

1983 February 26

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DEMETRA PAPANTONIOU,

*Applicant.*

v.

THE PUBLIC SERVICE COMMISSION,

*Respondents.*

(Case No. 487/81).

MYRIANTHI PAPAONISIFOROU,

*Applicant.*

v.

THE PUBLIC SERVICE COMMISSION,

*Respondents.*

(Case No. 42/82).

*Public Officers—Confidential reports—Countersigning Officer—Powers of—He can make an assessment of the officer reported upon only if he has personal knowledge of his performance—He has no authority to assess such officer by reference to the reporting tendencies or habits of the reporting officer—If he acts in this way he exceeds his powers and acts in abuse of them.* 5

*Administrative Law—Misconception of fact—Vitiates an administrative decision provided it is material—Public officers—Confidential reports—Misconception as to their effect is apt to result in a serious misappreciation of the merits of the candidates—Public Service Commission in effecting promotions attaching importance to unauthorised comments of countersigning officer in the confidential reports—Not possible to make any prediction about what the decision of the Commission would be had it not been for the misconception under which they laboured—Sub* 10 15

*judice decision taken under a material misconception as to the facts—Annulled.*

*Public officers—Confidential reports—Comments about political loyalties of officers undesirable.*

5       The applicants, Demetra Papantoniou and Myrianthi Papaonisiforou were among the candidates for promotion to the post of Senior Welfare Officer. They were not among the appointees; and hence the present recourses whereby they challenged the appointment of Georghios Kastellanos (“the interested party”).

10       Applicant Papantoniou contended that the Public Service Commission misconceived the facts emerging from the confidential reports of the parties and wrongly assumed that the confidential reports of the interested party were better than her own reports.

15       Applicant Papaonisiforou had better confidential reports than the interested party but in countersigning the confidential reports of the applicant for the years 1978 and 1979 the Countersigning officer commended that applicant’s reporting officer was prone to overestimate the performance of his subordinates. In this connection counsel for this applicant submitted that in making the above comments the countersigning officer exceeded his authority and acted outside the sphere of his powers.

20       *Held, (I) with regard to the recourse of Demetra Papantoniou:* That an examination of the relevant records in no way supports the contentions of the applicant; that on the contrary an overall assessment of their confidential reports lends support to the view taken by the Commission that the interested party was a more meritorious candidate; that this being the case, the complaint of the applicant crystallizes as unfounded; accordingly her recourse should fail.

25       *Held, (II) with regard to the recourse of Myrianthi Papaonisiforou:* That under the General Orders the powers of the countersigning officer are limited to an assessment of the qualities of the person reported upon, provided the countersigning officer has personal knowledge of the performance of the officer; that only if he has such a knowledge can he proceed to make an assessment of the officer by endorsing, qualifying or refuting the assessment

of the reporting officer, as well as stating his personal opinion on her qualities; that no authority vests in him to assess the officer reported upon by reference to the reporting tendencies or habits of the reporting officer; that in the present case, so far as the confidential reports for the years 1978 and 1979 are concerned, the countersigning officer totally failed to carry out his duties under the General Orders and, omitted from stating whether he has personal knowledge of the applicant and, his opinion on her performance; that, instead, he sought to cast doubts on the objective implications of the confidential report of the applicant, by reference to the reporting officer, something he had no authority to do; and that in so doing, he exceeded his powers and acted in abuse of them.

(2) That in attaching importance to the unauthorised comments of the Director of the Department of Social Welfare Services, the Public Service Commission took into consideration improper material that evidently led them to a misconception about the merits of the applicant; that a misconception of the facts on an area of the factual situation vitiates the decision provided it is material in the sense that it influences the decision taken; that confidential reports are a principal guide to the assessment of the merits of a candidate; that misconception as to their effect is apt to result in a serious misappreciation of the merits of the candidates, a matter of great importance for the merits of a candidate are the first consideration to which regard should be paid in effecting promotions; that this Court is unable to make any predictions about what the decision of the respondents would be had it not been for the misconception under which they laboured; that, therefore, the decision of the Commission was taken while they laboured under a material misconception as to the facts and must, consequently, be annulled so far as this applicant and the interested party are concerned.

*Per curiam:*

Perusing the confidential reports, it came to my notice that in some of them, comments are made about the political loyalties of civil servants. There is no authority either in the law or the General Orders applicable until 1979, or the Regulations that replaced them under Circular No. 491, for an evaluation of the political loyalties of civil servants. Hopefully this practice

has been discontinued for, in recent confidential reports no mention is made of the political loyalties of officers. If not, it must be discontinued for it is arbitrary and tends to undermine the stature of the public service.

