

1983 April 7

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MARIA TSIROPOULLOU—KYRILLOU,

Applicant.

v.

1. THE EDUCATIONAL SERVICE COMMITTEE,
2. THE MINISTER OF EDUCATION,

Respondents.

(Case No. 360/81).

Educational Officers—Acting Appointments—Recommendation of the Minister—Respondent Committee bound by such recommendation and has no discretion in the matter—Term “recommendation” in section 34(2) of the Public Educational Service Law, 1969 (Law 10/69) does not only refer to the act of recommendation but also to the person so recommended—An acting appointment can be made for an indefinite period—No duty on the Minister to select the best candidate—Only limitation being the possession by the person appointed of the required qualifications.

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- 10 *Public Educational Service Law, 1969 (Law 10/69)—“Vacant” and “recommendation” in section 34 of the Law.*

This recourse was directed against the decision* of the respondent Committee to appoint the interested parties as acting Assistant Headmasters of Secondary Education.

- 15 Counsel for the applicant contended.

(a) That the respondent committee is bound by the recom-

* The decision was taken under section 34 of the Public Educational Service Law, 1969 (Law 10/69) which provided as follows:

“34(1) When an office is vacant for any reason or its holder is absent on leave or incapacitated, another person may be appointed to act in his place under such terms as may be prescribed.

(2) An acting appointment shall be made on the recommendation of the Minister”.

mentation of the Minister and that the express "recommendation" refers to the need for the making of an acting appointment and not to the person to be appointed.

- (b) That an acting appointment cannot be made when the post is vacant but only when its holder is incapacitated to act. 5
- (c) That it was the duty of the Minister to select the best candidates. 5

Held, (1) that it is clear from the wording of the law that an acting appointment is made on the recommendation of the appropriate authority and the Educational Service Committee is bound to accept such recommendation and has no discretion in the matter; that it is, also, clear that the term "recommendation" does not refer only to the act of recommendation but refers also to the person so recommended; that the argument of the counsel for applicant that the term should be interpreted to refer to the need for such an appointment and not to the person to be so appointed, is, therefore, rejected, as well as the argument that the Educational Service Committee should not have felt bound by the recommendation of the Minister. 10 15 20

(2) That although section 34(1) provides that the person appointed in an acting capacity is appointed "to act for him" (meaning the holder of the post in a substantive or permanent capacity), this clearly refers to the cases where the holder of the post is absent on leave or is incapacitated to act; that the wording of the section "when an office is vacant for any reason" is very clear in this respect; that the meaning of "vacant" is that there is nobody holding that office; that an acting appointment can be made for an indefinite period; and that, therefore, contention (b) must be rejected. 25 30

(3) That there is nothing either under the Law or the Regulations, casting a duty on the Minister to select the best candidates; that the only provision is (regulation 32(2)) that the person so appointed must have the qualifications required for the post for which he is appointed; that being an accepted fact that both interested parties possess the qualifications required for the post in question, contention (c) must also be rejected. 35

Observations: It is expected that the appropriate authority

5 should discontinue the practice of making appointments renewable annually and when the possibility of filling vacant posts does exist, to proceed with the filling of same in the prescribed way and avoid as far as possible the practice of the temporary solution of an acting appointment.

Application dismissed.

Cases referred to:

Olympios v. Republic (1974) 3 C.L.R. 17.

Recourse.

10 Recourse against the decision of the respondents to appoint and/or promote the interested parties to the post of Acting Assistant Headmasters of Secondary Education in preference and instead of the applicant.

A. Markides, for the applicant.

15 *R. Vrahimi (Mrs.)*, for the respondents.

Cur. adv. vult.

20 SAVVIDES J. read the following judgment. The applicant, who is a schoolmaster in secondary education, seeks by this recourse, a declaration of the Court that the act and/or decision of the Educational Service Committee, respondent 1 and/or the Minister of Education, respondent 2, which was published in the daily press on or about the 25th July, 1981 by which interested parties Maria Zavrou and Demetrios Spanos were appointed and/or promoted as Acting Assistant Headmasters of Secondary Education, is null and void and of no legal effect
25 whatsoever.

