

(1988)

1988 November 22

(CHRYSOSTOMIS, J.)

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PHILIPPOS PISKOPOS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondents.

(Case No. 706/85).

Public Officers—Promotions—Judicial control—Principles applicable.

Public Officers—Promotions—In taking into account all relevant factors, the Commission may attribute more significance to some of them than to others.

Public Officers—Promotions—Striking superiority—Meaning of.

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Public Officers—Promotions—Seniority—Significance of.

Public Officers—Promotions—Merit—Carries more weight than the other two factors.

Public Officers—Promotions—Confidential reports—Reports on candidates made by different reporting officers—Significance that the Commission may attach to such a fact.

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Public Officers—Promotions—Head of Department—Recommendations of—A separate factor pointing to the suitability of a candidate.

Misconception of fact—Should be proved by reference to the Administrative file and the reasoning of the decision.

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Misconception of fact—Promotions of public officers—Interested party

5 charged before an Assize Court with serious criminal charges referring to a period prior to the sub judge promotion—Acquittal—Adverse comments in the judgment as to the way he carried out his duties—Such comments cannot be treated as findings of fact—The judgment could not in any event have been taken into consideration, as it was delivered after the sub judge decision.

10 The applicant challenges the promotion of the interested party to the post of Animal Husbandry Supt. 1st Grade. The applicant was senior to the interested party by five years as regards a previous post they both held, but as regards the post of Animal Husbandry, 2nd Grade, both parties were appointed therein on the same day. Moreover, the applicant was better qualified than the interested party and, in fact, possessed the additional qualification referred to in the scheme of service. On the other hand, the interested party had better confidential reports and was recommended for promotion by the Head of the Department.

The applicant's case is twofold, i.e.:

- (a) That he is strikingly superior to the interested party, and
- 20 (b) That the Commission laboured under a misconception of fact, in that the applicant faced serious criminal charges (Case 568/87) relating to a period before the sub judge promotion and allegedly reflecting the unsatisfactory way in which the applicant was performing his duties.

25 *The Court, having reiterated the principles governing judicial control of promotion of public officers and having explained the notion of "striking superiority", held, dismissing the recourse:*

- 30 (A)(a) The fact that the confidential reports on the parties were not made by the same reporting officer does not carry the case of the applicant any further. The legal position is simply that it is open to the Commission to give due weight to the fact that different reporting officers cannot be treated as having made their assessments by using identical standards and, therefore, some allowance may have to be made for possible differences in the evaluation of the various candidates.
- 35 (b) A recommendation by the Head of the Department is deemed to be a separate factor pointing to the suitability of the candidate for promotion.

- (c) In this case the respondents weighed together all relevant considerations and selected the most suitable candidate by attributing, as they were entitled to do so, more weight to the recommendations of the Head of the Department and to the confidential reports of the interested party, which were undisputedly superior to those of the applicant and thus merit prevailed in the present case. 5
- (B)(a) A misconception of fact can be proved by reference to the administration file of the case and to the reasoning of the sub judge decision.
- (b) The Assize Court acquitted the accused in Case 568/87. Its judgment was not and could not have been before the Commission at the material time. Any adverse comments made by the Court against the interested party were mere observations and not findings as regards his merit. These observations are not sufficient to rebut the presumption that the sub judge decision was reached after a correct ascertainment of the relevant facts. 10
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Recourse dismissed.
No order as to costs.

