1988 September 5

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS CHRISTOFI,

Applicant,

v.

THE MUNICIPALITY OF NICOSIA,

Respondent.

(Case No. 444/86).

Acts or decisions in the sense of Art. 146.1 of the Constitution—Appointments on contract for a limited duration to a local authority—Test applicable.

Constitutional Law—Equality—Constitution, Art. 28—Exclusion from appointments to a Municipal Office on ground of overqualification—Violation of the principle of equality.

Officers of local authorities—Appointments—Scheme of service—Exclusion from appointment on ground of overqualification—Abuse of power.

The two questions raised in this recourse are: (a) Whether an appointment on contract to the sub judice post in the Municipality for the limited period of one year is justiciable under Art. 146.1 of the Constitution, and (b) the legitimacy of the respondent's decision to exclude the applicant from being considered for appointment on the ground that he was overqualified.

Held, annulling the sub judice decision.

(1) The contractual character of an appointment to a public position does not of itself remove the act from the realm of public law. If the sub judice decision is intended to promote one or more of the purposes of a public authority, the action retains its public law character. In this case the appointment of the interested parties was inextricably connected with the objectives of the Municipality of Nicosia, the local authority.

(2) A scheme of service lays down the minimum qualifications necessary for appointment to a post. Exclusion of a candidate who possesses those qualifications amounts to a violation of the legislative framework governing the exercise of the discretionary powers of the Administration.

(3) Moreover, the distinction is arbitrary. It constitutes a breach of the right to equality. The classification of candidates and their grouping into categories for purposes of employment, beyond the requirements of the scheme of service, depending on the level of their formal education reflects archaic notions of social stratification incompatible with the concept of equality. Any suggestion that a candidate is too good for a particular post does, in an indirect way, subordinate the right to work to social status pegged to formal education.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

Paschalidou v. The Republic (1969) 3 C.L.R. 297;

Vassiliou and others v. The Republic (1969) 3 C.L.R. 417;

Mahlouzarides v. The Republic (1985) 3 C.L.R. 2342;

Antoniou v. The Republic (1984) 3 C.L.R. 623;

Mavronichis v. Industrial Training Authority (1986) 3 C.L.R. 2213;

HadjiKyriakou v. HadjiApostolou, 3 R.S.C.C. 89;

Valana v. The Republic, 3 R.S.C.C. 91;

Republic v. M.D.M. Estate (1982) 3 C.L.R.642;

Kalisperas v. Minister of Interior (1982) 3 C.L.R. 509;

The Hellenic Bank v. The Republic (1986) 3 C.L.R. 381;

Republic v. Arakian and Others (1972) 3 C.L.R. 294;

Apostolides and Others v. The Republic (1982) 3 C.L.R. 928.

Recourse.

Recourse against the decision of the respondent to exclude applicant from consideration for appointment on the ground that he was over-qualified for the post of Technical Assistant.

P. Vrahas, for the applicant.

K. Michaelides, for the respondent.

E. Lemonaris, for interested party Sp. Sophocleous.

A. S. Angelides, for interested party Y. Aspri.

Cur. adv. vult.

PIKIS J. read the following judgment. The fate of this recourse turns on the legitimacy of the action of the Municipality of Nicosia to exclude the applicant, a University graduate, from consideration for appointment on the ground that he was academically over-qualified for the post of Technical Assistant, a position on the lower rank of the establishement of the Technical Department of the corporation. The only other question that has to be decided, preliminary to the merits of the case, is the justiciability of this sub judice decision, in particular whether the decision of the Municipality involving temporary appointments of one year duration was a decision taken in the domain of public law.

The respondents advertised the position in the press and invited application for the filling of two posts in the Technical Department of the Authority. Seemingly the respondents regarded the employment of two Technical Assistants as necessary for the accomplishment of the functions of the Technical Department, notwithstanding the existence of only one organic post. It was in the contemplation of the respondents to appoint one of the two candidates that would be selected on a permanent basis after the expiration of the contractual appointment.

The scheme of service stipulating the qualifications and conditions for appointment required:

(a) A diploma of the Higher Institute of Technology or an equivalent qualification in Civil Engineering or Architecture, that is, a qualification of higher education, albeit, of lesser status than a University degree; or in the alternative.

(b) A Leaving Certificate of a Secondary School, preferably a Technical School.

117 candidates applied for the position. Of them only 78 turned up to take the written examination set by the respondents to test the knowledge and abilities of the candidates. Interested Party Spyroulla Sophocleous and the applicant performed best at the examination scoring 270 and 247 marks respectively, out of a total of 350 marks. The second interested party, Y. Aspris, secured 201 marks and was listed 13th in order of success. On the basis of the results of the written examination a short list was compiled that included the applicant and the interested parties. Thereafter the candidates named therein were invited to an oral interview.

. . Notwithstanding the procedure followed, the applicant and as far as we may gather, other candidates who held a University degree were excluded from consideration for appointment for policy reasons founded on the view that it was contrary to the interest of the service to appoint University graduates to low positions in the hierarchy. Past experience persuaded the respondents that appointment of University graduates to low positions created tension and often led to insubordination arising out of unwillingness on the part of University graduates to follow the instructions of superiors who were not likewise qualified.

