

1988 December 10

[BOYADJIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS ARISTODEMOU,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE PUBLIC SERVICE COMMISSION,
2. THE MINISTER OF COMMUNICATIONS AND WORKS,

Respondents.

(Case No. 118/86).

5 *Public Officers—Promotions—Merit, Qualifications, Seniority—7 years' seniority of applicant over the interested party, equality as regards qualifications, but superiority of interested party over the applicant as regards merit—Promotion of interested party, who was, also, recommended by the Head of the Department for promotion, reasonably open to the respondents.*

General principles of administrative law—Presumption of regularity—Effect.

Misconception of fact—Burden to establish—Cast on applicant.

10 *Public Officers—Promotions—The principles that should guide the Court, when confronted with a recourse challenging a promotion.*

The facts of his case appear sufficiently in the judgment.

*Recourse dismissed.
No order as to costs.*

*Cases referred to:**Theodossiou v. The Republic*, 2 R.S.C.C. 44;*Partellides v. The Republic* (1969) 3 C.L.R. 480;*Lordos and others v. The Republic* (1974) 3 C.L.R. 447;*The Republic v. Ekkeshis* (1975) 3 C.L.R. 548;*The Republic v. Haris* (1985) 3 C.L.R. 106;

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Aristodemou v. The Republic (1986) 3 C.L.R. 434;*Elia v. The Republic* (1985) 3 C.L.R. 38;*HjiSavva v. The Republic* (1982) 3 C.L.R. 76.**Recourse.**

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Recourse against the decision of the respondents to appoint the interested party to the post of Airport Supervisor in the Department of Civil Aviation in preference and instead of the applicant.

Th. Montis, for the applicant.*M. Cleridou - Tsiappa (Mrs.)*, for the respondents.

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Cur. adv. vult.

BOYADJIS J. read the following judgment. By the present recourse the applicant seeks a declaration of the Court that "the act and/or decision of the respondents published in the Official Gazette of the Republic on 14.2.1986 whereby they appointed Mr. Christakis Shekkeris in the permanent post of Airport Supervisor (Ordinary Budget) in the Department of Civil Aviation from 1.1.1986 instead of appointing and/or promoting the applicant to the aforesaid post, is void and without legal effect".

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The salient facts are briefly as follows:

5 By his letter dated 10 July 1985 addressed to the Chairman of the Public Service Commission, the Director-General of the Ministry of Communications and Works applied for the filling of one vacant post (Ordinary Budget) of Airport Supervisor in the Department of Civil Aviation. The Minister of Finance had agreed with the filling of the aforesaid post which, in accordance with the relevant scheme of service, is a promotion post. In view of this, the Public Service Commission decided on 18 July 1985 to submit to the chairman of the appropriate Departmental Board a list of the candidates together with the files of their confidential reports and the scheme of service of the post.

15 By his letter dated 14 November 1985, the Chairman of the Departmental Board informed the Public Service Commission that in its meeting of 18 October 1985 it had unanimously decided (a) that five candidates including the applicant and the interested party possessed the qualifications required by the scheme of service and (b) to recommend for promotion four candidates including the interested party Christakis Shekkeris but not including the applicant. Having evaluated the several candidates, the Departmental Board expressed the view that the interested party was the best as far as merit is concerned and that the applicant was lacking in merit compared with the four candidates which it had decided to suggest for promotion.

25 At its meeting on 30 November 1985, the Public Service Commission decided to examine the matter at a subsequent meeting which the Director of the Civil Aviation Department would be invited to attend. This meeting took place on 20 December 1985. The Director of the Department of Civil Aviation was present and he recommended for promotion to the aforesaid vacant post the interested party whose performance was better than that of the others. The Commission then dealt with the evaluation and the comparison of the candidates. It examined the material facts appearing in the file which had been opened for the filling of the post and the personal files and the confidential reports of the can-

didates and took also into consideration the conclusions of the Departmental Board and the opinion and recommendation of the Director of the Department of Civil Aviation and decided to adopt the latter's recommendation. The minutes of the meeting are concluded by the statement that, having taken into consideration all the material facts before it, the Commission decided on the basis of the established criteria taken together (merit, qualifications, seniority) that the interested party is superior compared with all the other candidates and it proceeded to promote him, being the most suitable candidate, to aforesaid vacant post as from 1st January 1986. The aforesaid decision of the Public Service Commission was published in the Official Gazette of the Republic dated 14 February 1986.

