

1988 May 18

[KOURRIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS KAMENOS AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYRPUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 616/86).

5 *Annulment of an administrative act or decision—Reconsideration of matter—
Promotion of public officers—The reconsideration should be made on the
basis of the legal and factual situation existing at the time of the making of
the annulled promotions, except as regards the matter of qualifications, in
respect of which the crucial date is the date, when the Public Service Com-
mission received the request for the filling of the post.*

10 *Public Officers—Promotions—Qualifications—Due inquiry—Not restricted to
specific acts or manner—Commission not bound to conduct examinations
or hold interviews or to conduct the inquiry in the same manner in respect
of all the candidates—Commission may consider documents made after the
crucial date, but referring to the factual situation existing at such time.*

*Public Officers—Promotions—Qualifications—Scheme of service—
Interpretation and application of—Judicial control—Principles applicable.*

Public Officers—Promotions—Judicial control—Principles applicable.

15 *Misconception of fact—Promotions of public officers—Statement by police
that interested party had no previous convictions, whereas he had been con-
victed of gambling—As more than 5 years elapsed between conviction and
such reply, the reply was correct—The Rehabilitation of Convicted Persons
Law, 1981 (Law 70/81), section 5.*

Previous Convictions—The Rehabilitation of Convicted Persons Law, 1981 (Law 70/81)—Deletion of previous convictions after the lapse of a period of time.

The promotion of the interested party to the post of Inspector in the Department of prison was annulled for lack of due inquiry as to his qualifications and in particular as to the required standard of his education. 5

As a result the matter of promotion was reconsidered by the Public Service Commission. In the course of reconsideration the Commission applied to the Director-General of the Ministry of Education in order to assist them in their inquiry as to such qualification. 10

Finally, the Commission once again promoted the interested party to the post in question. Hence this recourse. The issues expounded by the Court in dismissing it sufficiently appear in the hereinabove headnote.

Recourse dismissed.

No order as to costs. 15

Cases referred to:

Alexandrou and Others v. The Republic (1986) 3 C.L.R. 1059;

Republic v. Safirides (1985) 3 C.L.R. 167;

Republic v. Pericleous (1984) 3 C.L.R. 557;

Mytides v. The Republic (1983) 3 C.L.R. 1096; 20

Maratheftou and Others v. The Republic (1982) 3 C.L.R. 1088;

Ktorides v. The Republic (1983) 3 C.L.R. 171;

Mikellides v. The Republic (1981) 3 C.L.R. 461;

Republic v. Rousos (1987) 3 C.L.R. 1217.

Recourse.

Recourse against the decision of the respondent to promote the interested parties to the post of Inspector in the Department of Prisons in preference and instead of the applicants.

5 *A. S. Angelides*, for the applicants.

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

N. Cleridou, for interested party A. Papadopoulos.

No appearance for interested party A. Pontikides.

Cur. adv. vult.

10 KOURRIS J. read the following judgment. By this recourse the three applicants challenge the decision of the Public Service Commission to promote the interested parties, namely Andreas Pontikides and Antonis Papadopoulos, to the post of Inspector in the Department of Prisons as from 15.9.83 in preference and/or
15 instead of the applicants.

 The post in question is a promotion post and before the sub-judice decision both the applicants and the interested parties were holding the post of Senior Warden.

 The facts of this case shortly are these:

20 The interested parties were promoted to the post of Inspector in the Department of Prisons by a decision of the Public Service Commission dated 27.8.83. The present applicants, together with other applicants, challenged the decision of the respondent Commission to promote the interested parties to the post of Inspector
25 in the Department of Prisons instead of them.

 Mr. Justice Savvides, who tried the recourse, in annulling the decision of the Public Service Commission. (See *Nicos Alexan-*

drou and Others v. The Republic (1986) 3 C.L.R. 1059) said the following at pp. 1070 and 1071: -

"My conclusion from all the material before me, is that first the Departmental Committee failed to make a list of those candidates possessing the qualifications stated in the scheme of service, as is required by Regulation 4 of the Regulations concerning the functions of Departmental Committees (Appendix 22) and secondly, the P.S.C. relied on the report of the Departmental Committee and the statement of the Head of the Department regarding the standard of education of certain candidates and refrained from conducting any further inquiry. The fact that the P.S.C. called another candidate, Mr. Christou, for an interview, does not mean, by itself, that the P.S.C. conducted a due inquiry into the matter of qualifications since as it seems from the minutes, such candidate was called because he had very good confidential reports. The fact also that Pontikides possesses a certificate of attendance of certain tutorial lessons for a period of three years does not exonerate the P.S.C. from its duty to inquire into the matter and evaluate this certificate. The failure of the P.S.C. to evaluate the qualifications of the candidates results in the absence of a due inquiry into the matter which is a ground for annulment. (see *Aristotelous v. Republic and Constantinidou v. Republic* (supra)). The recourse therefore, succeeds on this ground".

