

1975

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[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

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GEORGHIOS  
P. LYONAS  
AND OTHERS

GEORGHIOS P. LYONAS AND OTHERS,

*Applicants,*

v.

*and*

REPUBLIC  
(PUBLIC SERVICE  
COMMISSION)

THE REPUBLIC OF CYPRUS, THROUGH  
THE PUBLIC SERVICE COMMISSION,

*Respondent.*

(Cases Nos. 348/73, 397/73, 398/73 and 357/73).

*Administrative Law—Recourse for annulment under Article 146.1 of the Constitution—Abatement—Recourse against secondment to temporary post of Assessor (Estate Duty)—Interested party promoted to the corresponding permanent post pending the hearing of the recourse—Said secondment a factor that was taken into account and gave him advantage over other candidates—Aim of recourse being annulment of an administrative act and the erasing of all its consequences said secondment constituted administrative consequences which applicants had an interest specifically to prevent—Recourse not abated—Papadopoulos v. Municipality of Nicosia and Another (1974) 3 C.L.R. 352 distinguished.*

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*Public Officers—Filling of posts—Appropriate Authority concerned authorising filling of posts of Assessor in the Income Tax Office—Head of Department earmarking one such post for Estate Duty Office—Difference between Schemes of Service for the posts of “Assessor” in the said two offices—Head of Department had no competence to act as he did in the absence of express statutory provision and delegation of authority from the Appropriate Authority—Filling of post of Assessor (Estate Duty) made without the necessary legal authorisation—Declared null and void.*

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*Administrative Law—Administrative Organ—Competence—Does not extend upon matters for which no provision is made in the enactment establishing it.*

*Public Officers—Confidential Reports—Delegation of reporting and countersigning Authority—Does not preclude Head of Department from making recommendations to Public Service Commission*

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regarding promotions—Section 44 (3) of the Public Service Law, 1967 (Law 33 of 1967) and General Order II/2.9.

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5 *Public Officers—Promotions—Post of Assessor (Income Tax)—Merit—Interested party on the whole the best—Qualifications—Nothing to show that they were ignored—Interested Party recommended by Head of Department—All relevant factors taken into consideration—No misconception of fact—No failure in the duty to select the best candidate—Sub judice decision arrived at after a proper and due inquiry and it is a duly reasoned one—Reached in a proper exercise of administrative discretion—Reasonably open to the respondent Commission on the material before it to decide as it did.*

15 The applicants in these recourses challenge the validity of the promotion of interested party Sofocles Neophytou, to the permanent post of Assessor (Income Tax) and of the secondment of interested party, Gregoris Mateas, to the temporary ordinary post of Assessor (Estate Duty).

20 Arising out of the fact that interested party Mateas was on the 10th April, 1974, and pending the hearing of these recourses, promoted to the corresponding permanent post, Counsel for the respondent Commission submitted that the recourses, to the extent that they attack the validity of the decision regarding this interested party, have been abated, due to the intervening event of his said promotion.

25 According to the relevant scheme of service the posts of Assessor (Income Tax) and of Assessor (Estate Duty) are promotion posts from the immediately lower post of Assistant Assessor; but there is a difference between the two schemes of service, both in the duties and responsibilities and the qualifications required.

30 The Appropriate Authority concerned having authorised the filling of two posts of Assessor in the Income Tax office, the Public Service Commission met to fill the two posts. The Director of the Department of Inland Revenue, who was present at the meeting stated that the two vacancies “were intended for the following Sections:

“1 for the Income Tax Office

1 for the Estate Duty Office”.

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Regarding the secondment of interested party Mateas Counsel for applicants contended that the Director had no authority to earmark the post in question to the Estate Duty Section of the Department, as he did, as this was a matter of organization of the service, and as such, an exercise of executive power.

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Regarding the promotion of interested party Neophytou counsel for applicants contended that the Head of Department, having delegated the countersigning Authority for the confidential reports to the Assistant Director, under General Order II/2.9, he (the Head of Department) did not know the officers concerned well. Therefore his recommendations to the Commission could not be relied upon and the Commission had to prefer instead, the confidential reports.

