

1988 October 17

[A. LOIZOU, P. SAVVIDES, STYLIANIDES, KOURRIS, PAPADOPOULOS,
HADJITSANGARIS, BOYADJIS, CHRYSOSTOMIS, JJ.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COSTAS PASCHALIS,

Applicant,

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondents.

(Case No. 570/88).

*Public Officers—Promotions—Interviews, performance at—Reconsideration of
case following annulment of promotions—Change, in the meantime, in the
composition of the Commission—Impressions from old interviews rightly
disregarded—Whether new interviews should have been conducted—
5 Question determined in the negative.*

Public Officers—Promotions—Interviews, performance at—Weight.

*Collective organs—Composition—Reconsideration of promotions following
their annulment—Change in the composition of the appointing organ (Pub-
lic Service Commission) in the meantime—Whether only the old members
10 should participate so that impressions from the first interviews could be ta-
ken into consideration—Question determined in the negative.*

*Public Officers—Promotions—Qualifications—Due inquiry into—All relevant
material contained in the files before the Commission—Presumption of re-
gularity—Effect—Finding on previous occasion in relation to promotion to
15 another post that candidate possessed particular qualification—
Significance.*

Public Officers—Promotions—Judicial control—Principles applicable.

Public Officers—Promotions—Striking superiority—Onus on applicant to es-

establish such superiority over interested party.

Public Officers—Promotions—High posts in the hierarchy—Discretion of Commission—Breadth of.

Public Officers—Promotions—Qualifications—Additional qualifications, considered as an advantage by the scheme of service—Special reasons (applicant's latter reports) given why they did not prevail. 5

The promotion of the present applicant to the post of Head, Prices Control and Consumers' Protection Service, was annulled by this court (*Mytides v. The Republic* (1983) 3 C.L.R. 1096). The Commission reconsidered the matter. Its composition was, however, different in that two of its members were new members, having replaced two of the previous members. 10

The Commission examined the question of the qualifications of the present applicant—as his first promotion had been annulled for lack of due inquiry as to his qualifications. The examination was concluded in the presence of all five members of the Commission. 15

Once all the members concluded that the applicant possessed the qualifications required under the scheme of service, the two new members withdrew and the remaining three members proceeded and promoted the present applicant. 20

The promotion, however, was annulled by the Full Bench (See *Mytides v. The Republic* (1988) 3 C.L.R. 737). Once again the Commission reconsidered the matter and finally promoted retrospectively to the post in question Mytides. Hence this recourse by applicant Paschalis.

The decision was taken by majority of three to two. The impressions at the interviews held in the process of effecting the first promotion—annulled as aforesaid—were disregarded, as they were held before a different composition of the Commission. 25

Paschalis was senior to Mytides. He was, better qualified, having a post-graduate diploma obtained after studies of six months, which was an advantage under the scheme of service. Mytides had better confidential reports than Paschalis. 30

The majority of the Commission thought that the seniority of Paschalis and his slight superiority in qualifications as a result of a post-graduate diploma obtained after a six month attendance at Hague, do not tilt the scales 35

in his favour.

The issues that arose for determination in this recourse were:

- (a) Whether Paschalis had the required qualifications.
- 5 (b) Whether there has been a due inquiry, as regards possession by Mytides of the required "very good knowledge of English".
- (c) Whether it was reasonably open to the Commission to select Mytides.
- (d) Whether the Commission ought to have invited the candidates to new interviews.
- 10 (e) Whether the re-examination ought to have been conducted only by the three old members of the Commission, i.e. in which case the impressions from the original interviews could have been taken into consideration. The recourse was heard by the Full Bench.

Held, dismissing the recourse: (1) As the submission relating to Paschalis' qualifications fails, the decision was reasonably open to the Commission and, therefore, this Court cannot interfere.

(2) The files of the candidates, which contained the material relating to their qualifications, were always before the Commission. In the absence of evidence to the contrary and on the strength of the presumption of regularity, it may be inferred that the respondent Commission did consider the question of the possession by the candidates of the necessary qualifications. There is sufficient material in the file to justify a conclusion that Mytides possessed "a very good knowledge of English".

In this respect, one should bear in mind that Mytides was found in the past, when he was promoted to another post, that he had the required "very good knowledge of English".

(3) It is the paramount duty of the Commission to select the best candidate. But the Commission does not have to show that the one selected was strikingly superior to the others. The onus is on the applicant to show that he was strikingly superior to the interested party. In cases of appointments to the higher posts the Commission is vested with very wide discretionary power in selecting the most suitable candidate.

In this case and in view of Mytides' excellent reports it was reasonably

open to the respondent Commission to prefer the interested party.

(4) However important interviews may be in selecting a candidate the administrative organ entrusted with the task of appointing or promoting has to be properly constituted and the respondent Commission would not be so with only three members.

