

1988 November 4

{PIKIS, J.}

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION.

VARNAVAS CHARALAMBOUS AND ANOTHER,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondents.

(Consolidated Cases Nos. 261/87 & 299/87).

Public Officers—Promotions—Qualifications—Additional academic qualifications not envisaged as an advantage in the scheme of service—Only of marginal importance.

Public Officers—Promotions—Decision by majority of one—One of the members of the Commission voted in favour of the interested party because of his seniority and of the absence of "striking superiority" on the part of the other candidates—"Striking superiority" a wholly extraneous consideration—Such reasoning amounted to misconception of the duty to select the best candidate upon consideration of the three criteria, i.e. merit, qualifications, seniority. 5
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Public Officers—The Public Service Law, 1967 (Law 33/67), section 58(I) (a)—Duty to be loyal and respect the law—The arbiters of the discharge of those duties is the Public Service Commission, not K.Y. II. (Central Intelligence Service)—In making an inquiry, the Commission may ask the views of K.Y. II.—But in case of any adverse report by the latter the officer prejudiced thereby must be given an opportunity to be heard—Lack of respect for the law can only be evidenced by specific breaches of the law. 15

Public Officers—Promotions—Recording in old minutes of the Commission of adverse comments by K.Y. II. (Central Intelligence Service) remaining in applicant's file—Subsequent part of same minutes stated that any question marks about the fidelity of the officer were lifted and sequentially thereto 20

applicant was promoted—Consequently, the report of K.Y.II. did not play any part in the sub judice promotions.

The facts of this case appear sufficiently in the judgment of the Court.

*Promotion of interested party Kazamias annulled.
Recourse as far as the other two interested parties
are concerned dismissed. No order as to costs.*

Cases Referred to:

Papadopoulos v. The Republic (1982) 3 C.L.R. 1070;

Papadopoulos v. The Republic (1983) 3 C.L.R. 405.

10 Recourses.

Recourses against the decision of the respondents to promote the interested parties to the post of Senior Storeman in the Department of Stores in preference and instead of the applicants:

M. Christofides, for applicant in Case No. 261/87.

15 *A. Andreou*, for applicant in Case No. 299/87.

M. Florentzos, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

20 PIKIS J. read the the following judgment. This is an application to annul a decision of the Public Service Commission by virtue of which the three interested parties were promoted to the post of Senior Storeman, a position in the Department of Government Stores. The applicants were among the 12 candidates who were
25 shortlisted for promotion by the departmental committee set up under s.36 of the Public Service Law (33/67) to screen the eligibility and advise on the suitability for promotion of the candidates who applied for the three vacant posts.

The most significant grounds on the basis of which the vitiation of the sub judice decision is sought, are the following:

- (a) Defectiveness of the recommendation of the head of the department deriving from failure to found it on the criteria specified in the law, namely, merit, qualifications and seniority (s.44(2)—Law 33/67). 5
- (b) Misappreciation by members of the committee and, in any event, its chairman, of the significance and impact of the factor of "qualifications" in the selection process.
- (c) Misconception by members of the Public Service Commission or, at least, one of them, of the criteria by reference to which the selection should be made. 10
- (d) Taking into consideration or consulting extraneous matters, specifically extracts from a report by "K.Y.II." (Central Information Service) incorporated in previous minutes of the Public Service Commission. 15

Next, we shall attempt to correlate the grounds advanced for the annulment of the decision to the material facts of the case which are recounted, albeit with brevity, below:

The overall performance of the applicants and that of the interested parties as elicited in their confidential reports, was broadly of similar worth. The respondents made specific reference to their confidential reports of the seven years immediately preceding their selection as indicative of the overall contribution of the parties to the service. To complete the picture relevant to the merits of the candidates, we may note that the performance of two of them in the year immediately preceding the sub judice decision, was better than that of the others. These candidates are, interested party Theocharides and applicant Charalambous. 20 25

The applicants had academic qualifications that the interested parties did not possess; in particular, Mr. Charalambous had 30

passed the examination in Book-keeping, Intermediate level, of the London Chamber of Commerce, and was also in possession of a certificate in Accounting, Stage III (Advance) of the Royal Society of Arts.

5 Mr. Poullis had also been successful in the Book-keeping examination which Mr. Charalambous had passed. The head of the department recommended the three interested parties noting their seniority. Read in isolation, his recommendation could be considered as defective. Nonetheless, he explained his recommendation
10 by informing members of the Commission that the parity among candidates in terms of merit, made seniority a decisive factor. The inevitable inference is that he founded his recommendation on a review of the sum total of material factors bearing on the selection process.

15 After due reflection on the material before them, and after paying due heed to the recommendations of the head of the department, the Public Service Commission unanimously chose interested parties Theocharides and Savva as the most suitable candidates for promotion. However, they were divided with regard to the choice of the third candidate to be selected.
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Subject to the complaint of Mr. Charalambous attributable to the admission of extraneous material, to which we shall refer later, the choice of two interested parties was, at the least, reasonably open to the respondents. Contrary to the submission made,
25 the recommendations of the head of the department are not vulnerable to be set aside for any valid reason. They were founded upon due evaluation of all facts relevant to the suitability of candidates.

