

1983 December 21

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LOUIS TANTAS,

Applicant,

v.

THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 491/80).

Public Officers—Confidential reports—Adverse confidential reports—Non communication to officer concerned—Effect—Section 45(4) of the Public Service Law, 1967 (Law 33/67).

Public Officers—Promotions—Merit—Qualifications—Seniority—Merit counts first—Seniority prevails if all other factors are equal—Which were not in this case in view of the better merits of the interested parties and the recommendations in their favour by the Head of Department and the Departmental Committee. 5

The applicant in this recourse challenged the promotion of the interested parties to the post of Clerk 2nd Grade. Applicant was senior to some of the interested parties but the latter were all better in merit and they were recommended for promotion by the Head of Department and the Departmental Committee. Applicant and the interested parties were more or less equally qualified and they all possessed the qualifications required by the schemes of service. 10 15

Counsel for the applicant mainly contended:

- (a) That though there were two confidential reports containing adverse comments about the applicant they were never communicated to him, contrary to section 45(4) of Law 33/67. 20
- (b) That having regard to his seniority, merits, qualifications, recommendations of Head of Department and

all other relevant considerations the applicant was by far the best candidate.

Held, (1) that the non-communication of adverse reports to the applicant constitutes a disciplinary offence on the part of the officer whose duty it was so to do but it does not render void either the report itself or the decision based thereon; accordingly contention (a) should fail.

(2) That in considering promotions of public officers the Commission must give due regard to the merit, qualifications and seniority of the candidates in that order and in this respect, merit counts first; that seniority is the last consequential and prevails only when all other factors are equal; that since the overall picture from the confidential reports shows that the interested parties are better in merit than the applicant; that since, also, there exist the recommendations of the Departmental Committee and the Head of the Department which go to the merit of the interested parties and count in their favour; that since the qualifications of applicant and the interested parties are more or less equal; and that since seniority prevails only when all other factors are equal which is not the case here, it has to be disregarded; accordingly the applicant has failed to establish striking superiority over the interested parties and it was indeed entirely open to the respondent to decide as it did, especially in view of the merit of the candidates and the recommendations of the Head of the Department and the Departmental Committee.

Application dismissed.

Cases referred to:

Pierides v. Republic (1971) 3 C.L.R. 233 at p. 250;
Kyriacopoullou v. Republic (1973) 3 C.L.R. 1 at p. 12;
Korai v. C.B.C. (1973) 3 C.L.R. 546 at pp. 570-573;
Michanicos and Another v. Republic (1976) 3 C.L.R. 237 at pp. 249, 250;
Kontemeniotis v. C.B.C. (1981) 3 C.L.R. 195 at pp. 200, 201;
HadjiSavva v. Republic (1982) 3 C.L.R. 76 at p. p. 78, 79;
HadjiIoannou v. Republic (1983) 3 C.L.R. 286;
Ioannou v. Republic (1983) 3 C.L.R. 449;
Michaeloudis v. Educational Service Commission (1982) 3 C.L.R. 963;

- Soteriadou v. Republic* (1983) 3 C.L.R. 921;
Karageorghis v. Republic (1982) 3 C.L.R. 435;
Ioannou v. Republic (1983) 3 C.L.R. 75;
Larkos v. Republic (1982) 3 C.L.R. 513;
Constantinou v. Republic (1983) 3 C.L.R. 136; 5
Bagdades v. Central Bank of Cyprus (1973) 3 C.L.R. 417 at
 pp. 428-429;
Cleanthous v. Republic (1978) 3 C.L.R. 320 at pp. 327;
Papadopoulos v. Republic (1982) 3 C.L.R. 1070 at p. 1075-1076.

Recourse.

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Recourse against the decision of the respondent to promote the interested parties to the post of Clerk, 1st Grade, General Clerical Staff, in preference and instead of the applicant.

