

1987 May 11
[KOURRIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS LARDOS AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE PUBLIC SERVICE COMMISSION,
2. THE DIRECTOR OF PRISONS,

Respondents.

(Case No. 262/86).

Words and Phrases: «Organic post» in a scheme of service relating to a promotion post in a combined establishment — It is a post created by Law — The Law pertaining to the creation of such post is the Budget Law.

Executory act — Informatory act — Preparatory act.

Omission — Meaning of — In the absence of a recommendation for the promotion of applicants to the higher post in a combined establishment, the Commission was not guilty of an omission to promote them, because it was not seized of the opportunity to do so.

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Public Officers — Promotions — Combined establishments — Circular 608 dated 27.1.82 — Paragraph 4 — Interpretation of.

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Time within which to file a recourse — Doubt as to the date when the sub judice decision was taken — Benefit of doubt given to applicant.

All applicants, except applicants 5 and 10, were appointed to the organic post of Prison Warder under salary scale A3 and A5 as from 1.6.74. Applicants 5 and 10 were appointed to the same post as from 1.5.74. All such appointments were made by the Public Service Commission. Prior to their said appointment the applicants were engaged on various dates between 1964 and 1972 by the Director of Prisons on a month to month basis as Temporary Warders.

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In virtue of Law 48/83 there was created the post of Prison Warder on scale A7, which is a combined establishment office with the post of Prison Warder scales A3 and A5.

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In accordance with the relevant scheme of service, which was approved by the Council of Ministers on 12.7.84, Prison Warders serving on scales A3 and A5 shall be promoted to the post of Prison Warder A7, if, among other prerequisites, they have completed 13 years of service from the date of their appointment to the post of Prison Warder (Scales A3 and A5).

Respondent 2 refused a request by the Trade Union of the Prison Warders to recommend the applicants for promotion to the new post, because, in his view, they did not complete 13 years of service in the organic post of Prison Warders as provided by the scheme of service. Hence the present recourse.

It must be noted that the aforesaid Trade Union addressed a letter to the Public Service Commission inquiring whether the years of service as a temporary Warder should be taken into account in calculating the period of 13 years. The Public Service Commission replied in the negative.

Held, dismissing the recourse: An organic post is a post, which is created by law and the law pertaining to the creation of organic posts in the Government is the Budget Law. The posts held by the applicants before their appointment by the Public Service Commission were not included in the permanent posts in the Budget laws of the relevant years, but there was a separate provision in respect of them, classifying them as Temporary Warders on a monthly basis. It follows that the way, in which the Director of Prisons interpreted the scheme of service, was reasonably open to him.

Held further, on the assumption that such a construction of the scheme of service was not reasonably open to the second respondent: (1) The reply of the Public Service Commission to the inquiry of the Trade Union is not an executory, but an informatory act, and, consequently, cannot be impugned by a recourse.

(2) The respondent Commission was not guilty of a continuing omission to promote the applicants, because, in the absence of a recommendation by respondent 2, the Commission was not seized of the applicants' case.

(3) It follows that the recourse as against the Commission has to be dismissed.

(4) The question, now, is whether under para. 4 of Circular 608 dated 27.1.82, as regards the procedure of promotion of officers serving in combined establishments, the Director of Prisons was obliged to make recommendations irrespective of whether the applicants have in fact completed the required period of service or whether he was obliged to make such recommendations in cases only of completion of such service.

(5) If the former solution is preferred, the act of the Director is a preparatory act and, as such, cannot be impugned by a recourse. If the latter solution is accepted, the act is an executory one, because it produces direct legal results.

(6) This Court is of the opinion that the second construction is the correct one. It follows that the decision of the Director affected directly and adversely applicants' legitimate interest.

(7) As there is a doubt as to the date when the Director took the sub judice act, this Court will give to the applicant the benefit of doubt by holding that the recourse is not out of time.

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Recourse dismissed
No order as to costs

Cases referred to

Der Parthogh v C B C. (1984) 3 C L R 635,

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Costea v. The Republic (1983) 3 C L R 115,

Cyprus Tannery v. The Republic (1980) 3 C L R. 405.

Recourse.

Recourse against the refusal of the respondents to recommend applicants for promotion to the combined establishment on salary scale A.7.

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A. Eftychiou, for the applicants.

P. HadjiDemetriou, for the respondents.

Cur. adv. vult.

KOURRIS J. read the following judgment. The ten applicants are Prison Warders in the Central Prisons, Nicosia, in the salary scale A3 and A5 and they allege that they ought to be employed in the scale A7.

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The ten applicants were engaged on various dates between the years 1964 and 1972 by the Director of Prisons as Temporary Warders from month to month on a salary at an annual rate payable in arrear in the end of each month of service under Regulation 3 of the Prisons (Prison Service) Regulations 1948-1982 made under s. 6 of the Prison Discipline Law Cap. 206.

