

1988 February 26

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PARASKEVI ZENIOU EVANGELI AND ANOTHER,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Cases Nos. 309/86 and 310/86).

Recourse for annulment—Filing before publication, required by law, of the sub judice decision—Whether premature—In the circumstances, the question was determined in the negative.

5 *Public Officers—Promotions—Head of Department—Recommendations—Inconsistent with overall picture as regards merit and qualifications and, moreover, contained no reference to the substantial seniority of the interested parties over the applicants—Rightly disregarded.*

Public Officers—Promotions—Merit—Assessing of—The significance of the confidential reports and, especially, of the most recent ones.

10 *Public Officers—Promotions—Publication of, in Official Gazette—Time of publication—The Public Service Law 33/67, sections 44(6) and 44(5).*

By means of these recourses the applicants impugned the decision to promote interested parties Agathocleous and Kyprianou to the post of Ward Supervisor, Department of Mental Health Services.

15 The interested parties raised, inter alia, a preliminary objection that the recourses are premature, in that they were filed before publication of the sub judice decision in the Official Gazette.

The rating of the applicants in the confidential reports of the last 2 years is more or less equal with interested party No. 2 and marginally better from the rating of interested party No. 1.

The applicants, however, were recommended for promotion by the Head of the Department, who, in recommending applicant in recourse 309/86, stated that her merit is very great in comparison with others and she has qualifications as well. 5

As regards qualifications, the applicants and the interested parties are more or less equal.

Interested party No. 1 has a seniority of over 11 years over applicant in Case No. 309/86 and a seniority of 6½ years over the applicant in Case No. 310/86, whilst interested party No. 2 has a seniority of 10½ years over applicant in Case No. 309/86 and a seniority of 6 years over the applicant in Case No. 310/86. 10

Held, *dismissing both the preliminary objection and the recourse*: (1) Section 44(6) of Law 33/67 provides that "Promotions shall be published in the Official Gazette of the Republic", but does not say when. In view of the provisions of s. 44(5) one would expect the publication to be made within reasonable time after the acceptance in writing of the officer promoted. 15

The objection, however, is in the circumstances untenable, because at the time the recourse was filed the applicants had an existing legitimate interest. Furthermore the relevant publication in the Official Gazette of the Republic, sanctioned retrospectively the certainty of the administrative decision in question. 20

(2) In deciding on the merits of the candidates it is necessary to look at the confidential reports of the candidates and especially the most recent ones. 25

(3) The recommendations of the Head of the Department were inconsistent with the overall picture presented by the confidential reports and the personal files; furthermore the failure of the Head of the Department to pay any heed to seniority and the absence of a single word towards that direction was impermissible. 30

(4) The respondent Commission gave clearly the reasons for non adopting the recommendations in question.

(5) The applicants in both cases failed to establish "striking superiority" over the interested parties.

*Recourses dismissed.
No order as to costs.*

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Cases referred to:

HadjiGregoriou v. The Republic (1975) 3 C.L.R. 477;

Jacovides v. The Republic (1966) 3 C.L.R. 212;

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

Republic v. Koufettas (1985) 3 C.L.R. 1950;

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Hjiloannou v. The Republic (1983) 3 C.L.R. 1041.

Recourses.

Recourses against the decision of the respondents to promote the interested parties to the post of Ward Supervisor in the Department of Mental Health Services in preference and instead of the applicants.

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E. Efstathiou, for applicants.

A. Papasavvas, Senior Counsel of the Republic, for respondent.

L. Papaphilippou, for interested party 1 in both cases.

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A.S. Angelides, for interested party 2 in both cases.

Cur. adv. vult.