C. Clerides, for the applicant.

Cl. Antoniadis, Senior Counsel of the Republic, for the respondent. 15

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant in this case prays for a declaration of the Court that the decision of the respondent, published in the official Gazette of the Republic on 17.10.1980, by which the interested parties were promoted to the post of Clerk, 1st Grade, General Clerical Staff, in preference and instead of the applicant, be declared null and void and of no effect whatsoever. 20

The interested parties, as listed in Schedule 'A' attached to the application, are the following:- 25

1. Maroulla Magidou, Education Department, Nicosia.
2. Pavlina Papadopoulou, Accountant General's office, Nicosia.
3. Paschalis Koullapis, Medical Department, Psychiatric Service, Nicosia. 30
4. Andreas Galatariotis, Public Works Department, Paphos.
5. Andreas Koumouris, District Administration, Nicosia.
6. Panayiotis Constantinou, Customs, Nicosia".

The facts of the case are briefly as follows:-

Both the applicant and the interested parties were, before the date of the sub judice decision, holding the post of Clerk, 2nd Grade, in the General Clerical Staff. Between December, 1979
5 and May, 1980 after the approval of the Ministry of Finance was given for the filling of certain vacant posts of Clerk, 1st Grade, a Departmental Committee was set up to examine the matter.

The Departmental Committee met on the 5th, 6th and 13th
10 May, 1980 and proceeded first to examine who out of the candidates who were holding the post of Clerk, 2nd Grade, satisfied the conditions, under the schemes of service, for promotion to the post of Clerk, 1st Grade. The Committee prepared a list of names of all candidates, 141 in number, who satisfied
15 such conditions and a second list of 115 who did not satisfy the conditions. Then the Committee went on to consider who out of the 141 candidates eligible for promotion were the best to be recommended taking into consideration their merit, qualifications and seniority on the basis of their confidential
20 reports and personal files, and selected 44 candidates whom it recommended and whose names it included in a third list, in which, opposite to the name of each one, the reasons for so selecting such candidate, are given. The applicant was not amongst those recommended by the Departmental Committee.
25 All three lists prepared by the Committee were attached to the minutes of the meetings at which the selection was made and were annexed to the opposition as part of Appendix 6. The Departmental Committee after concluding its work submitted a suggestion for consideration by the respondent Commission,
30 which was recorded in the minutes of the Committee, that before the respondent proceeded with the selection of the best candidates out of those recommended, all recommended candidates should be called for interview by the respondent in the light of the provision in the schemes of service that the
35 candidates should have the ability of exercising control over subordinate officers and the fact that candidates were serving in different departments with varying duties some of which involved more responsibility than others.

The respondent Commission met on 19.6.1980 (see Appendix
40 7 to the opposition) and decided to adopt the suggestion of

the Departmental Committee and invite for personal interview all the candidates recommended for promotion with the addition of one more candidate who was not recommended, namely, Mr. C. Violaris, on the ground that his annual confidential reports were as good as those of certain other candidates who were recommended and to whom he was senior by one year. 5

The applicant on 1.8.1980 addressed, through the Head of his Department, a letter to the Chairman of the respondent Commission, requesting the respondent to reconsider his case and invite him for a personal interview as well (see Appendix 8). At its meeting of 19.8.1980, the respondent examined the request of the applicant and, after a reconsideration of the report of the Departmental Committee and the personal files and confidential reports before it, decided not to depart from its previous decision to invite for an interview only those recommended and the additional candidate Mr. Violaris, for the reasons contained in its previous decision. (The minutes of the meeting of the respondent of 19.8.1980 appear in Appendix 9). 10 15

The respondent interviewed the 45 candidates on 19.8.1980 and on the 1st, 2nd, 3rd and 4.9.1980, and met again on 5.9.1980, to take its final decision (Appendix 14). The Head of the Personnel Department, who was present at the meeting, gave his evaluation about each one of the candidates during the personal interviews and departed. Such evaluation in respect of each candidate was recorded in their minutes. The respondent Commission then proceeded to compare its own evaluation of the candidates with that of the Head of the Department and examined who were the most suitable candidates for promotion. In this respect its decision reads as follows: 20 25 30