It appears that the ground on which the learned judge annulled the decision of the respondent authority was their failure to evaluate the qualifications of the candidates resulting in the absence of a due inquiry into the matter.

In the light of the said Judgment, the Public Service Commission made inquiries as to the qualifications of the interested party Pontikides and at a meeting that they held on 22.6.86, decided to promote again the interested parties to the said post retrospectively as from 15.9.83. Hence, the present recourse.

Counsel for the applicants based his address mainly on the fol-

5 lowing grounds: (1) The respondent authority acted under misconception of law and fact; (2) the respondent authority failed to conduct a sufficient inquiry into the possession by the candidates of the required qualifications and they failed to evaluate properly the qualifications of the interested party; (3) the respondent authority failed to select the most suitable candidate.

First Issue:

10 This issue concerns the "material time" in relation to the legal and factual situation of a case of reconsideration, and the "material time" at which a candidate must possess the required qualifications. This arises from a letter addressed by counsel of the Republic to the respondent authority as a result of the annulment of their decision by the Supreme Court advising them how to approach their new decision in reconsidering the matter. This letter, dated 7th July, 1986, is appendix 2 to the opposition, and the material part which is under attack by the applicant reads as follows:

20 "4. θα πρέπει να επανεξετάσετε την απόφαση σας με βάση το νομικό και πραγματικό καθεστώς που ίσχυε στις 27.8.1983. Ειδικότερα, θα πρέπει να προβείτε σε επαρκή έρευνα για να διαπιστώσετε αν ο κ. Ποντικίδης είχε στις 27.8.1983 το προσόν της 'καλής γενικής μόρφωσης επιπέδου όχι κατώτερου ενός απολυτηρίου πεντατάξιας σχολής μέσης εκπαίδευσης'."

25 It is settled now that on a new consideration of the matter by the Public Service Commission, after annulment of the previous decision for promotion, as in the case before us, the "material time" is (a) as regards the legal and factual situation to be taken into consideration, the time of the making of the first decision in the matter, (i.e. the one annulled). (See *R. v. Safirides* (1985) 3 C.L.R. 167 at p. 170); (b) as regards the date at which a candidate must possess the required qualifications, the date on which the request for the filling of the vacancy is received by the Public Service Commission. (*R. v. Perikleous* (1984) 3 C.L.R. 557 at pp. 580 - 588).

Counsel for the applicants submitted that the opinion of counsel of the Republic to the respondent authority in the letter of 7th July, 1988, is wrong because he advised them to conduct a sufficient inquiry to ascertain whether Pontikides had on 27.8.83 the qualification" of good general knowledge not below the standard of a certificate of a five year secondary school". Counsel said, that in accordance with the principles of administrative law the material time for possessing qualifications is the date on which the request for the filling of the vacancy is received by the Public Service Commission and not the date of its decision.

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Counsel for the respondents tried to explain that this part of his letter should have been read together with the preceding lines in which counsel advised the respondent authority to reconsider their decision on the basis of the factual and legal situation existing on 27.8.83. The argument of counsel for the respondent was very attractive but it cannot stand. Counsel for the respondent authority argued, in the alternative, that as the Chairman of the respondent authority issued a circular dated 11.6.84 (Appendix 11) stating that in the light of the *Pericleous case* (supra), the date at which a candidate must possess the required qualifications is the date on which the request for the filling of the vacancy is received by the Public Service Commission, then no misconception operated in the minds of the Chairman and Members of the Public Service Commission. Indeed, it appears from the contents of the said circular that the Chairman of the respondent Authority knew the "material time" at which a candidate must possess the required qualifications and it appears to me that in reconsidering the case in hand, they took into consideration the contents of the circular. Further, from a perusal of the files of the interested parties and the applicants, it appears that their qualifications on 22.8.86, when the P.S.C. promoted the interested parties, after reconsideration of the case, were the same on 27.8.83 when they reached their first decision which was annulled by the Court.

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Second Issue;

The second issue raised by learned counsel for the applicant

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relates to the evaluation of the qualifications of interested party Pontikides and to the inquiry carried out in relation to that issue.

5 The first decision of the Public Service Commission on 27.8.83 had been annulled on the ground that "Failure of the Public Service Commission to evaluate the qualifications of the candidates results in the absence of a due inquiry into the matter which is a ground for annulment". (See *Alexandrou and Others v. The Republic* (supra)). It should be noted that the failure of the Public Service Commission to evaluate the qualifications of the candidates, concerned only interested party Pontikides. The respondent authority in the course of reconsideration of the matter ought to carry out a due inquiry in order to enable themselves to evaluate the qualifications of the candidates, and without by any means surrendering their own discretionary power, applied to the Director - General of the Ministry of Education to assist them to form their opinion in relation to the qualifications of Pontikides.