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*Held, (I) with regard to the contention concerning the abatement of the recourse against the promotion of interested party Mateas:*

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What is sought by a recourse, is the annulment of an administrative act, which, annulment, erases all its consequences. In the present case, the *sub judice* act was not withdrawn or annulled. It came to an end by the promotion of the interested party to a permanent post and, in my view, not all legal consequences of the *sub judice* secondment were extinguished, as in deciding the said promotion, the secondment of the interested party was a factor taken into account and gave him an advantage over all others, which, in the circumstances, constitutes administrative consequences which the applicants had an interest specifically to prevent. The subject-matter of the recourses against Mateas has not been abated and should be examined on their merits (*Papadopoulos v. Municipality of Nicosia and Another* (1974) 3 C.L.R. 352 distinguished).

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*Held, (II) with regard to the contention concerning the earmarking of the posts in question by the Head of Department:*

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(1) The existence of separate schemes of service for the two posts, calls for a specific decision as to which of the two posts has been approved to be filled. In the absence of any express statutory provision authorising the Head of the Department to decide the reorganization of his department, in the sense in which this term has been used in this instance, and in the absence of any delegation of Authority from the organ of the State which exercises executive power and within whose province the Public Service of the State normally, otherwise comes, the Head of the Department, at the time, had no competence in the matter.

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(2) Therefore, the filling of the post in question was made without the necessary legal authorization, and as such, it should be declared null and void (see *Papapetrou and The Republic*, 2 R.S.C.C. 61 at p. 66; *Conclusions of Jurisprudence of the Greek Council of State* (1929-1959) p. 103; *Decisions of the Greek Council of State* Nos. 1672/52 and 1665/45 and s. 17 of the Public Service Law, 1967).

*Held, (III) with regard to the contention concerning the delegation of countersigning authority for the confidential reports and the promotion of interested party Neophytou:*

(1) A delegation of reporting or countersigning Authority under General Order II/2.9 does not preclude the Head of the Department from making his recommendations to the respondent Commission regarding promotions (See s. 44 (3) of the Public Service Law, 1967).

(2) Looking at the confidential reports separately and making a comparison between the various assessments, the conclusion to be drawn is that the recommendation of the Head of Department—he recommended interested party Neophytou—is not contrary to the assessments and does not conflict with the merits of the parties, as they appear from the said confidential reports. (After going through each confidential report separately the learned Judge held that “from the confidential reports, it appears that the interested party was, on the whole, the best”).

(3) It was upon the applicants to establish striking superiority over the interested party so that this Court would interfere with an administrative decision of this nature, mere superiority not being sufficient ground for such interference (*Vide Evangelou v. The Republic* (1965) 3 C.L.R. 292 at p. 300).

(4) In the circumstances, the *sub judice* decision concerning interested party Neophytou was reached in a proper exercise of administrative discretion, inasmuch as all relevant factors were taken into consideration and there was no misconception of fact. It was arrived at after a proper and due inquiry and it is duly reasoned, and the Commission did not fail in their paramount duty to select the best candidate.

(5) It is well established that this Court will not interfere with a decision of an administrative organ by substituting its own discretion, so long as the decision was reasonably open to

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it, on the material before it, even if in exercising its own discretion on the merits, it could have reached a different conclusion.

*Secondment of interested party Mateas annulled; promotion of interested party Neophytou affirmed.* 5

Cases referred to:

*Papadopoulos v. Municipality of Nicosia & Another* (1974) 3 C.L.R. 352, distinguished;

*Papapetrou and The Republic*, 2 R.S.C.C. 61 at p. 66; 10

*Evangelou v. The Republic* (1965) 3 C.L.R. 292 at p. 300;

*Decisions of the Greek Council of State* Nos. 1762/52 and 1665/45.

**Recourse.**

Recourse against the decision of the respondent Public Service Commission to promote to the permanent post of Assessor (Income Tax) interested party S. Neophytou and to second to the temporary ordinary post of Assessor (Estate Duty) the interested party G. Mateas in preference and instead of the applicants. 15

*K. Talarides*, for applicants in Cases Nos. 348/73, 397/73 and 398/73. 20

*M. Christofides*, for applicant in Case No. 357/73.

*N. Charalambous*, Counsel of the Republic, for the respondent.

*A. Moushioutas*, for the interested party in Cases Nos. 357/73 and 397/73. 25

*Cur. adv. vult.*

The following judgment was delivered by:—

A. LOIZOU, J.: The respondent Commission at its meeting of the 10th May, 1973, considered the filling of vacancies in the Department of Inland Revenue and for the reasons appearing in the relevant minutes, it promoted to the permanent post of Assessor (Income Tax), Sofocles Neophytou and seconded to the temporary ordinary post of Assessor (Estate Duty), Gregoris Mateas. 30

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5 The validity of the decision regarding interested party Neophytou is challenged in Recourses Nos. 357/73 and 397/73, whereas the one in respect of interested party Mateas, is challenged in Recourses Nos. 348/73, 397/73 and 398/73. This last recourse, filed on behalf of four applicants, was discontinued in the course of the hearing by three of them and it proceeded only on behalf of applicant Iosif Georghiades.