Cases referred to:

- Georghiou v. The Republic* (1976) 3 C.L.R. 74; 20
- HjiSavva v. The Republic* (1982) 3 C.L.R. 76;
- Larkos v. The Republic* (1982) 3 C.L.R. 513;
- Karagiorghis v. C.B.C.* (1985) 3 C.L.R. 378;
- Georghiades and Others v. The Republic* (1967) 3 C.L.R. 653;
- Kyriacou and Others v. The Republic* (1975) 3 C.L.R. 37; 25
- Kokkinos and Another v. The Republic* (1984) 3 C.L.R. 588;
- Philotheou v. The Republic* (1985) 3 C.L.R. 662;
- Spanos v. The Republic* (1985) 3 C.L.R. 1826;

Ionides v. The Republic (1982) 3 C.L.R. 1136;

Georgiades and Another v. The Republic (1970) 3 C.L.R. 257;

Thalassinos v. The Republic (1974) 3 C.L.R. 290;

Christodoulou v. CYTA (1978) 3 C.L.R. 61;

5 *Serafim v. The Republic* (1985) 3 C.L.R. 286;

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

Recourse.

10 Recourse against the decision of the respondent to promote the interested party to the post of Animal Husbandry Superintendent, 1st Grade, Department of Agriculture in preference and instead of the applicant!

St. Charalambous, for the applicant.

A. Vlademirou, for the respondents.

Cur. adv. vult.

15 CHRYSTOSTOMIS J. read the following judgment. The applicant challenges the validity of the decision of the respondent Commission of 16.4.85, by which it promoted Charalambos Argyrides, the interested party, to the post of Animal Husbandry Supt. 1st Grade, Department of Agriculture as from 15.8.85.
20 This post is a promotion post from that of Animal Husbandry Supt., 2nd Grade.

25 The legality and validity of the sub judice decision is challenged on the ground that it is unconstitutional, unlawful, ultra vires, that it lacks due reasoning and that the Commission acted under a misconception of fact and was unlawfully and irregularly influenced by an appropriate authority or organ.

In spite of the above contentions, the applicant really rests his case on the ground that he is strikingly superior over the interested party as regards merit, qualifications and seniority and on the ground of misconception of fact.

It is a fact that the applicant has got over 5 years seniority over the interested party as regards a previous post they held, although both of them were appointed on the same date to the post of Animal Husbandry Supt., 2nd Grade. Also the applicant has got better qualifications. He graduated the A' Gymnasium of Paphos and between 1959-61 he attended the School of Agriculture of the University of Salonica, but he obtained no certificate or diploma. During 1968 he was granted a scholarship and he attended a seven month course in Crop Production at the American University of Beirut. Following another scholarship during 1977-78, he attended in Netherlands a six month course on Pig Husbandry, at Barneveld College and he obtained a diploma. On the other hand, the interested party attended the High Commercial Lyceum of Nicosia between 1951-56 but he obtained no certificate. During 1978 he attended in Baghdad an one month training course in Dairy Production and Processing, and from 12.12.81 - 24.12.82 he attended lectures on Sheep and Goat Husbandry (FAO-MINEADEP).

Both the applicant, the interested party and two others, were eligible for promotion and were recommended by the Departmental Committee. Also it can be said at this stage that the applicant, because of his said qualifications, was deemed to be in possession of the additional qualification referred to in the scheme of service. In spite of the seniority and better qualifications of the applicant, the respondent Commission promoted the interested party because he was considered to be the most suitable candidate for the post, mainly because he was recommended by the Head of the Department and also for the reason that for the last six years prior to his promotion, his confidential reports were more favourable than those of the applicant.

It is an accepted principle that it is open to an administrative or-

gan when trying to select the most suitable candidate to weigh together all relevant considerations and to attribute more significance to one factor than to another, in the course of doing so, provided, however, that it exercises properly its relevant discretion; and this court will not interfere with a decision of the Commission when it appears that it was reasonably open to it to select a particular officer, instead of another, for promotion. 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 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. (Vide *Odysseas Georghiou v. The Republic* (1976) 3 C.L.R. 74, 82, 83).

The notion of "striking superiority" was analysed by Piki J. in *Hjisavva v. The Republic* (1982) 3 C.L.R. 76 at p. 78, in the following terms:

"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 view of the combined effect of the merit, 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."