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Applicants 1, 2, 3, 4, 6, 7 and 8 were appointed by the Public Service Commission to the organic post of Prison Warders as from 1/6/74 and applicants 5 and 10 were appointed to the organic post of Prison Warders as from 1/5/74 under salary scale A3 and A5. Their appointments were effected by the Public Service Commission in the usual way that vacant posts are filled.

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By virtue of the Prison Service (Restructuring of Offices of Members) Law which was enacted in 1983 (Law No. 48/83) it was created the post of Prison Warders under scale A7 which is a combined establishment office with the post of Prison Warders serving under scale A3 and A5.

The Council of Ministers acting under s. 44(1)(a) of the Public Service Law, 1967 (Law 33/67) by its decision No. 24765 dated 12/7/1984 approved the Scheme of Service for the promotion post under scale A7. The relevant part for the purposes of the present case reads as follows:-

«Σημείωση:- Δεσμοφύλακες στις Κλίμακες Α3 και Α5 που βρίσκονται στην Υπηρεσία κατά την 1/10/1981 προάγονται στη θέση Δεσμοφύλακα (Κλίμακα Α7) αφού συμπληρώσουν 13 χρόνια υπηρεσίας από την ημερομηνία διορισμού τους στην οργανική θέση Δεσμοφύλακα (Κλίμακες Α3 και Α5) από την οποία 4 τουλάχιστον χρόνια στην Κλίμακα Α5 ή/και στην πρώην Κλ. Α4, νοουμένου ότι είναι κάτοχοι των τεσσάρων σημάτων καλής διαγωγής που προβλέπονται δυνάμει του Κανονισμού 23 (1) των Περί Φυλακών (Υπηρεσία Φυλακών) Κανονισμών του 1948-1981 (Vide Appendix «Α»).»

(«Note: Prison Warders on scales A3 and A5, who were in the service as on 1.10.81, shall be promoted to the post of Prison Warder (Scale A7) after completing 13 years of service from the date of their appointment to the organic post of Prison Warder (Scales A3 and A5) of which at least 4 years on scale A5 and/or on former scale A4, provided that they possess the four marks of good behaviour, which are provided for by Reg. 23(1) of The Prisons (Prison Service) Regulations 1948-1981»).

The central issue in this case concerns the interpretation of the scheme of service and particularly the phrase «in the organic post of Prison Warder».

Counsel for the applicant submitted that the applicants hold an organic post within the meaning of the organic post in the said scheme of service as from their engagement by the Director of Prisons whereas counsel for the respondent submitted that the applicants held an organic post as from their appointment by the Public Service Commission.

Counsel for the applicants argued that since the applicants' posts were organic as from their engagement by the Director of Prisons as Temporary Warders and as they were in the Service on 1/10/1981 they were eligible for promotion because they satisfy the requirements of the scheme of service.

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I have considered this matter and I have reached the conclusion that an organic post, for which there is no definition in the Public Service Law No. 33/67 is a post for which there is provision in the Budget Law and it may be permanent or temporary. An organic post is a post which is created by the law and the law pertaining to the creation of organic posts in the Government Service is the Budget Law; and the question arises whether there was provision in the Budget Law for organic posts at the time of the engagement of the applicants by the Director of Prisons.

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I have examined the Budget Laws for the years 1964 till 1983 marked Exh. 21, and I am satisfied that there was no provision for such posts. In the structure of the office of the Prisons there is provision for permanent posts and the applicants are not included in these permanent posts. There is a separate provision for them under paragraph 1A, in the next page, under the heading «Prisons» which classifies them as Temporary Warders on a monthly basis. Further, the termination of their engagement as Temporary Warders may be effected by the Director of Prisons under Regulation 7 of the Prisons (Prisons Services) Regulations without assigning any reason upon his giving one month's notice in writing or on paying one month's salary in lieu of notice. For these reasons I am satisfied that the applicants did not hold organic posts from the time of their engagement by the Director of Prisons as Temporary Warders. As the applicants did not hold organic posts from the time of their engagement by the Director of Prisons as Temporary Warders, it follows that they did not complete 13 years in the organic post of Prison Warders and consequently, did not satisfy the requirements of the scheme of service in order to be eligible to be emplaced in the promotion post under salary scale A7.

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In view of the above it was reasonably open to the Director of Prisons to construe the scheme of service and particularly the phrase «in the organic post of the Prison Warder» in the way he did it and the Court cannot interfere with the said interpretation (*Vide Lana der Parthogh v. Cyprus Broadcasting Corporation* (1984) 3 C.L.R. 635).

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5 The Director of Prisons when requested by the Trade Union of the Prison Warders to recommend the applicants for promotion to the combined establishment under salary scale A7, he refused to do so on the ground that they did not complete thirteen years in the organic post of Prison Warders as provided for by the scheme of service.

10 In the circumstances the recourse is dismissed but I shall proceed and examine the other issues raised in this recourse if it were held that it was not reasonably open to the Director of Prisons to put the aforesaid construction to the scheme of service.