LORIS J. read the following judgment. Applicants in the above intituled recourses, which were heard together on the application of all concerned as presenting common factual and legal is-

sues, challenge the decision of the respondent P.S.C. dated 27.3.86, whereby interested parties No. 1 and 2 namely Christophoros (Takis) Aghathocleous and Eleni Kyprianou together with another 2 candidates, who were not joined as interested parties in the present proceedings, were promoted to the post of Ward Supervisor, Department of Mental Health Services, Ministry of Health, in preference to and instead of the applicants. 5

Before proceeding to examine the merits of the aforesaid cases I shall deal briefly with two preliminary objections raised by the interested parties in both recourses. 10

A. Objection referring to the title of both recourses. Both recourses were initially referring to the respondent as "The Republic of Cyprus, through the Public Service Authority"; during the hearing of both recourses both interested parties conceded that the word "Authority" was inserted through clerical error and should read instead "Commission". In the circumstances, on 8.7.1987 I allowed an amendment of the title in respect of the Respondent so as to read "The Republic of Cyprus, through the Public Service Commission", being satisfied that the amendment at that stage, as above, did not prejudice either of the parties in these proceedings, or the interests of justice, in any way. 15 20

B. Objection that both recourses are premature having been filed before the publication of the sub-judice decision in the Official Gazette of the Republic.

In considering this objection I shall confine myself to the particular facts of the cases under consideration and the relevant provisions of our Law. 25

On 27.3.86 the respondent P.S.C. reached the sub-judice decision thereby selecting for promotion to the post of Ward Supervisor, Department of Mental Health Services, 4 candidates, the interested parties being the two out of the four selected; it is clear therefore that the applicants were not selected for promotion. Furthermore the respondent Commission decided to make an offer accordingly, to those selected. 30

Thus on 14.4.86 the respondent P.S.C. forwarded to both interested parties the offer in question and invited them to acknowledge whether they are accepting such offer (vide red 36 in the personal file of interested party No. 1 - Ex. 3A and red 63 in the personal file of Int. Party No. 2 - Ex. 4A).

On 19.4.86 both interested parties addressed to the respondent their respective replies indicating their acceptance of the offer made to them (vide red 37 in Ex. 3A and red 64 in Exh. 4A).

On the same day i.e. on 19.4.86 the Director of the Mental Health Services, (who obviously came to know about the offer and the respective acceptance by the interested parties, as the whole correspondence between the P.S.C. and the interested parties was exchanged through him) issued an announcement to all members of the Staff of Mental Health Services (vide Exh. 1 attached to the address in reply) informing all concerned of the promotion of the 4 candidates to the said post as from 15.4.86.

Both applicants filed the present recourses on 30.4.86.

The relevant publication in the Official Gazette of the Republic was made on 6.6.1986; and it is clearly stated therein that the promotions in question were made with effect as from 15.4.1986.

It is true that s. 44(6) of Law 33/67 provides that "Promotions shall be published in the Official Gazette of the Republic". It is significant to note that it does not say when. In view of the provisions of s. 44(5) one would expect the publication to be made some time after the acceptance in writing of the officer promoted; and of course within reasonable time thereafter.

The time that elapsed from the acceptance of the interested parties up to publication is, in my view, quite reasonable.

The applicants obviously came to know about the finalized sub judice decision from the aforesaid announcement of the Director of Mental Services dated 19.4.1986; and they filed their respec-

tive recourses on 30.4.1986. In the circumstances they had an existing legitimate interest at the time.

Furthermore the relevant publication in the official Gazette of the Republic on 6.6.86, sanctioned retrospectively the certainty of the administrative decision in question. 5

In the circumstances the objection under B above is untenable and is accordingly dismissed.

Reverting now to the merits of the cases under consideration:

Both applicants complain that the respondent P.S.C. failed to select the most suitable candidates for promotion by ignoring the superior merit and qualifications of the applicants, and that in reaching at the sub-judice decision the respondent disregarded the recommendation of both applicants by the Head of the Department concerned and selected for promotion, without due inquiry, the interested parties who were not so recommended. 10
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In deciding on the merits of the candidates it is necessary to look at the confidential reports of the candidates "and especially the most recent ones" (*HadjiGregoriou v. The Republic* (1975) 3 C.L.R. 477 at p. 483).