30 The choice of the third interested party, namely, Cleo Kazamia, was the result of a majority decision. The chairman, and Messrs. Hadjiprodromou and Xenopoulos, decided in favour of the interested party, whereas the two other members of the Commission, namely Messrs. Papaxenophontos and Christodoulides, favoured the selection of Mr. Charalambous and another candi-

date, Mr. Frangou, respectively.

In explaining his reasons of the choice of Mrs. Kazamia the chairman stated that he regarded the additional academic qualifications of the two applicants as inconsequential to the choice that had to be made. The caselaw establishes that qualifications additional to those envisaged by the scheme of service, are a factor of very marginal importance.* On the other hand, it must be appreciated - a fact not made clear in the statement of the Commission, that "qualifications" are one of the three factors determinative of the choice to be made. Seemingly, the chairman was somewhat confused on this issue though his overall assessment cannot be faulted as defective. If that were its effect the selection of the remaining two parties might be called into question for we can assume that this was the appreciation of the chairman of the Commission in relation to the importance of qualifications in making the choice of all three interested parties.

The reasons for the choice of Mrs. Cleo Kazamia by Mr. Xenopoulos are stated to be her seniority and the absence on the part of the remaining candidates of "striking superiority". Evidently, he misconceived the duty of members of the Commission to select the best candidate on a consideration of the three relevant factors, namely, merit, qualifications and seniority. Instead, he used as a yardstick for his selection a wholly extraneous consideration, that of striking superiority. "Striking superiority" is the test by reference to which the Court may annul a decision notwithstanding the breadth of the discretion of the Public Service Commission, whenever it appears that the choice made was in defiance to objectively ascertainable superiority of one or more of the applicants. We do not know what the choice of Mr. Xenopoulos would have been had he not misdirected himself. This is a matter of speculation. His choice was decisive for the selection of Mrs.

* (See, *Papadopoulos v. Republic* (1982) 3 C.L.R. 1070; *Papadopoulos v. Republic* (1985) 3 C.L.R. 405).

Kazamia. Therefore, the misconception cannot be regarded as anything other than material for the decision made and, on that account, it must be annulled.

5 Section 58(1)(a) requires of public servants to be loyal and re-
spect the law. Loyalty goes to fidelity in the discharge of their du-
ties and the democratic institutions of the State. Respect for the
law is none other than obedience to the laws of the Republic. The
universal duty to abide by the law is statutorily cast upon civil
10 servants as a specific obligation for the true fulfilment of their
mission. Years back, long before the sub judice decision, refer-
ence was made in the minutes of the Public Service Commission
to a report of "K. Y.II." (Central Intelligence Service) to the effect
that applicant was not faithful and showed no respect for the law.
15 Copy of those minutes are included in the personal file of the ap-
plicant but not the report itself. At a subsequent part of the same
minutes of the Public Service Commission, it is recorded that res-
ervations and question marks about the fidelity of the applicant
and his respect for the law, were lifted and sequentially thereto
the applicant was promoted. Nothing in any of the files before me
20 suggests that those reservations surfaced again. Consequently,
the ill effects of the report of "K. Y.II.", whatever they may have
been in the past, were removed and could not have played any
part in the decision taken - a fact confirmed by the minutes of the
respondents relevant to the sub judice decision. Therefore, the
25 complaint of applicant Charalambous made on this score, cannot
be sustained.

Nevertheless, I consider it appropriate to observe that those
charged to judge the fidelity and respect for the law, and generally
the discharge of the obligations cast on public servants by s. 58
30 (1)(a), are not "K. Y.II.", the intelligence branch of the police.
The arbiter of the discharge of those duties is the Public Service
Commission, after due inquiry into the facts bearing on the mat-
ter. If the Public Service Commission decides to consult
"K. Y.II." on any occasion, they must evaluate the material placed
35 before them and if adverse they must afford, as a matter of ele-
mentary justice, an opportunity to the public servant prejudiced

thereby, to answer accusations of lack of loyalty to his mission and lack of respect for the law. To my mind, lack of obedience to the law in the context of s.58(1) (b), can only be evidenced by breaches of the law on specific occasions. One may add that pre-judicial material of an inadmissible nature must not be allowed to remain in the file of civil servants in the interests of justice to their rights. Secrecy and sound administration cannot be reconciled. I repeat that this is said parenthetically for, in this case, the report of "K.Y.II." was not inserted in the file of the applicant, whereas reservations arising from its content noted in the minutes of the Public Service Commission, were subsequently withdrawn.

For all the above reasons the recourses of the applicants are dismissed so far as they are directed against interested parties Theocharides and Savva whose promotion is confirmed in accordance with the provisions of para. 4(a) of article 146 of the Constitution. The recourses succeed so far as they affect Cleo Kazamia whose promotion is declared to be wholly void pursuant to the provisions of para. 4(b) of article 146 of the Constitution. There shall be no order as to costs.

*Promotion of interested party
Kazamia annulled.
No order as to costs.*