

1988 December 22

[PIKIS, J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ELIAS TSANGAROGLOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 582/87).

Public Officers—Promotions—Confidential reports—Circular 49/179 for their preparation, Reg. 9—Breach of—Whether and in what circumstances leads to annulment of the final act of promotion.

Public Officers—Promotions—Judicial control—Principles applicable.

Public Officers—Promotions—Head of Department—Recommendations—Departure on grounds of other candidates' superiority in merit and seniority—Justified. 5

The applicant submitted that the sub judice promotion must be annulled for lack of due inquiry.

During the judicial inquiry, it was revealed that the confidential reports of the applicant and the interested party for 1985 were amended by the countersigning officer in breach of Reg. 9 of the aforesaid circular by downgrading both of them in two items from "excellent" to "very good". 10

Finally, it must be noted that the Head of the Department had recommended a candidate, who is not a party to these proceedings. 15

Held, dismissing the recourse: (1) The candidate recommended by the Head of the Department ran third in merit and was the less senior of the

three candidates. There was, therefore, sufficient justification to depart from his views.

5 2) The Commission duly noted applicant's seniority and the interested party's light edge in merit. The submission for lack of due inquiry has not been substantiated. The decision was reasonably open to the Commission.

10 3) Illegality in the preparation of the confidential reports does not automatically lead to annulment of the final act of promotion. It leads to such a result, when the report in question constituted a material consideration for the promotion. To have that effect it must result to material misconception of fact. In these cases, the changes left unaffected the general picture of merit of the candidates.

*Recourse dismissed.
No order as to costs.*

Cases referred to:

15 *Sekkides v. The Republic* (1988) 3 C.L.R. 2136;

Papatryfonos v. The Republic (1987) 3 C.L.R. 1882.

Recourse.

20 Recourse against the decision of the respondent to promote the interested party to the post of Chief Foreman in preference and instead of the applicant.

Ph. Valiantis, for the applicant.

L. Koursoumba (Mrs.), for the respondent.

Cur. adv. vult.

25 PIKIS J. read the following judgment. Elias Tsangaroglou, the applicant, Andreas Constantinides, the interested party, and a third party, namely, Christos Triteos, were the three candidates short listed by the Departmental Committee (set up under s. 36, Law 33/67) for promotion to the vacant post of Chief Foreman in

the Department of Public Works. All three held the position of Assistant Chief Foreman that qualified them for promotion to the post of Chief Foreman, one step in the hierarchical ladder.

In the report of the Departmental Committee, in addition to listing the recommended candidates in alphabetical order, reference is made to their seniority, qualifications and the general effect of their confidential reports. Before embarking on the process of selection, the P.S.C. invited the views of Mr. Michael Christodoulides, the Director of the Department of Public Works. He recommended Mr. Triteos for promotion. After due consideration of the service record and confidential reports bearing on the candidates, the respondents chose the interested party as the most suitable candidate and on that account promoted him to the post of Chief Foreman.

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The applicant challenges the decision as invalid for lack due inquiry into the facts defining the suitability of the candidates for promotion, particularly those affecting the applicant. Specifically, they complain of failure on the part of the respondents to appraise correctly the content of their confidential reports, the qualifications of the candidates or evaluate in perspective the factor of seniority. Examination of the sub judice decision and the reasoning accompanying it, does not bear out any of the above complaints. On the contrary, the inevitable inference is that respondents made a thorough inquiry and duly acquainted themselves of the relevant facts and addressed every consideration that should guide them in the exercise of their discretion with a view to selecting the candidate best suited for promotion.

