

1987 April 27

[KOURRIS J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LEONTIOS HJIPARASKEVAS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent

(Case No 682/85)

5 *Public Officers — Promotions — Reconsideration of matter following annulment of original promotions — Head of Department, recommendations of, found by this Court when annulling the original promotions to be conflicting with views expressed by the same Head of Department before the Departmental Committee — In the circumstances respondent Commission in reconsidering the matter rightly ignored such recommendations*

Public Officers — Promotions — Reconsideration of matter following annulment of original promotions — Duties of respondent Commission

Public Officers — Promotions — «Striking supenonty» — Meaning of

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

15 As a result of the annulment of the promotion of the applicant and of interested party Andreas Mavrogenis to the post of Senior Commercial Officer (see *Sosilos v The Republic* (1984) 3 C L R 1133 the respondent Commission reconsidered the matter and promoted to the said post Andreas Mavrogenis and Cosmas Sosilos

Hence the present recourse challenging the validity of the decision to promote the two interested parties Mavrogenis and Sosilos

20 In reconsidering the matter the respondent Commission ignored completely the views of the Director-General of the Ministry of Commerce and Industry, which the latter had expressed on the occasion, which led to the aforesaid promotion of the applicant and Mavrogenis, on the ground that such views were in conflict with the views expressed by the same person before the Departmental Board

Held, *dismissing the recourse*: (1) The respondent Commission was duty-bound to comply with the judgment of this Court in *Sosilos v The Republic*, supra and had to decide the matter on the facts and the law as they existed on 14 2.83, that is on the date when the annulled decision was taken. In the light of the above and of the contents of the judgment in *Sosilos'* case, the respondent Commission rightly ignored the views of the Head of the Department 5

(2) It appears that all the material as to the qualifications and experience of the applicant were before the respondent Commission and, therefore, applicant's complaint that the Commission did not have before it a complete picture of his qualifications and experience cannot be accepted 10

(3) As regards applicant's contention that the applicant is strikingly superior to *Sosilos*, the answer is to be found in *Sosilos case' supra*, at page. 1135

(4) Applicant's submission that the respondent Commission might have been influenced by the fact that in its minutes of 11.7.85 *Sosilos* was described as «excellent» in respect of 1982, whilst he should have been classified as «very good» cannot be accepted, because in view of the material before the Court it is obvious that the letter «E» (which means Excellent) in the said minutes is a clerical mistake. 15

(5) In the light of the judgment in *Sosilos'* case, supra, and the material before the Commission this Court is of the opinion that the applicant failed to establish a striking superiority over interested party Mavrogenis. 20

(6) When an administrative organ, such as the Public Service Commission, selects a candidate on the basis of comparison with other candidates, it is not necessary to show, in order to justify the selection, that the appointee was strikingly superior to the others. On the other hand, an administrative Court does not intervene with a promotion, unless satisfied by an applicant in a recourse before it, that such applicant was an eligible candidate strikingly superior to the others. The expression «striking superiority» was expounded in *HadjiSavva v. The Republic* (1982) 3 C.L.R. 76. The applicant in this case failed to prove such superiority 25 30

Recourse dismissed.
No order as to costs

Cases referred to:

Sosilos v. The Republic (1984) 3 C.L.R. 1133;

Georghiou v. The Republic (1976) 3 C.L.R. 74; 35

HadjiSavva v. The Republic (1982) 3 C.L.R. 76,

HadjiIoannou v. The Republic (1983) 3 C.L.R. 1041.

Recourse.

Recourse against the decision of the respondent to promote the interested parties to the post of Senior Commercial Officer in the Ministry of Commerce and Industry in preference and instead of
5 the applicant.

E. Lemonaris, for the applicant.

A. Vladimirov, for the respondent.

Cur. adv. vult.

KOURRIS J. read the following judgment. The applicant, by this
10 recourse, challenges the validity of the decision of the Public Service Commission to promote the interested parties, Andreas Mavrogenis and Cosmas Sosilos to the post of Senior Commercial Officer, Ministry of Commerce and Industry, as from 1st March, 1983, in preference to and instead of the applicant.