20 Counsel for the applicant argued that the respondent authority failed to carry out a sufficient inquiry in relation to that issue and also failed to evaluate correctly the qualifications of interested party Pontikides. He said that the respondent authority should have carried out a written examination in order to ascertain whether Pontikides possessed the required qualifications envisaged by the scheme of service instead of applying to the Director - General of the Ministry of Education. He further contended that there is no law or regulation authorising the Director-General to evaluate the certificates of K.T.E.E., the school at which Pontikides had attended tutorial lessons.

30 Learned counsel for the respondent authority argued that the Public Service Commission could conduct their inquiry as aforesaid and they had no specific duty to call all candidates for an interview or to conduct an examination for that matter, and the fact that the inquiry as to the evaluation of the qualifications of other candidates was conducted in a different manner is irrelevant, and she referred the Court to Stassinopoulos, Law of Administrative Acts, 35 1951 at pp. 331 - 333, particularly at p. 333 where it is stated: -

Ἡ περίπτωσης τῆς αυτοδεσμεύσεως τῆς διακριτικῆς ἐξουσίας, ἤτοι ἡ οικειοθελῆς υπαγωγή αὐτῆς εἰς τύπους καὶ δεσμεύσεις, μὴ επιβαλλομένας, ἀλλ' οὐδ' ἀπαγορευομένας ὑπὸ τοῦ νόμου, δὲν ἀποκλείεται, ὡς συνιστώσα ἐκλογὴν μέσων πρὸς μόρφωσιν κρίσεως. Συνέπεια ὅμως τῆς αυτοδεσμεύσεως ταύτης εἶναι ὅτι δὲν δύναται ἐφεξῆς ν' ἀγνοηθῆ αὐτὴ αυθαιρέτως ὑπὸ τοῦ προκαλέσαντος αὐτὴν οργάνου, διότι τούτο θ' ἀποτελεῖ ἀπόδειξιν ἀσυνεπούς καὶ αυθαιρέτου, ἤτοι πλημμελοῦς ἀσκήσεως τῆς διακριτικῆς ἐξουσίας.'

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I agree with learned counsel for the respondent authority that the exercise of the duty of the Public Service Commission to ascertain the qualifications of each candidate as a factual situation is nowhere restricted to specific acts or manner. (See *Mitides v. The Republic*, (1983) 3 C.L.R. 1096, and *Maratheftou and Others v. Republic*, (1982) 3 C.L.R. 1088 at p. 1093.)

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In *Ktorides v. The Republic* (1983) 3 C.L.R. 171 at p. 173, it is stated:

"It is well-settled that this Court, as an administrative Court controlling the exercised of the discretion of the Public Service Commission, when it decides whether or not a candidate possesses the qualifications required under a scheme of service, examines only whether the Commission, on the material before it, could reasonably have come to a particular conclusion."

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In the case of *Mikellides v. The Republic* (1981) 3 C.L.R. 461 at p. 469, it is stated as follows: -

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"There is ample authority that the interpretation of a scheme of service and its application will not be interfered with by the Court, so long as such interpretation and application was reasonably open to the competent administrative organ. The application, however, by such organ of a scheme of service to the circumstances of each particular case, has to be made after sufficient inquiry regarding all material consideration."

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I have reached the conclusion that the Public Service Commission, without surrendering their ultimate competence and responsibility to decide themselves whether the candidate was qualified under the relevant scheme of service for promotion, whether in fact he had "a good education not below the standard of a leaving certificate of a five-year secondary school" inquired into the matter in a manner that was quite legitimately open to them before evaluating themselves the certificate of Pontikides as a factual situation and thereafter deciding whether this candidate was under the relevant scheme of service eligible for promotion.

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The inquiry was certainly carried out subsequent to 1983 but the matters that were taken into consideration were those that factually and legally existed on 27.8.83; and that on that day the Public Service Commission could legitimately have considered documents made subsequent to 1981 to decide whether on the material date in 1981 Pontikides had the required qualifications.

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In view of the above, I think, that it is evident in the light of the relevant material placed before the respondent Commission, that it could reasonably have reached the conclusion that the interested party possessed the required qualifications envisaged by the scheme of service.

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Third Issue

The third issue which calls for determination is whether the Public Service Commission promoted the most suitable persons to the post of Inspector in the Department of Prisons.

