

1988 August 31

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GREGORIS THALASSINOS

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 746/87).

5 *Public Officers—Promotions—Departmental Committees—The nature and object of their functions—Their existence does not in any way limit or restrict the competence of the Public Service Commission—Once the competence of the Commission was duly exercised, the legality of the final act is not affected by any failure of a departmental committee to examine a relevant fact.*

Reasoning of administrative acts—Collective organs—Decisions taken by majority—The views of the minority need not be duly reasoned.

Public Officers—Promotions—Judicial control—Principles applicable.

10 *Public Officers—Promotions—Striking superiority—Onus on applicant.*

15 *Natural Justice—Bias—Public Officers—Confidential reports—Organs participating in administrative process must appear to act with impartiality—Lack of impartiality must be established with sufficient certainty—Facts establishing bias may take a variety of forms, but invariably they must offend basic principles of fairness.*

The principles emerging from the decision in this case sufficiently appear from the hereinabove notes.

Recourse dismissed.

No order as to costs.

Cases referred to:

Michanikos and Another v. The Republic (1976) 3 C.L.R. 237;

Duncan v. The Republic (1967) 3 C.L.R. 153;

Platritis v. The Republic (1969) 3 C.L.R. 366;

Christou v. The Republic (1980) 3 C.L.R. 437;

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Ioannides v. The Republic (1985) 3 C.L.R. 2450;

Soteriadou and Others v. The Republic (1985) 3 C.L.R. 300;

Michael and Another v. The Republic (1982) 3 C.L.R. 726;

Frangoullides and Another v. The Republic (1985) 3 C.L.R. 1680;

Komodromou v. The Republic (1985) 3 C.L.R. 2250;

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Mytides and Another v. The Republic (1983) 3 C.L.R. 1096;

Demosthenous v. The Republic (1973) 3 C.L.R. 354;

Korai and Another v. C.B.C. (1973) 3 C.L.R. 546.

Recourse.

Recourse against the decision of the respondent to promote the interested party to the post of Labour Officer 1st Grade in preference and instead of the applicant.

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L. Clerides, for the applicant.

A. Vladimerou, for the respondent.

Cur. adv. vult. 20

5 A. LOIZOU P. read the following judgment. The applicant in this recourse challenges the decision of the respondent Commission to promote Anna Piperi ("the interested party"), to the post of Labour Officer First Grade in the Department of Labour, in preference and instead of himself.

The facts which led to the sub judice decision, so far as relevant, are as follows:

10 As the above post is a promotion post, a Departmental Board was set up. The Departmental Board which considered the suitability of the candidates at its meeting of the 28th August 1986, and 3rd September 1986, decided:

" (b) by majority to recommend as suitable for promotion to the permanent post of Labour Officer First Grade the candidates appearing hereinafter in alphabetical order:

- 15
1. Aristidou Panayiotis
 2. Georghiadou Irini
 3. Miltiadous Pantelis
 4. Piperi Anna

20 (c) By majority not to recommend for promotion the following because it decided that they lack behind the candidates referred to in paragraph (b) above.

- 25
1. Thalassinos Gregorios
 2. Toupia Lygia
 3. Georghiades Andreas
 4. Koui Antonis
 5. Sayvidou Yianoulla
 6. Philippou Phoevos
 7. Vanezi Georghios
 8. Charalambous Fostira
 - 30 9. Socratous Irini

10. Katselli Paraskevoulla.

4. The member of the Board Mr. Kolokotronis agreed with the decision of the Board to recommend candidates Aristidou Panayiotis and Piperi Anna, and disagreed with regard to candidates Georghiadou Irini and Miltiadous Pantelis. Mr. Kolokotronis argued that instead of those candidates there ought to have been recommended candidates Katselli Paraskevoulla and Philippou Phoevos. With regard to candidate Katselli Paraskevoulla he argued that her academic qualifications which are relevant to the duties of the post of Labour Officer First Grade are more significant and have more weight than the seniority at the previous post possessed by candidates Georghiadou Irini and Miltiadous Pantelis. With regard to candidate Philippou Phoevos he argued that his merit as appearing in the confidential reports is superior than that of the two other candidates and has more weight than seniority at the previous post possessed by candidates Georghiadou Irini and Miltiadou Pantelis.

