse 486/82*
(A) Taking into consideration the fact that the reports of the parties were prepared by different reporting officers, it cannot be said that those of the interested party were «clearly better» than those of the applicant in Case No 442/82. Having in mind the said applicant's qualifications as well as the recommendations of the Head of the Department, this Court is of the opinion that his substantial seniority (7 years) should not have been disregarded. This is a case where the other factors are more or less equal and, therefore seniority, especially since it is substantial, ought to have prevailed.

15 (B)(1) The contention of counsel for applicant in Case No 486/82 that the respondents did not obtain the recommendations of the Head of the Department with regard to this particular applicant and the interested party is untenable as the Head of the Department did in fact express his recommendation for the promotions in question and there was no need to express his views about each one of the candidates.

20 (2) The applicant in Case No 486/82 and the interested party are more or less equal in merit and qualifications, but the interested party is slightly senior to the applicant. It follows that the selection of the interested party in preference to the applicant was reasonably open to the respondents.

Recourse 442/82 succeeds
Recourse 486/82 dismissed. No order as to costs.

30 **Recourses.**

Recourses against the decision of the respondents to promote the interested party to the post of Auditor in the Audit Office in preference and instead of the applicants

35 L. Papaphilippou, for applicant in Case No. 442/82.

E. Lemonaris, for applicant in Case No. 486/82.

N. Charalambous, Senior Counsel of the Republic, for the respondents.

A. Panayiotou, for the interested party.

Cur. adv. vult.

DEMETRIADES J. read the following judgment. These two
recourses, which are directed against the same administrative act,
have been heard together as presenting common questions of law 5
and fact.

The applicants in both cases challenge the decision of the
respondents to promote Michael Polycarpou, the interested party,
to the post of Auditor in the Audit Office instead of and in
preference to them. 10

The facts of the cases are, in brief, the following: The applicants
and the interested party were, at the material time, holding the
post of Examiner of Accounts 1st Grade, the immediately lower
post to the post of Auditor, which is a promotion post.

After a request for the filling of certain posts was made to the 15
respondents by the Auditor-General, the respondents decided to
fill, amongst others, two vacancies in the post of Auditor and the
matter was referred to the Departmental Committee which was set
up for the purpose. The Departmental Committee, by their report
which was submitted to the respondents by letter dated the 31st 20
May, 1982, recommended seven candidates, amongst whom the
applicants and the interested party.

At their meeting of the 4th June, 1982 the respondents
considered the report of the Departmental Committee and
postponed further consideration of the matter to a future meeting 25
when the Head of the Department would, also, be invited to
attend.

The final meeting took place on the 14th June, 1984, when the
Head of the Department made his recommendations. His views
and recommendations are recorded in the minutes of that meeting 30
and they are (see Appendix 3 to the Opposition):-

«Κατόπιν πολύ προσεκτικής μελέτης των
Εμπιστευτικών Εκθέσεων και της εν γένει αποδόσεως
των υποψηφίων έχει καταλήξει εις το συμπέρασμα να
συστήση διά προαγωγήν τούς κ.κ. Ανδρέα Λ. Ταπάκη 35
και Χριστάκη Χατζηράφτην. Ούτοι προηγούνται των
λοιπών υποψηφίων εις αρχαιότητα, έχουν πολύ καλές

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Εμπιστευτικές Εκθέσεις και δεν υστερούν των άλλων υποψηφίων ώστε να μη δικαιολογήται η προαγωγή των.

5 Από πλευράς προσόντων υπερέχει ο κ. Ταπάκης, ο οποίος είναι ο μόνος υποψήφιος με πανεπιστημιακό δίπλωμα, ενώ οι άλλοι έχουν το Accounting Higher.»

10 («After a very careful study of the Confidential Reports and the general performance of the candidates he has come to the conclusion to recommend Messrs. Andreas L. Tapakis and Christakis Hadjiraftis for promotion. These candidates lead in seniority to the rest, they have very good Confidential Reports and are not inferior to the other candidates so that their promotion would not be justified.

15 As regards qualifications Mr. Tapakis, who is the only candidate possessing a university diploma, is superior to the other candidates who possess the Accounting Higher»).

The respondents then considered the matter and found that Hadjiraftis, the other candidate recommended by the Head of the Department, was on the whole the best candidate for promotion to one of the vacant posts. The Commission then proceeded to select the other candidate for the second vacancy. In doing so, they decided to compare the applicant, who was recommended by the Head of the Department, with Messrs. Kaoulides and Polycarpou (the interested party) who were the next two candidates in the line of seniority. The Commission took into consideration the fact that the applicant possessed a university diploma, but found, nevertheless, that the interested party had «clearly better confidential reports». The respondents, after making extensive analytical reference to the ratings of the parties in their last three confidential reports and noting that the reports of the interested party were superior in respect of the previous years also, especially in 1977, found that Hadjiraftis and Polycarpou were «superior to the remaining candidates on the basis of the established criteria (merit, qualifications, seniority), as a whole» and decided to promote them to the post of Auditor as from the 1st July, 1982.