15 *History of the proceedings*

The respondent Public Service Commission decided on 14/2/1983 to promote the applicant and Andreas Mavrogenis to the post of Senior Commercial Officer in the Ministry of Commerce and Industry. This decision was challenged before the Supreme
20 Court by Cosmas Sosilos. By the judgment of the Supreme Court, delivered on 31st October, 1984, the promotion of the applicant and of Andreas Mavrogenis to the post of Senior Commercial Officer, was annulled (*Vide Cosmas Sosilos v. The Republic* (1984) 3 C.L.R. 1133). As a result of the judgment of the Supreme
25 Court, the Public Service Commission by letter dated 6th November, 1984, emplaced the applicant and his colleague Andreas Mavrogenis to the post of Commercial Officer, Grade «A», the post which they held before their promotion.

The Public Service Commission considered the matter at its
30 meeting of 11/7/1985 in the light of the judgment of the Supreme Court in the aforesaid recourse and took also into account a letter dated 29/3/85 written by a counsel for the Republic advising the Public Service Commission on the course to be followed in reconsidering the matter of the promotions to the post of Senior
35 Commercial Officer. Counsel for the Republic advised the respondent Authority to disregard the recommendations of the Director-General of the Ministry of Commerce and Industry while reconsidering the matter because of conflicting views expressed

before the Departmental Board and the Public Service Commission.

It appears that the respondent Commission complied with the advice of counsel for the Republic and while reconsidering the matter at its meeting of 11/7/1985, ignored completely the views and recommendations of the Director-General which he expressed when the applicant and Andreas Mavrogenis were promoted to the post of Senior Commercial Officer and their appointment was the subject of the recourse No. 118/83. The Public Service Commission promoted to the post of Senior Commercial Officer the Interested Parties in this recourse, namely, Andreas Mavrogenis and Cosmas Sosilos.

Legal Grounds

The recourse is based on the following grounds of law:-

1) Respondents failed in their paramount duty to select the best candidate and thus, have acted contrary to s. 44(2) of the Public Service Law No. 33/67.

2) Respondents failed to carry out due inquiry for ascertaining material facts.

3) Respondents acted under a material misconception of the relevant facts, i.e. the interpretation of the relevant scheme of service and the materiality of applicant's post-graduate qualifications in regard to the proper construction of the scheme of service and

4) Respondents' decision is not duly reasoned and/or the reasoning behind same is wrong in law and/or defective.

Failure to hear the views of the Head of Department

Counsel for the applicant in his meticulous written address attacked the respondent Authority for its failure to hear the Director-General of the Ministry of Commerce and Industry before effecting the promotions in question. He said that by s.44(3) of the Public Service Law No. 33/67, it is mandatory to hear the recommendations and views of the Head of Department and failure to do so was not permissible and was a flagrant violation of the express provisions of s.44(3) of the Law; such course was not permissible and the course adopted and followed by the respondent

Authority is contrary to Law and in abuse of powers. He submitted that the respondent Authority ought to hear the recommendations and views of the Head of Department concerned and if there were any contradictions in the statements of the Director-General before
5 the Departmental Board and the respondent Authority, they should have been cleared by inquiry. He contended that the respondent Authority could depart from the recommendations of the Head of Department after giving strong reasons but they could not ignore him altogether by not hearing his views at all.

10 There is no dispute as to the provisions of the Law relied on by learned counsel for the applicant, but, I think, in the circumstances of this particular case, rightly the respondent Authority did not hear the views of the Head of Department in view of the contents of the judgment in the Sosilos case (supra). The learned trial Judge
15 in the Sosilos case said that the Head of Department gave conflicting views before the Departmental Committee which he chaired and before the Public Service Commission and he also has been misleading as to the performance of Sosilos during the year of 1982 and considered him to be unreliable.

20 As the respondent Authority was duty-bound to comply with the judgment of the Court and as they had to decide about the promotions on the facts and on the Law, as it existed on 14/2/1983, rightly they did not hear the views of the Head of Department and disregarded his views he expressed before the
25 respondent Authority when they decided to promote the applicant on 14/2/1983 because the trial Court in the case of Sosilos (supra) said that his recommendations were contradicting, illfounded and were apt to mislead the respondent Authority in material respects.

30 I now propose to deal with the complaint of the applicant that the respondent Authority failed to hold a proper inquiry and that they acted under a misconception of material facts.