5. The members of the Board, Messrs A. Kallimahos, A. Demetriades, K. Efreem and S. Soteriou, decided that candidates Georghiadou Irini, and Miltiadous Pantelis are superior to candidates Katselli Paraskevoulla and Philippou Phoevos, because they are substantially superior in seniority, and all four above candidates in accordance with the confidential reports of the last two years were marked as excellent and possess the qualifications required by the Schemes of Service."

The respondent Commission took cognizance of the recommendation of the Departmental Board at its meeting of the 2nd October, 1986. In the course of the said meeting it considered its report and dealt in particular with the case of Paraskevoulla Katselli and Phoevos Philippou who were not included in the list of recommended candidates but they were recommended by one of the members of the Board. The respondent Commission on the basis of the totality of the material before it decided that it was not appropriate to take into consideration for promotion the above two candidates along with the candidates who were recommended

by the Departmental Board, and after taking into consideration the material before it and on the basis of the findings of the Departmental Board, it decided to consider the question of the filling of the above post on a date to be given later.

5 By means of two letters dated the 22nd September, 1986 and
the 17th October, 1986, the applicant who has not been recom-
mended by the Departmental Board, alleged that the confidential
reports which have been submitted in respect of himself were par-
10 tial and unfair due to the adverse stand and attitude of the report-
ing Officer from 1979 until the present day. The respondent
Commission after referring the above letters to the Director of the
Department of Labour and after obtaining his views and those of
the reporting and countersigning officers, decided at its meeting
15 of the 27th March, 1987, that "on the basis of the material before
it the allegations of Gregoris Thalassinos, Labour Officer Second
Grade, in the Department of Labour, with regard to his annual
confidential reports have not been established with sufficient cer-
tainty. Following that the respondent Commission decided that
20 the said reports were valid and were taken into consideration. The
respondent Commission further decided that there was nothing
warranting reconsideration of its previous decision to proceed
with the filling of the vacant post of Labour Officer-First Grade,
Department of Labour, on the basis of the findings of the Depart-
mental Board".

25 At its meeting of the 24th April 1987, the respondent Commis-
sion "after taking into consideration all the substantive material
before it, decided on the basis of the totality of the established cri-
teria (merit, qualifications, seniority), that Anna Piperi is superior
to the remaining candidates", and it decided to promote her to the
30 above post.

The recourse was based on the following grounds of Law:

(a) The respondent Commission failed to select the most suitable candidate because, having regard to the established criteria of merit, qualifications and seniority, the applicant was the most

suitable candidate for promotion.

(b) The respondent Commission, acted under circumstances amounting to misconception of fact and/or in excess or abuse of power.

(c) The respondent Commission did not duly or sufficiently reason its decision. 5

(d) The respondent Commission applied the schemes of service in a defective manner.

(e) The respondent Commission took into consideration legally unacceptable confidential reports in respect of the applicant and acted under a misconception of fact. 10

Learned counsel for the applicant in his written address adopted the above grounds of law and relied further on the following grounds of law.

1. That the applicant has been excluded as a candidate by the Departmental Board before the consideration of his complaint by the Commission to the effect that his confidential reports were partial. 15

2. In the report of the Departmental Board it was decided by majority not to recommend the applicant without any reference in the minute as to the number of the members of the Board constituting the majority and the reasons for the exclusion of the applicant. 20

3. Also the interested party was recommended by majority but there is nothing in the report of the Departmental Board indicating the number of the members of the Board who agreed or disagreed with the majority decision. 25

Coming now to ground (a) of the grounds of law in support of the recourse, it is by now well settled that the Court cannot inter-

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fere with a promotion "unless it has been established that the person not selected did have striking superiority over the person selected; and the onus in such a case lies always on the applicant. (See inter alia, *Michanikos and Another v. The Republic* (1976) 3 C.L.R. 237, and *Duncan v. The Republic* (1967) 3 C.L.R. 153.) In this case the applicant failed to discharge the onus that lies upon him, namely to establish striking superiority over the interested party. Therefore ground (a) must fail.

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Regarding ground (b) - misconception of fact and abuse of power - the onus of proof of misconception of fact lies always on an applicant. (See *Platritis v. The Republic* (1969) 3 C.L.R. 366.) In this case apart from the averment of misconception of fact in the grounds of law in support of the recourse, nothing has been put forward on behalf of the applicant to substantiate the
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allegations of misconception of fact and excess or abuse of power. Therefore ground (b) must fail too.