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(5) The Commission could not have held new interviews as such course would necessarily defeat the principle that any re-examination of a decision which was annulled by the Court must be made under the legal and factual background that existed at the time of such annulled decision.

Recourse dismissed.
No order as to costs.

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Cases referred to:

Kolokotronis v. The Republic (1980) 3 C.L.R. 418;

Sergides v. The Republic (1988) 3 C.L.R. 1116;

Frangos v. The Republic (1970) 3 C.L.R. 312;

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Simillis v. The Republic (1986) 3 C.L.R. 608;

Demetriades v. The Republic (1988) 3 C.L.R. 1034;

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

Public Service Commission v. Potoudes and Others (1987) 3 C.L.R. 1591;

Andronikou v. The Republic (1987) 3 C.L.R. 1237;

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Georghiou and Others v. The Republic (1988) 3 C.L.R. 678;

Panagis v. Cyprus Ports Authority (1988) 3 C.L.R. 1095;

Republic v. Panayiotides (1987) 3 C.L.R. 1081;

Kyprianou v. The Republic (1967) 3 C.L.R. 210.

Recourse.

Recourse against the decision of the respondents to promote the interested party to the post of Head, Prices Control and Consumers' Protection Service in the Ministry of Commerce and Industry in preference and instead of the applicant.

G. Triantafyllides, for the applicant.

A. Vladimerou, for the respondents.

A.S. Angelides, for the interested party.

Cur. adv. vult.

10 A. LOIZOU P. read the following judgment of the Court. By
the present recourse the applicant seeks a declaration of the Court
that the decision of the respondent Commission to promote the in-
15 terested party G. Mytides to the post of Head, Prices Constol and
Consumers' Protection Service, in the Ministry of Commerce and
Industry, retrospectively as from the 1st April 1982, instead of
the applicant is null and void and of no legal effect whatsoever.

The background to this recourse is as follows:

20 On the 1st April 1982, as a result of the promotion of the ap-
plicant Paschalis, the present interested party, Mytides filed Re-
course No. 226/82 (reported as *Mytides v. The Republic* (1983)
3 C.L.R. 1096) for lack of due inquiry as to whether the appli-
cant satisfied the required qualifications of the scheme of service.

25 On the 16th November 1983, the respondent Commission de-
cided to re-examine the matter but meanwhile its composition had
changed by the substitution of two of its members with two new
ones.

The respondent Commission after conducting a due inquiry as
to whether Paschalis satisfied the scheme of service, concluded

on the 11th January 1984, that the degree of the applicant did satisfy the relevant provisions of the scheme of service, and at the same meeting, having found him as "superior to the other candidates", promoted applicant Paschalis.

As a result, a recourse by Mytides was filed, (see (1988) 3 C.L.R. 737). 5

It was held therein that the decision challenged thereby ought to be annulled because

1. The respondent Commission when re-examining the case was operating under the misconception that its previous decision was annulled *"on the sole ground that no due inquiry was carried out as to whether the degree of Bachelor in Business Administration possessed by the interested party satisfied the scheme of service."* This is clearly stated in the minutes of both the meeting of the 16th November 1983, when they started their deliberations and the meeting of the 11th January, 1984, when the sub judge decision was taken. The respondent Commission instead of proceeding to examine the promotion with reference to the factual and legal background prevailing at the time when their previous decision was taken, examined and decided in full quorum the question as to whether the interested party possessed the necessary qualifications under the scheme and then, in a composition of three members only, they simply re-affirmed their decision without going afresh into the merits, qualifications and seniority of the candidates in order to reach their decision after new inquiry. 10
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2. The respondent Commission, acting as a collective organ could not be considered as properly constituted when the sub judge decision was reached, because though the final deliberations had commenced in the presence of all its five members who participated in the reaching of the unanimous decision as to the qualifications of the interested party, nevertheless at the same meeting, the two new members, acting under an erroneous view that they could not participate in the final deliberations, excluded them- 30

selves form participating in the final decision and left the meeting.

On the 10th May, 1988, there was a new re-examination by the respondent Commission of the legal and factual situation as at the time of the original decision.

5 It proceeded with the evaluation and comparison of the candidates who had been recommended by the Departmental Board. It examined the material factors from the file of the filling of the post and the personal files and confidential reports until 1981 and considered the conclusions of the Departmental Board.

10 As regards the confidential reports of the candidates until 1981 it noted that the applicant had been rated as "Excellent" for 1979 and "Very Good" for 1980 and 1981, whereas Mytides was rated as "Excellent" for the three years. As far as the other two candidates were concerned, candidate Th. Charalambides was rated as
15 "Very Good" for 1979 and "Excellent" for 1980 and 1981, and Hadjiconstantinou as "VERY GOOD" for 1979 and 1981 and "Good" for 1980.