The promotions were published in the Official Gazette of the Republic, dated the 24th September, 1982, as a result of which the

present recourses were filed.

The main ground which is common to both recourses is that the respondents failed in their paramount duty to select the best candidate. I will consider each case separately.

Counsel for the applicant in Case No. 442/82, submitted that the respondents ought to have followed the recommendations of the Head of the Department which were in favour of the applicant and that their finding that the reports of the interested party are «clearly superior» to those of the applicant, is not correct, the correct position being that they are only slightly better. He, also, argued that the Commission ought not to have placed much weight on the reports in view of the fact that they were prepared by different reporting officers. The applicant's superiority, with regard to qualifications and seniority, counsel contended, should have prevailed, as well as the recommendations of the Head of the Department which were disregarded without proper reasons.

The paramount duty of the respondents is to select the best candidate for promotion. In doing so, however, due regard must be given to the recommendations of the Head of the Department concerned, the confidential reports of the candidates, as well as their merits, qualifications and seniority. The merits of the candidates are usually reflected through their confidential reports and the recommendations of the Head of the Department. It has been established by our case-law that seniority prevails if all other factors are more or less equal and the recommendations of the Head of the Department should not be disregarded without special reasons.

The applicant in the present case was recommended by the Head of the Department, who stated that he is superior to the other candidates in respect of seniority and is not inferior to them in other respects. The recommendations of the Head of the Department, who is in a position to know his subordinate staff, represent the picture of the candidates as a whole and not with regard to any single particular aspect on its own. To my mind, the meaning of the words of the Head of the Department is that he considered all the candidates as more or less equal in other aspects and, as a result, he recommended the most senior.

The respondents decided to compare the applicant with two other candidates and found that the reports of the interested party

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were «clearly better» than those of the applicant and decided, for this reason, to disregard the recommendation of the Head of the Department and promote the interested party. The applicant was assessed, during the last three years as «good», «good» and «very good», whilst the interested party was assessed as «very good» in all three years. The applicant, also, possessed a university diploma.

Taking into consideration the fact that the reports of the parties were prepared by different reporting officers, I would not say that those of interested party were «clearly better» than those of the applicant. Having, also, in mind the recommendations of the Head of the Department, who did not find him inferior to the rest, and the qualifications of the applicant, I am of the view that his substantial seniority (seven years) over the interested party, should not have been disregarded. It is a case where the other factors are more or less equal and seniority, especially since it is substantial, ought to have prevailed.

In the result, I find that the recourse of this applicant succeeds and the promotion of the interested party should, therefore, be annulled.

I now propose to deal with the merits of the applicant in Recourse No. 486/82. Counsel for this applicant argued that once the respondents decided to depart from the recommendations of the Head of the Department, they should not have restricted their selection to the three most senior candidates, but they ought to have compared the merits of all candidates and include the applicant in their comparison. It is counsel's submission that the applicant is equal in seniority with the interested party, more experienced in auditing work and better in merit and qualifications, which rendered him strikingly superior to the interested party. Counsel lastly contended that the respondents failed to obtain the recommendations of the Head of the Department regarding the applicant and the interested party which led to a bad exercise of their discretion.

I wish to point out here that the interested party is in fact slightly senior to the applicant and the respondents were not, therefore, labouring under a misconception of fact, as maintained by counsel for the applicant. By looking at the comparative table appended to the Opposition, one may see that both parties were promoted to the post of Examiner of Accounts 1st Grade on the 1st August 1977, and to the post of Examiner of Accounts 2nd Grade on the

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1st July, 1968. So far their seniority is equal. The applicant was, however, promoted to the post of Examiner of Accounts 3rd Grade on the 1st January, 1967, whilst the interested party held the same post as from the 1st January, 1965.

I must, also, say that I find the contention of counsel that the respondents did not obtain the recommendations of the Head of the Department with regard to this particular applicant and the interested party, as untenable, as the Head of the Department did in fact express his recommendations for the promotions in question and there was no need to express his views about each one of the candidates. 5 10

As to the selection of the interested party in preference to the applicant, from the material before me I find that both candidates were more or less equal in merit and qualifications and the interested party was slightly senior to the applicant. 15

In the light of the above, I find that it was reasonably open to the respondents to select the interested party and there is no reason for interfering with the sub judice decision. The decision of the respondents to promote the most senior candidate is perfectly legitimate once such candidate is not inferior to the others regarding merits and qualifications. The applicant in this recourse has failed to establish striking superiority over the interested party and his recourse must, therefore, fail. 20

In the result, Recourse No. 442/82 succeeds and the promotion of the interested party is set aside vis a vis applicant Tapakis. Recourse No. 486/82 fails and is hereby dismissed. 25

In the circumstances, I find that there should be no order as to costs.

*Recourse No. 442/82
succeeds. Recourse No. 486/82
dismissed. No order as to costs.* 30