"The importance of the more recent of such reports has been, also recognised in *Jacovides v. The Republic* (1966) 3 C.L.R. 212, 221, and may be derived too from the provisions of paragraphs (c) and (d) of sub-section (1) of section 44 of Law 33/67" (vide *Odyseas Georghiou v. The Republic* (1976) 3 C.L.R. 74 at p. 82). 20
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The rating of the applicants in the confidential reports of the last 2 years is more or less equal with interested party No. 2 and marginally better from the rating of interested party No. 1. Thus both applicants were rated for the years 1984 and 1985 with 8-4-0 whilst interested party No. 1 was rated for 1984 (4-8-0) and for 1985 (6-6-0). Interested party No. 2 was rated 7-5-0 for the years 1984 and 1985, as well. 30

5 It is true that the recommendation of the Head of the Department enhances the merit of a candidate and cannot be lightly disregarded. In the instant case the Director of Mental Services recommended as 1st and 2nd choices, Araouzos and Petridou, who are not parties in the present proceedings, and as 3rd and 4th choices the applicants in recourses 309/86 and 310/86 respectively. The respondent P.S.C. adopted the recommendations of the Head of the Department in respect of the candidates Araouzos and Petridou but did not follow his recommendations for both applicants giving clearly their reasons, in their aforesaid decision, for their aforesaid departure from the recommendations in questions.

15 The Head of the Department recommending applicant in case No. 309/86 as a 3rd choice, stated inter alia "that her merit is very great in comparison with others and she has qualifications as well."

20 Comparing his above statement, with regard to merit, with the merit of the interested parties as it transpires from the relevant confidential reports it may be observed that the aforesaid statement does not represent the reality; as already pointed out earlier on in the present judgment the rating of this applicant for the last 2 years is more or less equal with interested Party No. 2 and marginally better than that of interested party No. 1.

25 As regards qualifications, it is apparent from their personal files that the applicants as well as the interested parties possess a number of qualifications none of which is described by the Scheme of Service as an additional advantage. The picture, as regards qualifications, of the applicants and both interested parties may be described as more or less equal.

30 Independently of the merit and qualifications, the Head of the Department paid no heed at all to the overwhelming seniority of the interested parties over the applicants; and interested party No. 1 has a seniority of over 11 years over applicant in case No. 309/86 and a seniority of 6½ years over the applicant in case No. 310/86, whilst interested party No. 2 has a seniority of 10½ years

over applicant in case No. 309/86 and a seniority of 6 years over the applicant in case No. 310/86.

In view of the above it is clear that the recommendations of the Head of the Department in favour of both applicants were inconsistent with the overall picture presented by the confidential reports and their personal files; furthermore the failure of the Head of the Department to pay any heed to seniority and the absence of a single word towards that direction is impermissible. 5

In the circumstances, the recommendations of the Head of the Department in respect of both Applicants could be disregarded by the respondent P.S.C. (*Republic v. Koufettas* (1985) 3 C.L.R. 1950), who gave clearly their reasons in the sub-judice decision, for non adopting the recommendations in question. 10

It is quite clear that the applicants in both cases failed to establish "striking superiority" over the interested parties on anyone of the criteria envisaged by the Law and it is well settled that an administrative Court cannot intervene in order to set aside the decision regarding a selection for promotion unless it is satisfied by an applicant that he was strikingly superior to the one selected (vide *Hjloannou v. The Republic* (1983) 3 C.L.R. 1041 at p. 1045). 15 20

Having carefully gone through the material before me, I hold the view that the respondent P.S.C. reached at the sub-judice decision after carrying out a due inquiry into the facts and having also applied correctly the Law to the facts of both cases; in the circumstances the sub-judice decision was reasonably open to them and cannot be faulted on any ground put forward by the applicants. 25

In the result both recourses fail and they are accordingly dismissed; let there be no order as to costs. 30

*Recourses dismissed.
No order as to costs*