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*Recourse 487/81 dismissed.*

*Recourse 42/82 succeeds.*

Cases referred to:

- Ioannou v. Republic* (1976) 3 C.L.R. 431;  
 10 *HjiGregoriou v. Republic* (1977) 3 C.L.R. 477;  
*Ioannou v. Republic* (1977) 3 C.L.R. 61;  
*Ekkeshis v. Republic* (1972) 3 C.L.R. 87;  
*Ioannides v. Republic* (1972) 3 C.L.R. 318;  
*Papadopoulos v. Republic* (1982) 3 C.L.R. 1070;  
 15 *Evangelou v. Republic* (1965) 3 C.L.R. 292.

**Recourses.**

Recourses against the decision of the respondent to promote the interested parties to the post of Senior Welfare Officer in preference and instead of the applicants.

- 20 *A. Haviaras*, for the applicant in Case No. 487/81.  
*A. Markides*, for the applicant in Case No. 42/82.  
*A. Vladhimirou*, for the respondent.

*Cur. adv. vult.*

- 25 PIKIS J. read the following judgment. Demetra Papantoniou and Myrianthi Papaonisiforou were among the candidates for promotion to the post of Senior Welfare Officer. They were not among the appointees, hence the present proceedings. They challenge, by the recourses under consideration, the decision of the Public Service Commission of 10th October, 30 1981, promoting four Welfare Officers other than themselves, appointments that were gazetted on the 13th November, 1981.

- 35 The applicants confined their challenge to the appointment of one of those selected, namely Georghios Kastellanos, joined as an interested party in the proceedings in hand. Apparently, the applicants acknowledge, it was reasonably open to the respondents to choose the remaining appointees to the post of Senior Welfare Officer.

The factual background to these appointments is the following: The administration set in motion the machinery for the filling of five posts of Senior Welfare Officers. This was accomplished by the Director-General of the Ministry of Labour, inviting the Public Service Commission to take necessary steps in that direction. The position of Senior Welfare Officer belongs to the category of specialised posts under section 35(2) of the Public Service Law, 33/67, making necessary the setting up of a departmental committee for the examination of the merits and suitability of those eligible for appointment. The departmental committee examined the merits of those competing for appointment, about 20 Welfare Officers, who possessed the qualifications necessary for promotion. Their recommendations were embodied in two reports submitted to the Public Service Commission on the 4th and the 22nd day of September, 1981. The applicants and the interested party were among the 12 candidates recommended for promotion.

The Public Service Commission examined, on the 2nd October, 1981, matters relevant to the filling of the posts. They were aided in sifting the merits and qualifications of the candidates by the Director of Welfare Services Mr. Konis who passed on his views to the Commission as to the suitability of each candidate for appointment and comparative merits. He expressed preference for the four candidates that were eventually selected, including of course the interested party. The Public Service Commission met afresh on the 10th October, 1981, to complete its deliberations, this time in the absence of the Department Head. A decision was taken promoting the four interested parties to Senior Welfare Officers. Promotions were limited to four and not five, as originally planned, because it was discovered that four were in reality the vacant posts for promotion.

Demetra Papantoniou, the applicant in Recourse No. 487/81, challenges by her recourse the validity of the decision so far as the interested party is concerned on the ground of misconception on the part of the Public Service Commission of facts relevant to her and the interested party. The essence of her complaints is that the Public Service Commission misconceived the facts emerging from the confidential reports of the parties

and wrongly assumed that the confidential reports of the interested party were better to her own reports. She also charged the Commission with misconception of facts relevant to the seniority of the parties, a ground that was eventually abandoned if I understood rightly her position as clarified by her counsel at the final stage of litigation. Her complaint here was that the Commission wrongly treated the interested party as senior in service to her by accepting that appointment to an established post confers seniority on the appointee vis-a-vis holders of the same post on an unestablished basis. This allegation was rightly abandoned for it is well settled that a permanent appointment confers seniority on the holder to one appointed on an unestablished basis. The decision of the Supreme Court in *Niki Ioannou v. The Republic*, (1976) 3 C.L.R. 431 acknowledges the validity of this proposition and establishes that seniority dates from the last as opposed to the first appointment in Government Service firstly, and that appointment to an established post, as compared to an unestablished, seals the seniority of the parties, secondly. (See, also, section 46(2) of Law 33/67).

There remains to consider allegations of misconception respecting confidential reports, particularly the comparative merits of the parties as emerging therefrom. An examination of the relevant records in no way supports the contentions of the applicant. On the contrary an overall assessment of their confidential reports lends support to the view taken by the Commission that the interested party was a more meritorious candidate. Both candidates were reported upon as excellent in 1980 but the rating of the interested party was better for the years 1979 and 1978. Also the interested party had the edge over applicant in the preceding years. This being the case, the complaint of the applicant crystallizes as unfounded.