Justiciability of the sub judice decision:

Counsel for interested party Spyroulla Sophocleous submitted that the sub judice decision is not amenable to review because it

concerns contractual appointments made to meet extraordinary or emergency needs of the municipality. This statement is not wholly correct for it appears that one of the two temporary appointments was made against an organic post.

The contractual character of an appointment to a public position does not of itself remove the act from the realm of public law. If the sub judice decision is intended to promote one or more of the purposes of a public authority, the action retains its public law character; and can be classified as such for purposes of judicial review under Art. 146 of the Constitution. This was pronounced to be the law by the Full Bench of the Supreme Court in *Antigoni Paschalidou v. Republic**. In *Mahlouzarides v. The Republic***, the Full Bench of the Supreme Court made an effort to define what distinguishes the public from the private domain for purposes of review of administrative action. Treading on the lines set forth in *Antoniou v. The Republic**** they indicated that the purpose intended to be served and promoted by the action of the Administration is the principal consideration for the pertinent classification of an act or decision*****. An inevitable inference in this case is that the appointment of the interested parties was inextricably connected with the objectives of the Municipality of Nicosia, the local authority. Consequently, a proper selection was directly conducive to the attainment of those purposes with the public having a corresponding interest in the achievement of those ends. Hence the action of the Administration sounded in the domain of public law and as such is subject to review under Art. 146.1 of the Constitution.

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* (1969) 3 C.L.R. 297. See also *Emmanuel Vassiliou & Others v. Republic* (1969) 3 C.L.R. 417.

** (1985) 3 C.L.R. 2342.

*** (1984) 3 C.L.R. 623.

**** See also *HadjiKyriacou v. HadjiApostolou*, 3 RSCC 89, at pp. 90-91; *Valana v. The Republic*, 3 RSCC 91, at pp.93-94; *Republic v. M.D.M. Estate* (1982) 3 C.L.R. 642 (F.B.); *Kalisperas v. Ministry of Interior* (1982) 3 C.L.R. 509; *The Hellenic Bank v. Republic* (1986) 3 C.L.R. 381.

The Merits of the Decision.

The decision of the Municipality raises a fundamental question of public law concerning, on the one hand, the power of the Administration to lay down limitations to the appointment of personnel other than those laid down in a scheme of service and on the other, and perhaps more importantly, the application of the notion of equality before the Administration safeguarded by Art. 28.1 of the Constitution.

*In Mavronichis v. Industrial Training Authority**, Triantafyllides, P., observed there is no justification in law for the exclusion of candidates on account of high qualifications. He remarked "If such an approach is upheld and prevails it will be calamitous for all those who because of scarcity of jobs they are praiseworthily prepared to be employed even at posts below the level of their qualifications" (p.2216).

Ordinarily academic qualifications, additional to those required by the scheme of service, confer an advantage on the holder, albeit a marginal one. The exclusion of a candidate on the ground that he is over-qualified constitutes a plain abuse of power as well as a breach of the constitutional right of the citizen to equality of treatment by the Administration. A scheme of service lays down the minimum qualifications necessary for appointment to a post. Exclusion of a candidate who possesses those qualifications amounts to a violation of the legislative framework governing the exercise of the discretionary powers of the Administration. The offspring of such abuse cannot but be invalidated as illegitimate action stemming from abuse as well as excess of power.

More importantly the exclusion of a candidate on account of an arbitrary distinction constitutes a breach of one of the fundamental rights of the citizen, namely, that of equality before the Administration, safeguarded by Art. 28.1 of the Constitution. The ex-

* (1986) 3 C.L.R. 2213.

clusion of candidates from appointment on the ground that they are academically overqualified constitutes an arbitrary differentiation that cannot be supported on principle or authority*. The classification of candidates and their grouping into categories for purposes of employment, beyond the requirements of the scheme of service, depending on the level of their formal education reflects archaic notions of social stratification incompatible with the concept of equality and to my mind unsound. Formal education, it must be appreciated, is not the only source of knowledge. Knowledge may also be acquired by private effort, keen observation and alertness to what goes on around us, as well as by experience. Knowledge broadens one's vision and improves one's ability to cope with problems. The usefulness of knowledge is interwoven with one's ability to put it productively into effect in the performance of his duties. Any suggestion that a candidate is too good for a particular post does, in an indirect way, subordinate the right to work to social status pegged to formal education. Classification, according to such criteria, has no rational justification and cannot be countenanced but as a breach of the right of equality of treatment, an attribute of sound administration.The fact that in the past the municipality noticed signs of insubordination on the part of academically qualified personnel to superiors who were not likewise qualified, offered no ground for the exclusion of the applicant. An insubordinate employee may, no doubt, be dealt with disciplinarily.

For the above reasons the sub judice decision is annulled. It is declared to be wholly void and of no effect pursuant to the provisions of Art. 146.4(b) of the Constitution. Let there be no order as to costs.

Sub judice decision annulled.
No order as to costs.

* See, inter alia, Republic v. Arakian & Others (1972) 3 C.L.R. 294; Apostolides & Others v. Republic (1982) 3 C.L.R. 928.