Without taking into consideration the impressions at the inter-views (on the advice of the Attorney-General) which were carried
20 out before a different composition, the respondent Commission concluded that as regards merit Mytides was the best, followed by Charalambides and last by Hadjiconstantinou and Paschalis.

It also considered the qualifications of the candidates and noted that Hadjiconstantinou, Charalambides and Paschalis, had a post-graduate qualification which, according to the scheme of service
25 is an advantage.

It further found that Hadjiconstantinou was the most senior followed by Paschalis, then by Charalambides and last by Mytides.

30 By a majority of three to two the respondent Commission selected the present interested party, G. Mytides.

The majority considered that Mytides was strikingly superior to Hadjiconstantinou and Paschalis and that he was also superior to Charalambides despite the fact that he was junior to the other candidates who were also better qualified; yet taking into consideration that seniority as regards managerial posts does not play a decisive role, the majority considered that Mytides was the most suitable to take up the post.

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In particular comparison to Paschalis who had originally been selected "the Commission noted that the striking superiority of Mytides had been diminished as a result of the equally good (Very very Good) impression made by both of them before the Commission, now excluding the impression from the interviews as an evaluation element, the difference between the two is greater and consequently the seniority of Paschalis and his slight superiority in qualifications as a result of a postgraduate diploma obtained after a six month attendance at Hague, do not tilt the scales in favour of Paschalis, despite the fact that his postgraduate diploma is according to the scheme of service an advantage, nevertheless this would only play a decisive role if the two candidates were equal."

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A preliminary objection was raised on behalf of the interested party Mytides namely that the applicant lacked the necessary basic qualifications.

The respondent Commission examined the question of the qualifications of the applicant and concluded on the 11th January, 1984, that he did possess such qualification. As in the circumstances we consider that it was reasonably open to the respondent Commission to decide as it did, the Court cannot give the scheme of service a different interpretation than that given by the respondent Commission.

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The submissions made on behalf of applicant Paschalis are the following:

The first one is that once the decision of the respondent Com-

mission was annulled the respondents were under a duty to re-examine the whole matter afresh including the question of whether not only the applicant Paschalis but also the other candidates possessed the required qualifications of the post in question, this being more so in view of the fact that the Full Bench expressly stated at the end of their judgment that they did not consider it necessary to deal with the other grounds raised in the appeal and one of the main grounds raised by the appellant Mytides was the question of the eligibility of Paschalis; also it was submitted that there had been lack of due inquiry as regards the knowledge of English by the interested party.

We find that since the files of the candidates which contained the material about their qualifications, were at all times before the respondent Commission, on the presumption of regularity, it may be inferred, in the absence of evidence to the contrary, that the respondent Commission did consider the question of the possession by the candidates of the necessary qualifications. Also we find as regards interested party Mytides that there is sufficient material in his file which, as stated above, was at all relevant times before the respondent Commission to justify a conclusion that such interested party possessed "a very good knowledge of English", including a General Certificate of Education (G.C.E.) in English Language, Ordinary Level, passed with grade A, awarded in June 1982, stamped as received by the respondent Commission on the 6th September 1982 (Red 54, 53 in his Personal File); and also, as it appears in the Minutes of respondent Commission of 22nd January 1976 (Red 24) in relation to promotions to the post of Industrial Officer in the same Ministry, it found after an oral interview in English that Mytides did possess "a very good knowledge of English" which was an essential requirement for that post, to which he was as a result promoted.

Relevant to this is what was stated in *Kolokotronis v. Republic* (1980) 3 C.L.R. 418 at pp. 426-427:

"One of the main grounds on which counsel for the applicant has relied is that the Commission has failed to carry out a

proper inquiry in order to ascertain whether the interested party possessed a 'very good knowledge of English', which is an essential requirement under the relevant scheme of service...

Since, therefore, the interested party was initially promoted to the post of Industrial Relations Officer, 1st Grade - from which he was later promoted to the post of Senior Industrial Relations Officer - it may be inferred, on the basis of the presumption of regularity, that he had been found on that occasion to possess 'an excellent knowledge of English and Greek' (see, in this respect, inter alia, *Antoniou v. The Republic* (1975) 3 C.L.R. 510); therefore, the respondent Commission, when it stated in its minutes dated January 2, 1979, that, in promoting the interested party to the post of Senior Industrial Relations Officer, it was satisfied 'having regard to his long and satisfactory service in the Government' that he did possess the required qualification of a 'very good knowledge of English' it, presumably, had in mind, among other things, that, as already stated, he had been earlier on promoted to the post of Industrial Relations Officer, 1st Grade, in relation to which there was required 'an excellent knowledge of English and Greek.'