The application is based on the following grounds of Law:

“The sub judice decision and/or act is void in that:

30 1. It is illegal as being contrary to the provisions of section 34 of Law 10/1969 and/or to Law 10/1969 and/or the relevant Regulations enacted on the basis of it; and/or,

2. It is illegal as being based on a Regulation or Regulations which are ultra vires the Council of Ministers, and/or,

35 3. Was taken in excess and/or abuse of powers especially in that:

- (a) It was issued by an inappropriate organ, that is, respondent No. 2 and/or
- (b) the proper organ, that is respondent No. 1, declined and/or did not exercise its discretionary power being under the wrong impression that it was bound by the recommendation of respondent 2 in respect of the appointed persons, and/or 5
- (c) it is not duly or at all reasoned, and/or
- (d) no due or any inquiry was carried out before its issue and/or 10
- (e) the applicant is strikingly superior to the interested parties."

The factual position which led to the issue of the sub judge decision is shortly as follows:

On 25.7.1981 the Acting Director-General of the Ministry of Education sent to the Chairman of respondent (1) Committee a letter (copy of which is attached to the opposition as Annex 'A') attaching a list containing the names of 16 educationalists, amongst whom the two interested parties, which according to the letter had been prepared on the recommendation of the Minister of Education, recommending such educationalists for acting appointment to the post of Assistant Headmaster, in the Secondary and Technical Education. 15 20

The Committee met on the same date for the purpose of giving effect to the said acting appointments. Its minutes have been filed as exhibit 1 in the case. According to this exhibit, one of the members of the Committee, namely, Mr. Kallis, disagreed with the practice of filling any existing vacancies by acting appointments instead of proceeding to fill the vacancies properly in the normal way. He also disagreed with the view that the Commission was bound to follow the recommendations of the Minister. He stated, amongst others, that the role of the committee is not just to confirm the recommendations of the Minister without examining whether the persons recommended are suitable for acting appointment and that in this way the discretionary power of the Committee to choose and appoint the best candidates for any particular post is usurped and defeated. At the end he stated that he was not prepared, under 25 30 35

such circumstances to take part in the proceedings of the Committee and withdrew. Finally, the remaining members after having taken into consideration the legal opinion of the Attorney-General on the matter, proceeded unanimously and effected the said appointments, although one of such members stated the he had his reservations with regard to the legal aspect of the matter.

Counsel for applicant adopted in effect the views expressed by Mr. Kallis at the meeting of the Committee and stated that the Committee should not have felt bound by the recommendations of the Minister. He added that the true meaning of the expression "an acting appointment shall be made on the recommendation of the Minister" is that no acting appointment can be made, unless there is a recommendation of the Minister to that effect, but this does not mean that where there is a recommendation the Committee is bound to accept it. He further suggested that the above expression "recommendation" refers to the need for the making of an acting appointment and not to the person to be appointed. It is within the competency of the Committee to judge whether the acting appointment should be made and who is to be selected for such appointment. By following this unorthodox procedure, counsel stated, the provisions and spirit of the law are defeated because, in fact, when the time for the filling of the vacant posts comes, those who have already served at the posts in an acting capacity are always preferred to other candidates and in this way the Educational Service Committee does not choose as it is its duty the best candidates for the post, but those preferred by the Minister at the time of the acting appointment. It was further argued by counsel that the meaning of "acting appointment" is that the person so appointed is appointed to act for somebody else and this can happen only in the case when the post is not vacant, but its holder is incapacitated to act for some reason or another. Lastly, he suggested that even if it was found that once the Minister recommends the Educational Service Committee is bound to adopt his recommendation, then again the Minister should have a duty to select, amongst those qualified, the best candidates, and in this sense, the applicant compared to both interested parties is better both in respect of merit and seniority.

Counsel for the respondents, on the other hand, contended

that the meaning of section 34 of Law (10/69), is that once the appropriate authority, the Minister in this case, recommends a person who has the required qualifications for the post, the Educational Service Committee is bound to follow his recommendation and has no discretion in the matter. She cited in support of her argument, the case of *Olympios v. Republic* (1974) 3 C.L.R. 17, at p. 27, which was based on the corresponding similar provision in the Public Service Law (section 42 of Law 33/67). She also contended that the acting appointments are a completely different thing from the promotions and that the discretion of the Educational Service Committee is not affected by the acting appointments when effecting the promotions. Counsel further argued that according to section 34(1) of the Law, an acting appointment may be made where a post is vacant for any reason and that it can be made for an indefinite period of time. Lastly, she maintained that there is no principle of law or regulation requiring the Minister to choose the best candidate when making his recommendation for an acting appointment and that the only requirement is that the person so recommended must have the qualifications required for the post for which the appointment is to be made and no question of comparison of the applicant with interested parties arises.