“The Commission then proceeded to the evaluation and comparison of the candidates. The Commission, having taken into consideration the material facts from the Personal Files and Confidential Reports of the candidates, the conclusions of the Departmental Committee, as well as the performance of the candidates during the interviews with the Public Service Commission, in the light also of the views of the Head of the Department of Personnel on the matter, came to the conclusion that, on the basis of the established criteria as a whole, that is merit, quali- 35 40

fications, experience and seniority, the following are superior to the remaining candidates”.

and then it went on to name 21 candidates, amongst whom were the interested parties, whom it promoted to the post of Clerk, 1st Grade as from 15.9.1980 as being, in its judgment, the most suitable candidates.

As a result, applicant filed the present recourse, challenging the sub judice decision. The recourse is based on the following grounds of law as they appear in the application:

10 “The respondents have under Article 125 of the Constitution the power, inter alia, to promote Public Officers.

In exercising such powers the respondents have a paramount duty of selecting the best candidates available for such promotion.

15 It is submitted that in the promotions challenged in this recourse the respondents failed in their paramount duty to do so and that having regard to the seniority, merits, qualifications, recommendations of Head of Department and all other relevant considerations the applicant was
20 by far the best candidate suitable for promotion to the post of Clerk, 1st Grade, General Clerical Staff and that therefore the respondents’ decision to promote the interested parties should be declared null and void and of no effect whatsoever”.

25 Counsel for the applicant maintained in his written address that the applicant is senior to all interested parties, being first appointed as a Clerical Assistant in 1955, and that he is better qualified than the interested parties. With regard to merit,
30 counsel said that it should be taken into consideration that reports about different candidates were prepared by different reporting officers and the duties performed by the applicant and the interested parties were different. Lastly, counsel argued, there were two reports containing adverse comments about the applicant, for the years 1978 and 1979 respectively, which were
35 never communicated to the applicant, contrary to the provisions of section 45(4) of Law 33/67 and for this reason the sub judice decision should be annulled, since it was based on such reports which influenced the minds of the respondents.

Sub-section (4) of section 45 of Law 33/67 on which counsel for applicant sought to rely in support of his last argument reads as follows:

“The person preparing a confidential report on a particular officer in which the latter is criticized for negligence, failures or improper behaviour in the performance of his duties must, on the submission thereof, communicate to the officer concerned this part of the report. 5

Within fifteen days of the communication to him, the officer is entitled to require in writing from the competent authority concerned to strike out or modify this part of the report and the competent authority shall consider the matter and decide thereon”. 10

The question of non-disclosure of unfavourable reports and the effect of such omission has been considered by the Supreme Court in a number of cases, the result of which is that the non-communication of adverse reports to the applicant constitutes a disciplinary offence on the part of the officer whose duty it was so to do but it does not render void either the report itself or the decision based thereon. 15 20

In *Pierides v. The Republic* (1971) 3 C.L.R. p. 233 at p. 250, Hadjianastassiou, J. had this to say:

“With respect to counsel’s argument, I hold a different view. In the absence of any authority, lack of communication to the officer concerned does not make the report null and void, simply because if such a serious consequence was intended by the legislature, it ought to have been specifically referred to in the Public Service Law, 1967. I think the view I have taken in this judgment is supported by Stassinopoulos in his textbook on Lessons on Administrative Law, 1957, 2nd edn., at p. 347”. 25 30

In *Kyriakopoulou v. The Republic* (1973) 3 C.L.R. 1 at p. 12, A. Loizou, J., in dealing with a case of an educationalist under the corresponding section 36(3) of the Public Educational Service Law, 1969 (Law 10/69) expressed the following opinion as to the effect of the non-communication of an adverse report to the applicant in that case: 35