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Regarding ground (c) - absence of due reasoning - I must say that the sub judice decision is not only duly and sufficiently reasoned, but its reasoning is supplemented by the material in the file, namely the confidential reports of the candidates. Therefore ground (c) must fail as well.

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Regarding ground (d) - defective application of the schemes of service - nothing has been put forward by applicant to substantiate this ground which, for this reason must fail.

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Dealing now with ground (e) - the confidential reports - I must say that this ground brings into the picture the question of bias of the reporting officer against the applicant. It is a basic principle of administrative law that the organs participating in a particular administrative process must appear to act with impartiality, and it is also a principle of administrative law that the lack of impartiality by a public officer against another public officer must be established with sufficient certainty. (See *Christou v. The Republic* (1980) 3 C.L.R. 437 (FB)).

Further in order to establish bias, facts must be established making it objectively unjust for one to report upon another. Facts giving rise to bias may take a variety of forms; but invariably to establish a case of bias they must offend basic notions of fairness, in particular fair play in this area. (See the judgment of Piki J., in *Ioannides v. The Republic* (1985) 3 C.L.R. 2450; *Soteriadou and Others v. The Republic* (1985) 3 C.L.R. 300 (FB). In this case on the totality of the material before me it has not been established that the reporting officer was biased against the applicant or that he should be treated as not appearing to be impartial with the result that his participation in the relevant administrative process, which led to the promotion of the interested party, should have been regarded as a factor vitiating such promotion. Therefore ground (e) must fail.

Dealing now with ground (i) of the grounds of law in the written address of learned counsel for the applicant it must be said that the decisive competence in matters of promotions lies exclusively with the Public Service Commission. As I said in *Michael and Another v. The Republic* (1982) 3 C.L.R. 726 (affirmed on appeal - vide *Frangoullides and Another v. the Republic* (1985) 3 C.L.R. 1680), whatever the provisions of the Regulations governing the competence and functioning of Departmental Boards "they could not take away the competence of the respondent Commission as provided by the Law and they have to be interpreted in such a way as to be intra vires and not ultra vires of the empowering law". *The Michael* case (supra) was followed by Savvides J., in *Komodromou v. The Republic* (1985) 3 C.L.R. 2250, who said at p. 2262, that the purpose of section 36 of the Public Service Law, 1967, is to provide for the functions and procedure of Departmental Boards solely for the purpose of assisting the Public Service Commission and not in any way to limit, restrict or take away any of the functions vested in it under the Law. To the same effect we have the judgment of Stylianides J., in *Mytides and Another v. The Republic* (1983) 3 C.L.R. 1096 at pp. 1110—1111). In view of the above legal position I hold that the competence to decide on the legality or otherwise of the confidential reports lies with the Public Service Commission, and it is

quite clear that the Public Service Commission exercised such competence at the appropriate stage. Therefore, once the organ which is competent for the exercise of competence has duly exercised same, the fact that the subordinate organ - in this case the
5 Departmental Board - has not gone into the matter, does not affect at all the legality of the sub judice decision.

Coming lastly to grounds (2) and (3) which can be taken together because they are of the same nature, I must say that they lack any foundation for in the relevant report of the Departmental
10 Board there are clearly recorded both the views of the majority and the minority. (See paragraphs 4 and 5 of the report.) It is clear from paragraph 4 of the said report that the disagreement appearing in paragraph (b) thereof refers to the disagreement of member Kolokotronis. And it is also clear from paragraph 4, that
15 the disagreement appearing in paragraph (c) does not refer to applicant but to the candidates appearing in paragraph 4. Therefore both the majority and minority views have been adequately recorded and grounds 2 and 3 must fail. Even if, contrary to what
20 has been held hereinabove, the minority views were found not to have been recorded it is settled that "minority views need not be duly reasoned so long as the majority decision, which is the only executory one, is duly reasoned and that the dissenting member may ask that his views be recorded in the minutes. (See my judgment in *Demosthenous v. The Republic* (1973) 3 C.L.R. 354.
25 See, also, the judgment of Hadjianastassiou J., in *Korai and Another v. C.B.C.* (1973) 3 C.L.R. 546.

In view of all the above, I hold that the sub judice decision was reasonably open to the respondent Commission on the material before it and in particular the confidential reports of the candidates and the recommendations of the Head of the Department, in
30 favour of the interested party, and the recourse must therefore fail. The sub judice decision is confirmed. The recourse is dismissed but in the circumstances there will be no order as to costs.

35 *Recourse dismissed.*
No order as to costs.