Counsel for the applicant contended that it was clear from the material on record that the respondent Authority failed to embark on the necessary inquiry for clearing ambiguities and ascertaining
35 the merits of each one of the candidates. He submitted that the respondent Authority failed to hold the necessary inquiry to determine the experience and relevancy of the candidates' qualifications in relation to the duties of the post to be filled and that their failure to recall the Head of Department and hear his

views on the experience of the candidates and the relevancy of their academic qualifications renders their decision void and contrary to law for lack of the necessary inquiry inasmuch as they acted on a misconception of material facts. He went on to say that had these facts been properly ascertained, the scales would turn in favour of the applicant on the totality of the relevant criteria. 5

Further, the applicant sworn an affidavit on 4/4/1987 and in paragraph 8 he states his qualifications and experience.

During the hearing of this case the applicant adopted the contents of his affidavit and was cross-examined by counsel for the respondent. 10

The complaint of the applicant is that the Public Service Commission in reaching their decision did not have before them the complete picture of his qualifications and experience relevant to the post in question. 15

I do not agree with this suggestion because all that the applicant stated in his affidavit and oral evidence are contained in his personal file, Exh. 2, and in the file of the confidential reports, exh. 1, and particularly in red 53 and red 53F of Exh. 2 which is an application by the applicant for the appointment as a Director of Industry in the Ministry of Commerce and Industry dated 12/11/1982 and in the accompanying letter of the Director-General of the Ministry dated 19/11/1982. Also, the qualifications and experience appear in reds 64 and 66 of Exhibit 2 which is an application by the applicant for the appointment as Director of Trade dated 8/10/1983 and the accompanying letter by the Director-General dated 14/10/1983 respectively. Also, his experience and qualifications appear in the Confidential Report of 1982 (See exh. 1). 20 25

Thus, it appears that all the material as to the qualifications and experience of the applicant were before the respondent Authority when they took the sub justice decision. 30

I am of the opinion that the submissions of learned counsel for the applicant are untenable. It appears from the minutes of the meeting of the respondent Commission, Appendix 5, that the Commission made a due inquiry and it examined not only the confidential reports for 1982 but also the confidential reports of the five years prior to 1983. They also made inquiry as to the additional qualifications of the candidates under the relevant scheme of service. 35

Lastly, counsel for the applicant attacked the decision of the respondent Authority that they failed to select the best candidate. He contended that the applicant was strikingly superior to the Interested Parties having regard to merit seniority qualifications and experience.

He contended that the applicant as compared with Interested Party Cosmas Sosilos is that the applicant is better than the said appointee. He said from 1974 till 1982 applicant's confidential reports are better than those of Mr Sosilos, particularly for the year 1982 applicant's confidential report is strikingly better than that of Mr Sosilos. Both candidates he went on to say have post graduate qualifications but the applicant's qualifications are more pertinent to the needs of the post having regard to the fact that the applicant did his thesis on the marketing of agricultural produce and his experience in the Ministry of Commerce and his specialisation on the marketing of agricultural produce makes him a more suitable candidate as compared with Sosilos. He submitted that on the totality of the relevant criteria, the applicant was strikingly superior to Sosilos.

With regard to hereinabove argument the answer is to be found in the judgment of the *Sosilos (supra)* where the learned trial Judge at p 1135 had this to say -

«Considering the report of the Departmental Committee and comments made therein in relation to the candidates, together with their service record that was made available to the Committee the applicant emerged objectively as the candidate with the highest claims to promotion. The assessment made of his services in the confidential reports for the two preceding years, cited by the Departmental Committee is indicative of his abilities and value of his services over the two years, was better than that of Mr HadjiParaskevas and equal, if not marginally better, to that of Mr Mavrogenis. Moreover the applicant had superior qualifications to, at least, one of the interested parties, Mr Mavrogenis, being the holder of a post-graduate degree, an advantage in accordance with the relevant scheme of service. The fact that he was senior to both Interested Parties sealed his claim to seniority over the two Interested Parties on each one of the three scores specified by the Law as material for the determination of the suitability of a candidate for promotion - s 44(2) - 33/67 »

With regard to the confidential report for the applicant for the year 1982 the learned trial Judge had this to say at p. 1136:-

«It must be noted that the confidential reports on the value of the services for the parties for the year 1982 were not before the Commission. Now, the confidential report for the applicant for the year 1982 is available as well as those of the Interested Parties and far from supporting the assessment made by Mr. Erotokritos of the value of his services for the year 1982, the report tends to contradict his views. It is worthy of mention that the Reporting Officer certified that the overall performance of the applicant was excellent. Certainly, the confidential report of the applicant for the year 1982 is at least as good as that of Mr. HadjiParaskevas.»