The overriding duty of the Commission in each and every case

is to select the candidate most suitable for promotion and the recommendations of the Head of the Department carry considerable weight which cannot be lightly disregarded. Also merit should carry the most weight even vis-a-vis superior qualifications. (*Larkos v. The Republic* (1982) 3 C.L.R. 513; *Karagiorghis v. C.B.C.* (1985) 3 C.L.R. 378; *Georghiades & Others v. The Republic* (1967) 3 C.L.R. 653; *Kyriacou & Others v. The Republic* (1975) 3 C.L.R. 37).

As regards the complaint of the applicant that seniority over the interested party was not duly weighed, I shall reiterate whatever was said by Loizou J., as he then was, in the case of *Kokkinos & another v. The Republic* (1984) 3 C.L.R. 588, at p. 592, that sets the matter in its correct perspective:

"As regards the seniority of the two applicants as against that of Elisavet Lottidou, it can only be stated what was said in the case of *Michael Theodosiou v. The Republic*, 2 R.S.C.C. p. 44 at p. 48 that... length of service is always one of the factors to be considered but it is not proper to treat such factor exclusively as the vital criterion always entitling to promotion the one candidate among many qualified ones, who possess such long service". Furthermore it has to be born in mind that in the case *Partellides v. The Republic* (1969) 3 C.L.R. 480, it was held that seniority ought to prevail when all other things were more or less equal."

The argument of learned counsel for the applicant that was built up because the confidential reports were not made by the same reporting officer, does not take this case any further. In this respect reference may be made to the case of *Odysseas Georghiou v. The Republic* (supra) to the effect that it is not properly open to the Public Service Commission to evaluate the contents of the confidential reports by reference to the knowledge about the reporting or countersigning officers making them, although it is open to the Commission to give due weight to the fact that different reporting officers cannot be treated as having made their assessments by using identical standards and that, therefore, some

allowance may have to be made for possible differences in the evaluation of various candidates when having not been reported on by the same reporting or countersigning officer. This approach differs from whatever learned counsel for the applicant tried to impute in his address. Before leaving this subject of confidential reports, another extract from the judgment of Triantafyllides, P., may be usefully cited by way of guidance, from the case of *Odysseas Georghiou* (supra) at page 82 which reads as follows:

"We are in agreement with the learned trial Judge that the whole career of the candidates concerned had to be taken into account; this view has been propounded in, inter alia, *Georgiades and Another v. The Republic*, (1975) 3 C.L.R. 143, 150; but, in the judgment in that case it is stated (at p. 151) that it is not wrong to give due weight to the more recent confidential reports; and the importance of the more recent of such reports has been also recognized in *Iacovidis v. The Republic*, (1966) 3 C.L.R. 212, 221, and may be derived, too, from the provisions of paragraphs (c) and (d) of subsection (1) of section 44 of Law 33/67."

Also vide *Philotheou v. The Republic* (1985) 3 C.L.R. 662.

As regards the case where a candidate is recommended by the Head of his Department, as it happened in this case, the position is that such a recommendation is deemed to be a separate factor pointing to the suitability of the candidate for promotion (vide *Spanos v. The Republic* (1985) 3 C.L.R. 1826 at p. 1831).

With the above legal position in mind, I have considered very carefully the undisputed facts of this case, and I have arrived at the conclusion that the sub judge decision suffers from no legal defect. The sub judge decision is duly reasoned and such reasoning may also be found in the official records that were before the Commission for consideration, at the material time. In arriving at this conclusion, I had in mind all along the principles applicable on this issue, which were laid down by the Supreme Court in a number of cases. I need not refer in detail to such cases and I

shall only confine myself to cite the case of *Ionides v. The Republic* (1982) 3 C.L.R. 1136, where a brief analysis on this issue was made by Louis J., at pp. 1149-1150.