10 Before dealing with the grounds of law relied upon in these four recourses—heard together as they present common questions of law and fact—I find it convenient to consider and determine a legal point which arose out of the fact that interested party Mateas was on the 10th April, 1974, *i.e.* pending the hearing of these recourses, promoted to the corresponding permanent post.

15 Counsel for the respondent Commission has submitted that the recourses to the extent that they attack the validity of the decision regarding Mateas, have been abated, due to the intervening event of his said promotion. It was argued that the continuation of the recourse would have been possible, if, after the disappearance or the annulment of the *sub judice* act, its consequences remained, so that it would give rise to a claim for damages under Article 146.6 of the Constitution and that  
20 in the present case no such eventuality exists, because, even if the recourse is continued and the applicants are successful, they  
25 will only be successful in annulling an already non-existing act.

30 What is sought by a recourse, is the annulment of an administrative act, which, annulment, erases all its consequences. In the present case, the *sub judice* act was not withdrawn or annulled. It came to an end by the promotion of the interested party to a permanent post and, in my view, not all legal consequences of the *sub judice* secondment were extinguished, as in deciding the said promotion, the secondment of the interested party was a factor taken into account and gave him an advantage over all others, which, in the circumstances, constitutes administrative  
35 consequences which the applicants had an interest specifically to prevent. That this is so, appears from the minutes of the respondent Commission of the 10th April, 1974, where the promotion to the permanent post was decided. At that meeting, the Director of the Department of Inland Revenue is recorded  
40 to have stated that there was only one officer, namely, Mr. Gr. Mateas who was serving on secondment in the temporary (Ord.) post of Assessor and was employed in the Estate Duty

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Office and the decision of the respondent Commission says, *inter alia*, ..... having regard to the recommendations of the Head of Department, the Commission decided that Mr. Gr. Mateas was on the whole the best and that he be promoted to the permanent post of Assessor (Estate Duty) .....". That decision is now the subject of a recourse for annulment, pending before this Court. It is for this reason that the case of *Papadopoulos v. The Municipality of Nicosia and Another*, (1974) 3 C.L.R. 352 should be distinguished, as the eventual permanent appointment of the holder to an abolished post was not challenged anew by the person who had originally challenged the first temporary appointment. Therefore, the subject matter of the recourses against Mateas have not been abated and should be examined on their merits together with the other recourses.

By letter dated the 16th March, 1973 (Encl. 1), the Director-General, Ministry of Finance, informed the respondent Commission that—(a) The Minister of Finance had approved, *inter alia*, the filling of any consequential vacancies in the post of Assessor in the Department of Inland Revenue which would be created subsequent to the filling of vacancies in the post of Senior Principal Assessor and Principal Assessor, and (b) requested him to take the necessary steps for their filling.

According to the relevant scheme of service (Encl. 2) the posts of Assessor (Income Tax) and of Assessor (Estate Duty) in the Department of Inland Revenue are promotion posts from the immediately lower post of Assistant Assessor. It is important to note, however, that there is a difference between the two schemes of service, both in the duties and responsibilities and the qualifications required.

The respondent Commission at its meeting of the 10th May, 1973, (encl. 5), considered the filling of vacancies in the Department of Inland Revenue. There were two consequential vacancies in the permanent post of Assessor which were created as a result of the promotion of Messrs. M. Yiassoumis and H. Sofianos to the post of Senior Assessor. The Director of the Department of Inland Revenue stated that there was only one officer, namely, A. Panayides, who was serving on secondment in the temporary ordinary post of assessor and was employed in the Income Tax Office, was recommended by him for that post and the respondent Commission promoted him accordingly with effect from 1.6.1973. Their minutes, read as follows:

5 “The Commission then considered the filling of the remaining vacancy in the permanent post of Assessor, as well as the consequential vacancy in the temporary (O) post of Assessor, which was created as a result of the promotion of Mr. A. Panayides to the corresponding permanent post.