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Feeling aggrieved with the aforementioned decision of respondent No. 1, the applicant seeks to have it annulled through the present recourse filed on 18 February 1986 on the following grounds:

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"(a) The act and/or decision is contrary to the Law and the relevant Regulations and/or contrary to the lawful procedure and the lawful criteria of selection.

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(b) The act and/or decision was taken in excess of power and/or in abuse of power and/or by the wrong exercise of discretionary power, having regard to the qualifications, the merit and the experience of the candidates.

(c) The act and/or decision was the result of material misconception concerning the facts, the Law and the lawful criteria of selection.

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(d) The interested part does not have the qualifications for the post set out in the Scheme of Service.

(e) The act and/or decision is not duly reasoned and/or is based on a misconceived reasoning".

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5 The interested party, though duly served with notice of these proceedings, has not appeared and has not taken any part therein. In their opposition filed on 28 May 1986, the respondents allege that the sub-judice decision is correct and in accordance with the law and was taken by respondent 1 after due consideration of all relevant facts and in the proper exercise of its discretionary powers vested in it by the Public Service Laws.

10 In his written address learned counsel for the applicant submitted that the applicant and the interested party have more or less the same qualifications and the same knowledge of English language; that as far as merit is concerned there is no difference between the two for the years 1982 and 1983 since they are both rated in their respective confidential reports as very good; that it is only for the year 1984 that in the confidential reports the applicant is rated as very good whereas the interested party is rated as excellent; that the Court should reject the confidential reports for 1984 in view of the fact that the interested party was therein upgraded to "excellent" because there appears each year from 1982 onwards an up-grading of the ability of the interested party to express himself in writing and of the standard of his intelligence, something which is practically impossible; that the applicant has a three years' seniority over the interested party; and that, had the respondents considered the two men equal as they ought to have done as regards their qualifications and merit, the applicant's seniority over the interested party ought to have led the respondents to the decision to promote the applicant to the sub-judice vacant post in preference to the interested party. In support of his last submission counsel referred the Court to the decisions in *Theodossiou v. The Republic*, 2 R.S.C.C. 44, and *Partellides v. The Republic* (1969) 3 C.L.R. 480, where it was held that, all other things being more or less equal, the criterion of seniority prevails. Mr. Montis for applicant has also submitted that in the sub-judice decision the respondents do not set out their specific reasons on account of which they have ignored the applicant's substantial seniority over the interested party; therefore, counsel concluded, the sub-judice decision must be annulled for lack of due reasoning.

I shall now examine the submissions of counsel for the applicant in the light of the material placed before me which includes the personal files and the confidential reports of the applicant and the interested party respectively and bearing also in mind the following principles of administrative law:

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(a) In the absence of any concrete evidence establishing lack of a correct ascertainment of all relevant facts, the presumption of regularity - "omnia presumuntur rite esse acta" applies and the administrative decision is thereby treated as having been reached after proper ascertainment and evaluation of all relevant facts: *Paraskevas Lordos and others v. The Republic* (1974) 3 C.L.R. 447;

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(b) The burden of establishing that an administrative decision was reached on the basis of a misconception about a material fact lies on the person challenging the validity of such decision on this ground: *The Republic of Cyprus v. Nicolas Ekkeshis* (1975) 3 C.L.R. 548;

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(c) The paramount duty of the Public Service Commission in effecting promotions is to select the candidate most suitable in all the circumstances of each particular case for the post in question. The length of service of each candidate, though always a factor to be considered, is not always the exclusive vital criterion for such promotion: *Michael Theodossiou v. The Republic* (supra);