Furthermore, I hold the view that the respondent Commission weighed together all relevant considerations and selected the most suitable candidate by attributing, as he was entitled to do so, more weight to the recommendations of the Head of the Department and to the confidential reports of the interested party, which were undisputedly superior to those of the applicant and thus merit prevailed in the present case. In the case of *Georgiades & Another v. The Republic* (1970) 3 C.L.R. 257 at p. 268, the following was said:

"... where a person appointed to a post is duly qualified under the relevant scheme of service this Court will not, on the issue of suitability, substitute its own discretion for that of the Commission provided that the Commission's discretion has been properly exercised; in other words, the mere fact that the Court, had it been in the position of the Commission, might possibly not have selected for appointment the same candidates as the Commission, is not in itself sufficient ground for the Court to interfere with the decision of the Commission (and see, too, the case of *Vonditsianos and The Republic* (1969) 3 C.L.R. 83; on appeal (1969) 3.C.L.R. 445)."

As regards the allegation of misconception of fact, learned counsel for the applicant based his argument on the fact that a criminal case No. 568/87 was filed in the District Court of Nicosia against the interested party; which covered charges of forgery, fraudulent false accounting, stealing by person in public service, stealing cattle and others and which referred to a period prior to the promotion of the interested party and allegedly reflected the unsatisfactory way the interested party was carrying out his work at Athalassa Farm. However the Assize Court of Nicosia, that tried that case, acquitted and discharged the interested party on all counts as no prima facie case had been made out against him.

5 ~~Learned counsel~~ for the applicant in substantiating his argument referred to certain adverse comments, that were made by the Court in the judgment of that case, as regards the unsatisfactory way that the interested party had been carrying out his work and submitted that these comments are a sufficient proof that the respondent Commission acted on a misconception of fact in promoting the interested party on the ground of merit.

10 A misconception of fact exists inter alia, when the factual substratum upon which the administrative organ based its decision is non-existent. Such a misconception must be material and the presumption that an administrative decision is reached after a correct ascertainment of the relevant facts can be rebutted if a litigant succeeds in establishing that there exists at least a probability that a misconception had led to the taking of the decision complained of. A misconception of fact can be proved by reference to the administration file of the case and to the reasoning of the sub judice decision. A useful reference in this respect may be made in the Administrative Law of Michael Dendias, ed. 1965, vol. 3, at pp. 15 328 and 329 and in Stasinopoulos on the Law of Administrative Acts-1951 p. 304 etc. Also vide *Thalassinos v. The Republic* (1974) 3 C.L.R. 290, 294; *Christodoulou v. The Cyprus Telecommunication Authority* (1978) 3 C.L.R. 61, 69; *Serafim v. The Republic* (1985) 3 C.L.R. 286.

25 In the case of *Soteriadou and Others v. The Republic* (1985) 3 C.L.R. 300, the Full Bench of this Court held that the exercise of the discretionary powers of the respondent Commission was rendered defective because it reached the sub judice decision without knowing that confidential reports were biased. That factor is a material factor which was not within the knowledge of the Commission at the material time and it was not and could not have 30 been taken into consideration.

35 In this case there is no complaint that the confidential reports before the respondent Commission were tainted with bias in any way and the only material which was placed before me on this issue, is the said judgment of the Assize Court of Nicosia in crimi-

nal case No. 568/87, which was not and could not have been before the Commission at the material time. In that case, as I have already stated, the interested party was acquitted and discharged on all counts and any adverse comments made by the Court against him were mere observations and not findings as regards his merit. These observations in my view are not sufficient to rebut the presumption that the sub judice decision was reached after a correct ascertainment of the relevant facts. 5

In the circumstances, I have arrived at the conclusion that there was no misconception of fact, there was due inquiry and that it was reasonably open to the respondent Commission to take the sub judice decision. 10

Furthermore, the applicant failed to discharge the onus of establishing his striking superiority over the interested party, or that the sub judice decision ought to be annulled on any of the other grounds aforementioned. 15

In the result the recourse fails and is hereby dismissed and the decision of the respondent Commission is affirmed.

There will be no order as to costs.

Recourse dismissed. 20
No order as to costs.