“A perusal of the confidential report in issue in this case

has led me to the conclusion that the applicant is not therein criticized for negligence, failures or improper behaviour in the performance of her duties. It was a matter of appreciation of her ability which, as such, did not have to be communicated to the applicant. In any event, even if any part of the report came within the ambit of section 36(3), I would again say that the non-communication to the applicant of such part that had to be communicated was not a reason to annul a decision subsequently taken, in view of the wording of the section which did not provide for the annulment of a decision taken in reliance to such a report. Similar approach has been consistently taken by the Greek Council of State in relation to analogous provisions to be found in section 92 of the Code of the Civil Administrative Servants. It was found that the obligation to communicate the civil servants adverse reports has a consequence only the disciplinary liability of the person responsible for such violation, but not the annulment of the non-communicated report and the annulment of the decision based thereon. (See Decisions of the Greek Council of State, Nos. 2345/62, 1438/67, 732/68 & 1213/69)". (see also *Korai and Another v. Cyprus Broadcasting Corporation* (1973) 3 C.L.R. 546 at pp. 570-573, *Michanicos and Another v. The Republic* (1976) 3 C.L.R. 237 at pp. 249, 250, *Kontemeniotis v. C.B.C.* (1981) 195, at pp. 200, 201).

This contention of counsel, therefore, fails and is dismissed.

I shall proceed next to examine whether the respondent in taking the sub judice decision exercised its discretionary powers properly and in accordance with the statutory provisions and the well established principles of administrative law pertaining to promotions as emanating from our jurisprudence.

In considering promotions of public officers the Commission must give due regard to the merit, qualifications and seniority of the candidates in that order and in this respect, merit counts first. Seniority is the last consequential and prevails only when all other factors are equal. (see, inter alia, *HadjiSavva v. The Republic* (1982) 3 C.L.R. 76 at p. 79, *Hadjiioannou v. The Republic* (1983) 3 C.L.R. 286, *Ioannou v. The Republic* (1983) 3 C.L.R. 449, *Michaeloudis v. Educational Service Committee* (1982) 3 C.L.R. 963, *Soteriadou v. The Republic* (1983) 3 C.L.R. 921).

In considering the sub judice promotions in the light of the above principles, I have perused the confidential reports of the applicant and the interested parties, which were produced as exhibits. In this respect all interested parties are assessed as "excellent" in their last two reports (two of them also having one special report), with the exception of interested party No. 5. A. Kounouris, who is assessed as "very good" in both of his last two reports. The applicant, on the other hand, is assessed as "good" in both of his last two reports. Even leaving apart the comments of the reporting and countersigning officers, all interested parties are apparently superior in merit than the applicant. No question of comparison of the applicant and interested parties 1, 2, 3, 4 and 6 arises in this respect.

Comparing the applicant with interested party No. 5, for the year 1978, the picture is the following: Interested party No. 5 was assessed in one item as "excellent", in eight items as "very good" and in one, that is, general intelligence, as "above average", whilst the applicant was assessed as "excellent" in three items, as "very good" in another five items, in one item as "good" and in the last, that of general intelligence, as "High". The countersigning officer, however, has stated in the same report about the applicant that in his opinion on three items for which the applicant was assessed as "very good" and on another for which he was assessed as "excellent", he should have been assessed as "good" only.

For the year 1979 the picture of the two parties is as follows:

Interested party No. 5 was assessed as "very good" on ten items, whilst the applicant was assessed as "very good" in one item and as "good" in nine items.

The remarks of the reporting officer in both reports about the applicant are that "he is slow and not entirely devoted to his work".

From the above comparison between the applicant and the interested party No. 5 it does not emanate that the applicant is better in merit than the interested party and in any event the applicant has failed to show "striking superiority" over interested party No. 5 to lead the Court draw the inference that the discretion of the respondent was wrongly exercised. (See as to

the principle of "striking superiority" *HadjiSavva v. The Republic* (supra) at p. 78, *Karageorghis v. The Republic* (1982) 3 C.L.R. 435, *Michaeloudis v. Educational Service Committee* (supra), *Ioannou v. The Republic* (1983) 3 C.L.R. 75).