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(d) The recommendation of a Head of Department is a most vital consideration which should weigh with the Public Service Commission in cases of promotion for the simple reason that the Head of Department is in a position to appreciate best of all the demands of the post to be filled and the suitability of the several candidates to discharge efficiently the duties of the post. This applies a fortiori to cases where specialized knowledge and ability are required for the performance of certain duties. If the Public Service Commission decide to take the exceptional course and disregard such recommendations, they

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have to give their reasons for so doing: *M. Theodossiou v. The Republic* (supra) and *The Republic v. Haris* (1985) 3 C.L.R. 106;

5 (e) Section 44(3) of the Public Service Law 1967 (Law 33/67) provides that, in making a promotion, the Commission shall have due regard to the recommendations made in this respect by the Head of Department in which the vacancy exists, and to the annual confidential reports on the candidates;

10 (f) In cases of appointment or promotions to any public office "merit shall carry the most weight because the functions of a public officer are better performed in the general interest of the public by a public officer who is better in merit than seniority or qualifications" per Stylianides, J. in *A. Aristodemou v. The Republic* (1986) 3 C.L.R. 434, at p. 443; and

15 (g) In order to succeed in a case such as the present one, an applicant must establish his striking superiority over the parties selected for promotion. In *Michael Elia v. The Republic* (1985) 3 C.L.R. 38, Stylianides, J. said the following at p. 45:

20 "It is a settled principle of administrative Law that 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
25 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 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
30 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 - (*Odysseas Georghiou v. The Republic*, (1976) 3 C.L.R. 74, at p. 83)."

The expression "striking superiority" in the context of the last
aforementioned principle means nothing less than the applicant's
superiority must be a striking, self-evident and unquestionably
apparent fact emerging in on any view of the combined effect of
the merit, qualifications and seniority of the competing candi-
dates: *Hadjisavva v. The Republic* (1982) 3 C.L.R. 76. 5

Having referred to the principles that will guide me in the ex-
amination of the present case, I now focuss my attention to the
submissions of the applicant who has abandoned, in the course of
the trial, his allegation set out in the grounds of law on which the
application is based, to the effect that the interested party does not
possess the qualifications required by the scheme of service for
the sub-judice post, and has in essence limited his complaint to
the allegation that the seniority of the applicant should, in the cir-
cumstances of the present case, have tilted the scales in favour of
the promotion of the applicant instead of the interested party. The
factual substratum of this complaint consists of the allegation of
the applicant that he and the interested party are more or less equal
as far as qualifications and merit. If this allegation is correct, then
the sub-judice decision is liable to be annulled because applicant's
seniority should prevail in accordance with the principles of ad-
ministrative law hereinabove set out. 10
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It is common ground that the applicant has a substantial senior-
ity over the interested party. It is also common ground that the
qualifications of the two men are more or less equal. This is not,
however, true as far as the merit of the two men is concerned.
The Public Service Commission acted throughout on the assump-
tion, and this is the reasoning given for their decision, that the in-
terested party is by far superior in merit compared with the appli-
cant. Are they right in their assumption? Their counsel says that
they are right. They had the opinion and the recommendation to
that effect of the Head of the Department concerned. Additional 30
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5 evidence of this fact is to be found in the confidential reports which were before the Commission and which for a number of consecutive years up to the date of the sub-judice decision compose a picture plainly illustrating constant superiority over the applicant.

It follows from the above that the argument of the applicant that, all other things being equal, his seniority should prevail, has no sound foundation and cannot succeed.

10 The sub-judice decision was reasonably open to the respondent Commission and no valid ground exists for the Court to interfere with the result of the exercise of the Commission's discretion in the matter. Far from discharging the onus cast upon him by showing that the applicant has striking superiority over the interested party, the relevant material before the Commission clearly
15 shows that the interested party was superior in merit compared with the applicant. Furthermore, a perusal of the relevant minutes and the material in the file shows that the Commission reached its sub-judice decision after full enquiry in accordance with lawful procedure, duly applying the correct criteria of selection and has
20 given adequate reasons for it.

In the result, the recourse must fail. I do not propose, however, to make any order as to costs considering all the circumstances.

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*Application dismissed.
No order as to costs.*