The Director of the Department of Inland Revenue stated that the two vacancies referred to above are intended for the following Sections:

- 10           1 for the Income Tax Office  
              1 for the Estate Duty Office.

15           The Director of the Department of Inland Revenue stated that from the candidates serving in the Income Tax Office, he considered Mr. S. Neophytou as the best candidate and recommended him for promotion. The Director of the Department added that Messrs. J. Georghiades and G. Lyonas, who are also serving in the Income Tax Office, are rather slow in their work.

20           The Director of the Department added further that only one of the candidates—namely, Mr. Gr. Mateas—was serving in the Estate Duty Office; his services were very good; owing to his services and experience in land valuation, the Director of the Department recommended Mr. Mateas for the temporary post of Assessor.

25           After considering the above and after giving due consideration to the merits, qualifications, seniority, service and experience, as well as to the abilities of all the candidates, as shown in their Personal Files and in their Annual Confidential Reports and having regard to the recommendations of the Director of the Department, the Commission came to the conclusion that the following officers were on the whole the best. The Commission accordingly decided that the officers in question be promoted/seconded to the post of Assessor w.e.f. 15.6.73, as shown below.

- 35           S. Neophytou — to be promoted to the permanent post of Assessor (Income Tax)  
              Gr. Mateas — to be seconded to the temporary (O) post of Assessor (Estate Duty)”. ”.

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The first ground upon which the secondment of interested party Mateas is challenged, is that the Director of the Department of Inland Revenue, had no authority to earmark the post in question to the Estate Duty Section of the Department, as he did, as this was a matter of organization of the service, and as such, an exercise of executive power. 5

Learned counsel for the respondent Commission agrees that this was a matter of organization of the Department, and the documents produced, show that the only aim of the Director of Inland Revenue, was to staff the two Sections in such a way, that there would be some hierarchical sequence, particularly so, in the case of the Estate Duty office, which, after the retirement of Mr. Georghiades, a Senior Principal Assessor, was left with a Senior Principal Assessor and an Assistant Assessor, with no officer holding a rank in-between these two. 10 15

In the Budget for the year 1973 (p. 132), there is provision for 16 posts of Assessors and no distinction is made between those serving in the Income Tax and those in the Estate Duty office.

It has been submitted on behalf of the respondent Commission that thereby the legislator left the earmarking to the administration, and in particular, to the Head of the Department, as being conversant and suitable to decide on the needs of each section of his department. It was, also, stated that the reorganization of the service does not fall within Article 54.d of the Constitution, which speaks of the co-ordination and supervision of the public service, but is a power left to the legislator done usually through the Budget. In support of this proposition reference has been made to Dendias, Administrative Law, (1957), vol. 1, p. 201. 20 25

In my view, the existence of separate schemes of service for the two posts, calls for a specific decision as to which of the two posts has been approved to be filled. In the absence of any express statutory provision authorizing the Head of the Department to decide the reorganization of his department, in the sense in which this term has been used in this instance, and in the absence of any delegation of authority from the organ of the State which exercises executive power and within whose province the Public Service of the State normally, otherwise comes, the Head of the Department, at the time, had no competence in the matter. Therefore, the filling of the post in question was made without the necessary legal authorization, 30 35 40

and as such, it should be declared *null* and *void*. (See *Papa-  
petrou* and *The Republic*, 2 R.S.C.C. p. 61 at p. 66).

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As stated in the Conclusions of Jurisprudence of the Greek  
Council of State (1929–1959) at p. 103, the competence of each  
5 organ must necessarily be defined by a provision of, the Con-  
stitution, law or administrative act based on the authorization  
of the law. (See the decision of the Greek Council of State  
No. 1672/52). Furthermore, the competence of an organ  
does not extend upon matters for which no provision is made  
10 in the enactment establishing it. (See decision of the Greek  
Council of State No. 1665/45).

In the present case, under section 17 of Law 33/67 the Com-  
mission shall not proceed to fill any vacancy in any public  
office, except upon the receipt of a written request to that effect  
15 from the appropriate authority concerned. There was such a  
request for the filling of consequential vacancies to be created  
as a result of the promotions of their holders to senior posts.  
If anything, the consequential vacancies created by those pro-  
motions were vacancies in respect of posts in the Income Tax  
20 Office Section of the Department of Inland Revenue. No  
doubt, this authorization was in respect of filling of vacancies  
in the Income Tax Office and could not be taken as amounting,  
at the same time, to a delegation, to the Head of the Depart-  
ment of executive power in the sense of reorganizing the needs  
25 of the two Sections by transferring the vacancy from the Income  
Tax Office Section to the Estate Duty Section of the Depart-  
ment of Inland Revenue, for the reasons stated in *Exhibit 'L'*,  
however legitimate and proper they are. For all the above  
reasons, this ground succeeds and the *sub judice* decision re-  
30 garding the secondment of interested party Mateas, is hereby  
annulled.