See also *Sergides v. Republic* (1988) 3 C.L.R. 1116;

The second and third submissions are that the reasoning given by the majority for its decision is wrong, in that too much importance was given to the confidential reports of the candidates instead of to all aspects relating to each candidate, namely, confidential reports, qualifications (post-graduate), seniority, and also, in view of the previous decisions of the respondent Commission, the interested party could not now be found to be superior in merit, by merely disregarding the interviews.

We find that as it is evident from the minutes of the respondent Commission, all aspects were duly considered and special reasoning appears therein for disregarding the applicants' seniority and postgraduate qualification which under the scheme of service

was only an advantage.

It is the paramount duty of the respondent Commission when selecting a candidate for promotion to select the most suitable one and in the case of appointments to the higher posts the Commission is vested with very wide discretionary powers in selecting the most suitable candidate. See *Frangos v. Republic* (1970) 3 C.L.R. 312 at 343; *Simillis v. Republic* (1986) 3 C.L.R. 608 at p. 613; *Demetriades v. Republic* (1988) 3 C.L.R. 1034. Moreover one should not lose sight of the fact that the respondent Commission does not have to show that the interested party was strikingly superior to the other candidates. (See *Georghiou v. Republic* (1976) 3 C.L.R. 74 at p. 83.

"As it appears from the case-law in Greece, which is set out in "Επιθεώρησης Δημόσιου Δικαίου και Διοικητικού Δικαίου" (Review of Public and Administrative Law) 1965, vol. 9, p. 369, 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 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 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; also, in such a situation the complained of decision of the organ concerned is to be regarded as either lacking due reasoning or as based on unlawful or erroneous or otherwise invalid reasoning.

Useful reference, in this respect, may be made to the Conclusions from the Case-Law of the Council of State in Greece, 1929-1959, p. 268, and to the decisions of such Council in cases 601/1956, 778/1956 and 277/1964.

This Court has followed the same approach in a number of cases, such as the *Evangelou case* (1965) 3 C.L.R. 292, at p. 300; and of course, the onus of establishing his striking superiority lies always on the applicant in a recourse (see *Georghides and Another v. The Republic* (1970) 3 C.L.R. 257, 269)."

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We consider that in view of his excellent reports it was reasonably open to the respondent Commission to prefer the interested party.

The third submission is to the effect that the procedure followed by the respondent Commission is wrong. It was argued that only the three old members ought to have re-examined the matter afresh after taking the interviews into account; and that the post being what it is, the interviews were most important to ascertain whether the candidates had high administrative abilities.

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No doubt we also consider, as it has also been held by this Court in numerous occasions that interviews are an important factor in ascertaining a candidate's personality, abilities and suitability for a particular post, more so in the case of high executive posts where such qualities are important. (See *The Public Service Commission v. Marina Potoudes and Others* (1987) 3 C.L.R. 1591; *Andronikou v. The Republic* (1987) 3 C.L.R. 1237; *Georghiou and Others v. Republic* (1988) 3 C.L.R. 678; *Panayis v. Cyprus Ports Authority* (1988) 3 C.L.R. 1095. See also the Full Bench decision in *Republic v. Panayiotides*, (1987) 3 C.L.R. 1081. Nevertheless the administrative organ entrusted with the task of appointing or promoting has to be properly constituted and the respondent Commission would not be so with only three members.

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In the case of *Kyprianou v. Republic* (1976) 3 C.L.R. 210 at 213 it was held:

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"The principles governing the validity of decisions taken by a collective organ with a defective composition were consid-

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ered in the case of *Pissas v. The Republic* (1976) 3 C.L.R. 30 where reference is made to analogous situations in Greece, as set out in Kyriacopoulos, Greek Administrative Law, 4th Ed. vol. B p. 23 and the Conclusions of the Case Law of the Greek Council of State (1929-1959) p. 110. They are to the effect that in order to consider a collective organ as duly composed, it is not sufficient if the members necessary to constitute a quorum are present. It must also be clearly shown that the administration made possible the presence of all members of the organ by inviting them in time to be present at such a meeting. On the other hand, if a member or members are excluded on an erroneous view that they could not participate at such a meeting, the collective organ in question cannot be considered as properly composed when an administrative decision is taken even if there is quorum and, therefore, such decision should be annulled on the ground of wrong composition of the organ."

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In the circumstances, the respondent Commission rightly re-examined the matter as it did by disregarding the impressions created by the candidates at the interviews which took place before it under a different composition. Nor do we consider that new interviews could be made before the respondent Commission under its new constitution as such course would necessarily defeat the principle that any re-examination of a decision which was annulled by the Court must be made under the legal and factual background that existed at the time of such annulled decision.

For all the above reasons the recourse fails and is hereby dismissed but in the circumstances there will be no order as to costs.

Recourse dismissed.

No order as to costs.