The meaning of "recommendation" with regard to acting appointments was dealt with in the case of *Olympios v. The Republic* (supra) which is the only case on this point. In that case the acting appointment was made under section 42(2) of the Public Service Law (Law 33/67). Section 42 of Law 33/67, is similar to section 34 of Law 10/69. Section 42 of Law 33/67, reads as follows:

"42.(1) When an office is vacant for any reason or its holder is absent on leave, or incapacitated, another person may be appointed to act in that office (ἐν τῇ θέσει ταύτῃ) under such terms as may be prescribed.

(2) An acting appointment shall be made on the recommendation of the appropriate authority concerned".

And section 34 of Law 10/69, reads:

"34.(1) When an office is vacant for any reason or its holder is absent on leave or incapacitated, another person may be

appointed to act in his place under such terms as may be prescribed.

(2) An acting appointment shall be made on the recommendation of the Minister”.

5 It seems from the above, that sub-section (2) of the two sections of the above Laws are virtually the same and what applies to one applies to the other. I can therefore, adopt the meaning given to the word “recommendation” appearing in section 42(2) of Law 33/67 in the *Olympios* case (*supra*) as applying in this case. The judgment in the above case reads, in this aspect, at p. 27, as follows:

15 “Under section 42, sub-section 2, an acting appointment shall be made on the recommendation of the appropriate authority concerned. From the wording of this subsection it is clear that once the appropriate authority *recommends any person* who is possessed with the necessary qualifications for the post, the Public Service Commission *is bound* to make such appointment and cannot invite applications from other persons in order to make a selection. There is no power under section 42 for the Commission to take that course”. (The underlining is mine).

I fully agree and endorse the above opinion. It is clear from the wording of the law that an acting appointment is made on the recommendation of the appropriate authority and the Educational Service Committee is bound to accept such recommendation and has no discretion in the matter. It is also clear that the term “recommendation” does not refer only to the act of recommendation but refers also to the person so recommended. The argument of counsel for applicant that the term should be interpreted to refer to the need for such an appointment and not to the person to be so appointed, is, therefore, rejected, as well as the argument that the Educational Service Committee should not have felt bound by the recommendation of the Minister.

35 With regard to the argument of counsel for applicant that an acting appointment cannot be made when the post is vacant but only when its holder is incapacitated to act, again I cannot

agree with such contention. Although subsection (1) provides that the person appointed in an acting capacity is appointed "to act for him", meaning the holder of the post in a substantive or permanent capacity, this clearly refers to the cases where the holder of the post is absent on leave or is incapacitated to act. The wording of the section "when an office is *vacant* for any reason is very clear in this respect. The meaning of "vacant" is that there is nobody holding that office. The ordinary meaning of the word "vacant" in the Oxford Dictionary is "empty, not filled or occupied". It has also been decided in the case of *Olympios (supra)* at page 27, that an acting appointment can be made for an indefinite period. This argument of counsel for applicant is therefore also rejected

Coming now to the last argument of counsel, i.e. that it was the duty of the Minister to select the best candidates, there is nothing either under the Law or the Regulations, casting such a duty upon the Minister. The only provision is (regulation 32(2)) that the person so appointed must have the qualifications required for the post for which he is appointed. Being an accepted fact that both interested parties possess the qualifications required for the post in question, I must also reject this argument.

Before concluding, I wish to add that I share the observations of Mr. Kallis, the member of the respondent Committee who withdrew from the meeting after he made his observations and before the sub judice decision was taken, to the effect that if the practice of the Ministry of Education which has been described as a standing practice to make acting appointments renewable annually instead of filling the vacant posts in the proper way continues, it will inevitably lead to a defeat of the discretionary power of the Educational Service Committee to select and promote the most suitable candidates for filling the vacant posts, and will turn the Committee to a mere organ of confirming decisions of the Minister who is the appropriate authority under the law to recommend such acting appointments. I expect that the appropriate authority should take these observations into consideration and discontinue such practice and when the possibility of filling vacant posts does exist, to proceed with the filling of same in the prescribed way and avoid

as far as possible the practice of the temporary solution of an acting appointment.

In the result, this recourse fails but in the circumstances I make no order for costs.

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Recourse dismissed. No order as to costs.