Regarding the case against interested party Neophytou, this  
point does not arise, as he was promoted to the permanent  
post of Assessor (Income Tax) and in his case, there was a  
35 decision on the merits of the various candidates, including the  
applicants and the said interested party.

The first ground of law relied upon in that respect, is that  
the Head of the Department, having delegated the counter-  
signing authority for the confidential reports to Mr. Strovolidis,  
40 the Assistant Director of the Department of Inland Revenue, a  
delegation made under General Order II/2.9, shows that the

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Director did not know these officers well. Therefore, the recommendations made to the Commission, could not be properly relied upon, and the Commission had to prefer instead, the confidential reports.

Before dealing with the contents of the confidential reports, I wish to say that, in my view, a delegation of reporting or countersigning authority under the aforesaid General Order, does not preclude the Head of the Department from making his recommendations to the respondent Commission regarding promotions. In fact, section 44 (3) of the Public Service Law, speaks clearly that the Commission shall have due regard to the Annual Confidential Reports on the candidates, and to the recommendations made, in this respect, by the Head of the Department in which the vacancy exists.

I do not propose to take the assessment in each confidential report separately, but looking at them, and making a comparison between the various assessments, the conclusion to be drawn is that the recommendation of the Head of the Department—he recommended interested party Neophytou—is not contrary to the assessments and does not conflict with the merits of the parties, as they appear from the said confidential reports.

Interested party Neophytou was first appointed in the Government Service as Clerical Assistant on 1.11.61, and after serving at various posts, he was promoted to Assistant Assessor, on 1.6.68. He was recommended for promotion in the last three confidential reports by his reporting officer. In the general assessment he is rated as excellent and very good, with the exception, as to general intelligence, where he is rated as average.

Applicant in Recourse No. 397/73, Hji Gregoriou, first entered the Government Service on 1.2.1968 and promoted to the post of Assistant Assessor on 15.4.1969. He was recommended for promotion in the last two confidential reports and in the general assessment he is rated, mostly, as very good.

Applicant in Recourse No. 357/73, Neocleous, first entered the Government Service on 18.12.1961 and after serving at various posts, he was promoted to the post of Assistant Assessor on 1.6.1968. He has not been recommended for promotion in any of the confidential reports and he is rated as very good and good.

Therefore, from the confidential reports, it appears that the interested party was, on the whole, the best.

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5 Their respective qualifications were all before the respondent Commission, and there is nothing to suggest that they were either ignored or that no proper inquiry was carried out by the respondent Commission in arriving at the *sub judice* decision. As it appears from the relevant minutes, all relevant factors were duly taken into consideration by them. They were all found to satisfy the required qualifications under the relevant schemes of service, and I have no reason to interfere with the finding of the respondent Commission.

10 Regarding the allegation that the interested party did not have experience in the examination of accounts, which is one of the requirements under the scheme of service, the evidence of one of the applicants, Lyonas, as to who was in a better position to know regarding such experience, the Head of the Department or himself, was to the effect that the Head of Department knew better.

15 It was upon the applicants to establish striking superiority over the interested party so that this Court would interfere with an administrative decision of this nature, mere superiority not being sufficient ground for such interference. (Vide *Evangelou v. The Republic* (1965) 3 C.L.R. p. 292, at p. 300).

20 In the circumstances, the *sub judice* decision was reached in a proper exercise of administrative discretion, inasmuch as all relevant factors were taken into consideration, and there was no misconception of fact. It was arrived at after a proper and due inquiry and it is duly reasoned, and they did not fail in their paramount duty to select the best candidate. It is well established that this Court will not interfere with a decision of an administrative organ by substituting its own discretion, so long as the decision was reasonably open to it, on the material before it, even if in exercising its own discretion on the merits, it could have reached a different conclusion.

25 In the result, the recourses against the secondment of Mateas succeed, and the said secondment is annulled, and the recourses against the promotion of interested party Neophytou fail and are hereby dismissed.

35 In all the circumstances, there will be no order as to costs.

40 *Order accordingly.*