Counsel for the respondents raised the issue that the applicants lacked legitimate interest in the sense of Article 146.2 of the Constitution.

15 It is a well established principle of administrative law that legitimate interest exists where a person is directly and adversely affected by the decision complained of.

I propose to examine first whether the applicants have a legitimate interest with regard to respondents (1) viz. The Public Service Commission.

20 The facts giving rise to the recourse against the respondent Commission are these:- The Trade Union of Prison Warders addressed a letter dated 26/11/1985, which is Appendix «B», to the respondent Commission inquiring whether the years which a Prison Warder served from his appointment by the Director of Prisons as a Temporary Warder can be taken into consideration in calculating the years for service in the organic post of Prison Warder. The respondent Commission having received legal advice from the Office of the Attorney-General, replied in the negative to the query posed to it by a letter dated 1/2/1985 (Vide Appendix «Γ»). The legal advice on which the respondent Commission relied is marked Appendix «ΣΤ»).

35 It is apparent that the letter of the respondent Commission in reply to the letter of the Trade Union of the Prison Warders does not amount to a decision which is justiciable under Article 146.1 of the Constitution. It is merely an informatory act which cannot be made the subject of a recourse under Article 146.1 of the Constitution.

The second leg of the complaint against the respondent

Commission is its omission, which is continuing, to promote the applicants and emplace them in the scale A7. What amounts to «omissions» of the Administration has been explained in the cases of *Costea v. The Republic* (1983) 3 C.L.R. 115 and *Cyprus Tannery v. Republic* (1980) 3 C.L.R. 405 and I need not reiterate the principles again. 5

In the present case the Director of Prisons did not forward to the respondent Commission his recommendations as per the form which is attached to the opposition and is marked «Form A», because he was of the opinion that the applicants did not satisfy the requirements of the scheme of service, therefore, the respondent Commission was not seized of the opportunity to examine the case of the applicants and it is not guilty of omission within the meaning of administrative law. 10

In these circumstances the recourse against the respondents (1) viz. the respondent Commission cannot stand and is hereby dismissed. 15

I shall now proceed and examine the case against the Director of Prisons who is respondent (2) in this recourse. The Director of Public Administration and Personnel Service by circular No. 608, dated 27/1/1982 brought to the notice of the various departments of the Government the procedure to be followed in the case of Officers serving in combined establishment posts which the Council of Ministers approved in their decision No. 21311 dated 21/1/1982 (Vide Appendix Δ). 20 25

By virtue of paragraph (4) of the said directions the Head of Department should recommend all Officers who satisfy the schemes of service, whether they are judged to be fit for promotion or not. For this purpose the Head of Department has to fill in the Form «A» which forms part of Appendix «Δ». And he has to state whether or not the Officers have carried out their duties satisfactorily or not, that they completed the period of service prescribed by the scheme of service and whether or not they satisfy the other requirements of the scheme of service; and finally whether he recommends them for promotion or not. 30 35

The question which poses for consideration is whether the Head of Department is obliged to make recommendations in all cases in spite of the fact whether an officer has completed the period of service prescribed by the scheme of service or not and forward it to the Public Service Commission, which in the exercise 40

of its discretion promotes or not the Officer, or whether the Head of Department is obliged to make recommendations and forward the said form duly completed to the Public Service Commission in cases only where an Officer has completed the prescribed period
5 of service provided for by the scheme of service.

In my opinion, if it is the former, then, the act of the Head of Department is a preparatory act and could not as such be the subject of a recourse under Article 146.1 of the Constitution because it does not produce direct legal consequences. But, if it is
10 the latter, then, the act of the Head of Department is an executory one because it produces direct legal consequences and an Officer has a legitimate interest as he is directly and adversely affected.

In the circumstances of the present case and bearing in mind paragraph (1) of the Directions of the Council of Ministers (Part of Appendix «Δ») to the effect that the Head of Department forwards to the Public Service Commission the recommendations after the completion of the period of service which the scheme of service requires and bearing also in mind paragraph (4), which I
15 mentioned hereinabove, I have reached the conclusion that the
20 Head of Department is not obliged to forward his recommendations to the Public Service Commission in all cases but, in those cases only, where he is satisfied that an Officer has completed the period of service required by the scheme of service. And his decision is an executory one and is subject to a recourse
25 under Article 146.1.

In the present case the Head of Department i.e. the Director of Prisons decided that the applicants have not completed the period of service prescribed by the scheme of service which decision affected the applicants directly and adversely in the sense that the
30 decision rendered them not eligible for promotion and, in the circumstances, have a legitimate interest to pursue this recourse.

As the decision of the Director of Prisons was not in writing and was not communicated to the Trade Union of the Prison Warders in writing, I have doubts as to the date it was taken and
35 communicated to the applicants, and in these circumstances, I will give them the benefit of doubt by holding that they are not out of time in filing the recourse.

For all the above reasons the recourse is dismissed but with no
40 order for costs.

*Recourse dismissed.
No order as to costs.*