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First they considered the confidential reports on the parties a principal guide to the identification of the merits of the candidates and sequential suitability for promotion; and by way of example they referred to the overall effect of their confidential reports for the five years immediately preceding the sub judice decision. The picture conveyed thereby was, as noted in their minutes, indicative of the overall performance of the candidates in the service. Naturally, reports for recent years are apt to give an up-to-date ac-

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count of the performance of a candidate. A comparison of the confidential reports on the candidates reveals that the interested party had a slight edge over the applicant, a fact duly noted in the report of the Departmental Committee too. The exercise led the P.S.C. to conclude that the candidate recommended by the Head of the Department ran third in terms of merit as defined in the confidential reports. This conclusion, coupled with the fact that Christos Triteos was the least senior of the three candidates, offered, as noted in the decision, sufficient justification for departing from the recommendations of the Head of the Department. Contrary to the submission made on behalf of the applicant, the P.S.C. addressed specifically the question of seniority and noted that the applicant was the most senior of the three candidates. As can be deduced from their decision, they chose the interested party mainly on account of the confidential reports compared to those of the remaining two candidates.

The P.S.C. is the body charged, under the Constitution and the Public Service Law, to make appointments and promotions in the public service. They are the vestees of the discretionary power reposed in them by the Constitution and the law. Their choice will be sustained so long as it was one reasonably open to them on consideration of the facts relevant to their decision. In this case the selection was at the least reasonably open to them. Normally the judicial inquiry would have ended here. Nonetheless it cannot thus be concluded because of a fact that emerged in the course of judicial inquiry affecting the confidential reports on the applicant and the interested party for the year 1985. The counter - signing officer made alterations to the reports of both candidates without adhering to the procedure prescribed by Reg. 9 of the circular (made in 1979) regulating the preparation of confidential reports. He down-graded each of the two candidates on two items, reducing their rating from "excellent" to "very good" without prior consultation with the reporting officer and without recording his reasons for the revision of their rating. However, the interference left unaffected the overall rating of both candidates for the year 1985. The grading of each one for the year 1985 was "excellent", each having scored a rating of "excellent" on eight subjects and a

score of "very good" on the remaining four items of assessment.

The implications stemming from breach of Reg. 9 were the subject of examination and discussion in numerous decisions of the Supreme Court. The caselaw was reviewed in a recent decision of the Full Bench - *Sekkides v. Republic* (1988) 3 C.L.R. 2136 that offers authoritative guidance on the implications of breach of the circular, Reg. 9 in particular. 5

The circular is in pari materia with regulatory enactments stipulating the legal regime within which the Administration must operate in evaluating the performance of public servants. It establishes the legal framework for the assessment of the service of members of the public service. Every departure from its provisions constitutes an irregularity, the effects of which must be pondered first with regard to the report itself and then with respect to the sub judice decision. At issue is the validity of the sub judice decision and not the validity of the confidential report as such. What we must examine is the effect of the irregularity on the confidential reports themselves and secondly the failure on the part of the P.S.C. to notice the irregularity and examine it in the context of the decision making process. In *Papatryphonos v. Republic* (1987) 3 C.L.R. 1882 referred to in *Sekkides* (supra), it was decided that consideration by the P.S.C. of a confidential report fraught with illegality in the sense of Reg. 9, does not automatically invalidate the decision of the appointing body. To justify the annulment of the decision, the report tainted by the irregularity must have constituted a material consideration for the decision. Not every irregularity in the selection process has an invalidating effect on the decision taken. To have that effect it must result in material misconception of the facts of the case. Applying the above to the facts of our case, we may note the following:- 10 15 20 25 30

(a) Stripped on the impermissible changes made to the confidential reports of the applicant and the interested party for the year 1985, the position with regard to their rating would remain unchanged.

(b) Disregard of the reports for the year 1985 for both candidates would similarly leave unchanged the general effect of their confidential reports.

5 In the light of the above, I am driven to the conclusion that the irregular course followed by the countersigning officer in the submission of the confidential reports for the two candidates for the year 1985 did not result in a material misconception of the facts relevant to the merits of the parties as disclosed in their confidential reports.

10 Hence the recourse is dismissed. The sub judice decision, is confirmed pursuant to the provisions of para. 4(a) of Art. 146.

Let there be no order as to costs.

*Recourse dismissed.
No order as to costs.*