5 The overall picture from such reports shows that the interested parties are better in merit than the applicant. And this, leaving aside the adverse comments in the reports of the applicant, which, if taken into consideration, result in a striking superiority of all interested parties over the applicant.

10 In addition, there are the recommendations of the Departmental Committee (Appendix III) and the Head of the Department of Personnel (Appendix 14) which go to the merit of the candidates recommended and count in their favour. (*Hadji-Savva v. The Republic* (supra) *Larkos v. The Republic* (1982) 3 C.L.R. 513, *Constantinou v. The Republic* (1983) 3 C.L.R. 136).

On the basis of the above, I find that all interested parties are strikingly superior in merit than the applicant.

20 Although as I have already found there exists a striking superiority in merit of the interested parties over the applicant, nevertheless, I shall proceed to make a comparison of the parties on the basis of their qualifications. The schemes of service in this respect require:

25 "A good general education. A very good knowledge of Greek in the case of a Greek Officer or Turkish in the case of a Turkish Officer and a very good knowledge of English. Considerable experience of Government office work and ability to control subordinate staff. They should have passed the examination in General Orders and Financial
30 Instructions".

By looking at the comparative tables filed by counsel for the respondent as enclosure No. 15, it appears that all parties possess the required qualifications for promotion. Furthermore, the qualifications of the applicant and the interested
35 parties are more or less equal. The fact that the applicant possesses one or two C.C.E. subjects more than the other inter-

ested parties should not have, in my view, any bearing, especially taking into consideration the fact that most of the interested parties possess some other qualification instead (such as a course for clerks in the Personnel Department or a certificate from the Productivity Centre). The only case in which applicant appears to have higher qualifications is, probably, in respect of interested party No. 2 but the latter, as I have already mentioned, has been assessed as "excellent" in both her reports and in merit she has a striking superiority over the applicant. In any case, it was within the discretion of the respondent to decide whether the candidates before it possessed "a good general education" as envisaged by the schemes of service. Even if the contention of counsel for applicant that the applicant possessed higher qualifications than any of the interested parties was correct that by itself would not have been sufficient to make void the decision. As it was held by the Supreme Court time and again, once the candidates concerned possess the required under the schemes of service academic qualifications, the possession of additional qualifications to those envisaged by the schemes of service is never by itself a decisive consideration and are not by themselves sufficient to make out a case of striking superiority (see *Bugdades v. The Central Bank of Cyprus* (1973) 3 C.L.R. 417, 428-429, *Cleanthous v. The Republic* (1978) 3 C.L.R. 320, 327-328, *Papadopoulos v. The Republic* (1982) 3 C.L.R. 1070, 1075-1076).

Having found that the interested parties are superior in merit to the applicant and that he is not superior to them regarding qualifications, on the totality of the circumstances, there is no point in examining his alleged seniority over the interested parties. In any event, the applicant was promoted to Clerk, 2nd Grade, on 1.4.1968, together with interested parties Nos. 5 and 6, interested party No. 2 was promoted to such post six months later and the remaining three interested parties 20 months later (that is, on 1.12.1969). This shows that his seniority over them is not so substantial as to outweigh their superiority regarding merit. And since seniority prevails only when all other factors are equal, which is not the case here, I have to disregard it.

I, therefore, find that the applicant has failed to establish striking superiority over the interested parties and it was indeed

entirely open to the respondent to decide as it did, especially in view of the merit of the candidates and the recommendations of the Head of the Department and the Departmental Committee.

- 5 In the result, this recourse fails and is hereby dismissed, but in the circumstances of the case I make no order for costs.

Recourse dismissed.
No order as to costs.