Further, it appears that the respondent Authority took into consideration the confidential reports for the five years prior to 1982 and considered them for comparison purposes before they reached the sub justice decision.

Counsel for the applicant took up the point that in page 9 of Appendix 5 which are the minutes of the respondent Authority of 11/7/85, that the Interested Party Sosilos in 1982 is classified as «excellent» whilst he should be classified as «very good» having regard to his rating. He said this might have influenced the respondent Authority in reaching their decision.

I do not think that the respondent Authority overrated the interested party Sosilos because it is obvious that the letter «E» which means «excellent» is a clerical mistake because at page 10 of the same Appendix, Sosilos is rated as «very good» for the year 1982. That this is a clerical mistake it is obvious from the fact that Sosilos is rated with ten «very good» and two «excellent» which his rating should be «very good». Furthermore, the confidential reports were before the respondent Authority and in the year 1982 is rated «very good» with ten «very good» and two «excellent». In these circumstances I do not think that the respondent Authority acted under a misconception of fact.

Consequently, it appears that in view of the judgment in the Sosilos case and the material the respondent Commission had before them, they could not, but decide that Sosilos was better than the applicant and, in the circumstances, it was reasonably open to the respondent Commission to reach the decision which they did.

Now, with regard to the Interested Party Andreas Mavrogenis, counsel for the applicant contended that the applicant had seniority over the said appointee, better experience and post-graduate qualifications which according to the relevant schemes
5 of service, should be considered as advantageous. He conceded, however, that the confidential reports of Mavrogenis are better than those of the applicant but he submitted that on the totality of the relevant criteria the applicant was strikingly superior to the Interested Party Mavrogenis.

10 In the hereinabove passage from the judgment of the Sosilos case, the trial Judge made a finding as to the assessment of the services of the candidates. At page 1136 he said, referring to Sosilos, as follows:-

15 «The assessment made of his service in the confidential reports for the two preceding years, cited by the Departmental Committee is indicative of his abilities and value of his services over the two years, was better than that of Mr. HadjiParaskevas and equal, if not marginally better to that of Mr. Mavrogenis.»

20 Thus, his finding was, that, having regard to the confidential reports of the two years that Sosilos was better than HadjiParaskevas, the applicant in the present case, and equal, if not marginally better to Mr. Mavrogenis, the other Interested Party in the present recourse, the inference being that Mavrogenis was
25 also better than HadjiParaskevas.

It is well settled that when an organ, such as the Public Service Commission, selects a candidate on the basis of comparison with others, it is not necessary to show, in order to justify his selection, that he was strikingly superior to the others. On the other hand an
30 Administrative Court cannot intervene in order to set aside the decision regarding such selection unless it is satisfied by an applicant in a recourse before it, that he was an eligible candidate who was strikingly superior to the one who was selected, because only in such a case the organ which has made the selection for the
35 purpose of an appointment or promotion, is deemed to have exceeded the outer limits of its discretion and, therefore, to have acted in excess or abuse of its powers (*Vide Odysseas Georghiou v. The Republic* (1976) 3 C.L.R. 74, at p. 83).

40 The expression of «striking superiority» was expounded in the case of *HadjiSavva v. The Republic* (1982) 3 C.L.R. 76 where the

Court at p 78 stated as follows -

«As the expression 'striking superiority' suggests a party's superiority to validate an allegation of this kind. must be self-evident and apparent from a perusal of the files of the candidates Superiority must be of such a nature as to emerge on any fact of the combined effect of the merits, qualifications and seniority of the parties competing for promotion in other words it must emerge as an unquestionable fact. so telling as to strike one at first sight » 5

(See also *Hajiloannou v The Republic* (1983) 3 C L R 1041) 10

In view of the judgment of the Court in the Sosilos case (supra) and in view of the totality of the material the respondent Commission had before them. I am of the opinion that the applicant failed to establish that there existed striking superiority over the Interested Party Mavrogenis, or indeed any of the Interested Parties, as to lead to the conclusion that the sub judice decision was taken in excess or abuse of power 15

To sum up, having taken in the present case. into consideration every relevant factor and having duly weighed all that has been put forward by counsel on both sides, I am of the opinion that the respondent Commission in promoting the Interested Parties has exercised its relevant discretionary powers in a proper manner which was reasonably open to it on the basis of all relevant material before it, and therefore, the recourse has to be dismissed 20 25

For these reasons the recourse is dismissed but with no order for costs

Recourse dismissed
No order as to costs