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It is a settled principle of administrative law that when an administrative 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, the administrative Court cannot interfere nor set aside the decision unless the applicant establishes that he had striking superiority over the interested party.

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The criteria which the Public Service Commission have to take into consideration when reaching a decision have been expounded in the case of *Republic v. Rousos* (1987) 3 C.L.R. 1217.

In the present case the respondent authority made a comparison of the confidential reports of the interested parties and the applicants and although it appeared that for the years 1980 - 1981 and 1982 all were rated as "very good", nevertheless, the interested parties had a progressively better rating in individual items whereas the applicants (except Yiannouris) had a progressively lower rating in individual items during the same years. Yiannouris was rated in the confidential reports as "good". Thus, it appears that interested parties and applicants Kamenos and Tilemachou with regard to merit, are more or less equal though the interested parties had a progressively higher rating in individual items during the last 3 years prior to the decision of the P.S.C. Also, all the applicants and the interested parties had possessed the qualifications envisaged by the scheme of service but, only the interested parties were recommended by the Head of the Department for promotion and the fact that applicant Kamenos is senior by 2 years to the interested parties, his seniority cannot override the strong recommendations of the Head of the Department in favour of the interested parties. It should be noted that the interested parties were senior to applicant Telemachou whereas applicant Yiannouris was senior to the interested parties.

Counsel for the applicants argued that no mention is made of applicant Yiannouris during the meeting of the Public Service Commission when they took the sub judice decision. It appears that Yiannouris was not recommended by the Departmental Committee for promotion but the Public Service Commission when they took the sub judice decision they had all the files of the candidates for promotion before them and in reconsidering the matter they reconsidered all candidates. The fact that no mention is made of applicant Yiannouris does not follow that the respondent did not consider him in taking the sub judice decision.

In the present instance, it was reasonably open to the respon-

dent Commission on the totality of the material before it and in the exercise of its relevant discretionary powers, with which I find no sufficient cause to interfere, to select as being the most suitable persons for promotion the interested parties instead of the applicants. It follows that the applicants have failed to establish any striking superiority which is necessary in order to justify any interference by the Court with the sub judice decision which was in the circumstances reasonably open to the respondent Commission.

10 Counsel for the applicant on the date fixed for clarifications, raised the point that the Court annulled the previous decision of the respondent authority because it found that the departmental committee failed to make a list of those candidates possessing qualifications stated in the scheme of service and consequently re-consideration of the matter should go back to the departmental committee for reconsideration.

I am not inclined to agree with counsel for the applicant that the learned Judge who tried the first recourse (see *Alexandrou and Others v. The Republic* (supra)), annulled the decision for failure of the departmental committee to make a list of the candidates possessing the qualifications stated in the scheme of service. At p. 1070 of his Judgment, he mentions the said failure of the departmental committee but he did not state that that was a ground for annulment. The material part of the judgment which annulled the decision appears at p. 1071 where it is stated: "The failure of the Public Service Commission to evaluate the qualifications of the candidates results in the absence of a due inquiry into the matter, which is a ground for annulment. (See *Aristotelous v. The Republic* and *Constantinidou v. The Republic* (supra). The recourse, therefore, succeeds on this ground."

30 It is thus clear that the ground for annulling the decision was the failure of the respondent authority to evaluate the qualifications of the candidates which resulted in the absence of a due inquiry into the matter.

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Counsel for the applicant also raised the point that the Public Service Commission failed to carry out any inquiry into the criminal convictions of interested party Pontikides. Counsel alleged that Pontikides was convicted on 26.6.75 for gambling and that this was not taken into consideration by the Public Service Commission in view of the advice of counsel for the Republic that this conviction was irrelevant for the purposes of promotion of a public servant. Indeed, s.44(1)(d) of the Public Service Law 1967, provides that "No officer shall be promoted to another office if he has been punished during the preceding 2 years for any disciplinary offence of a serious nature". In the present case, no disciplinary proceedings were brought against the interested party Pontikides. Further, the respondent authority inquired with regard to any previous convictions by the interested party Pontikides from the Chief of Police who replied on 7.5.85 (Appendix 8) that Pontikides had no previous convictions.

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This is a correct statement because by virtue of the Rehabilitation of Convicted Persons Law 1981 (Law 70/81), the previous convictions of persons for certain offences are deleted after the lapse of a certain period. In the circumstances of the present case, under s.5 of the said law, a conviction is deleted after the lapse of 5 years. Consequently, at the time the Public Service Commission took their first decision in 1983, interested party Pontikides had no previous convictions because his conviction for gambling was deleted after the lapse of 5 years from the date of the conviction which was in 1975.

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For all these reasons, the recourse fails and is dismissed, but with no order for costs.

*Recourse dismissed.
No order as to costs.*

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