Another complaint of applicant raised in the recourse but not really pressed before me, is that the schemes of service were conveniently altered so as to accommodate the interested party and make possible thereafter his promotion. There is nothing to suggest that the schemes of service were improperly approved or that their effect was in any way misconstrued by the Public Service Commission. The approval of schemes of service is a matter falling exclusively within the province

of the Council of Ministers and there is nothing before me to suggest that this power was in any way exceeded or abused. Consequently, this complaint cannot carry the case for the applicant any further either.

In my judgment, the applicant in Recourse No. 487/81 totally failed to establish any ground justifying interference with the decision of the respondents. With this conclusion, the premises of the recourse collapse and her application is, consequently, dismissed with no order as to costs. 5

Myrianthi Papaonisiforou pressed similar complaints with Demetra Papantoniou, alleging misconception on the part of the respondents respecting her merits and seniority, as compared to the interested party. Her complaint as to seniority was, as in the case of the other applicant, abandoned for precisely the same reasons and, therefore, it need not concern us. The details of her complaint regarding the evaluation of the confidential reports are different from those of the other applicant and raise a point not specifically raised for consideration by the Court on any previous occasion. That is, the implications from the failure of the countersigning officer to confine his report within the ambit of his authority and its impact upon the decision of the Commission given the importance attached to it. It becomes necessary to examine in detail the confidential reports of the parties and the basis upon which the decision of the Public Service Commission was reached. 10  
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The confidential reports of the applicant for the three years immediately preceding selection presented her as a more meritorious candidate compared to the interested party. Both were reported upon as excellent for the years 1979 and 1980. However, her rating for the year 1978 was better than that of interested party. She was rated as excellent on eight items of assessment and as above average on the remaining two, whereas interested party was reported upon as excellent on only four of the ten items and as above average on the remaining six. Recent confidential reports are, as repeatedly stated by the Supreme Court, of especial importance in ascertaining the merits of the candidates for they convey an up-to-date picture of their performance. (See, inter alia, *HjiGregoriou v. The Republic* (1975) 3 C.L.R. 477 (F.B.): *Niki Ioannou* 30  
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v. *The Republic* (1977) 3 C.L.R. 61). It is a fact of life that performance in the service may well change over the years; improvement in the process is often a reflection of a more intensive application in the discharge of one's duties and, may  
5 denote greater devotion to duty. In this case, the position emerging with regard to merit over the last years, is consistent with the previous record of the parties, as one may discern from a comparison of their confidential reports. One notices  
10 in some of the confidential reports of the applicant, very complimentary comments about her performance, a factor missing from the reports of the interested party. Notwithstanding this superiority in merit, the Public Service Commission played down its implications because of the comments of the countersigning officer to the effect that applicant's reporting officer  
15 was prone to overestimate the performance of his subordinates. Comments to that effect, were made by the Director of the Department of Social Welfare Services when he countersigned the confidential reports of applicant for the years 1978 and 1979.

20 Mr. Markides submitted, the countersigning officer in making the above comments, exceeded his authority and acted outside the sphere of his powers. He referred us to reg. 8 of the General Orders applicable at the time of the preparation of the 1978 and 1979 confidential reports, defining the authority and setting  
25 out the powers of countersigning officers.

From a reading of the plain provisions of reg. 8, it appears that the Director of the Department of Social Welfare Services, in countersigning the confidential report of the applicant, acted outside his authority when he purported to underrate  
30 the assessment made by the reporting officer of the applicant, by reference to the reporting tendencies of the reporting officer. In accordance with reg. 8, the first duty of the countersigning officer is to read the report. This was done in this case. The powers of the countersigning officer are limited to an assessment  
35 of the qualities of the person reported upon, provided the countersigning officer has personal knowledge of the performance of the officer. Only if he has such a knowledge can he proceed to make an assessment of the officer by endorsing, qualifying or refuting the assessment of the reporting officer,  
40 as well as stating his personal opinion on her qualities. No authority vests in him to assess the officer reported upon by



reference to the reporting tendencies or habits of the reporting officer.

In the present case, so far as the confidential reports for the years 1978 and 1979 are concerned, the countersigning officer totally failed to carry out his duties under reg. 8 and, omitted from stating whether he has personal knowledge of the applicant and, his opinion on her performance. Instead, he sought to cast doubts on the objective implications of the confidential report of the applicant, by reference to the reporting officer, something he had no authority to do. In so doing, he exceeded his powers and acted in abuse of them. The Director of the Department of Social Welfare Services was the countersigning officer for the applicant over a number of years. Going through the confidential reports, it is nowhere stated whether he had personal knowledge of her performance and what his opinion on her merits was. The Public Service Commission attached, as it is manifest from the reasoning accompanying their decision, considerable importance to the views of the Director as to the reporting tendencies of the officer reporting upon the applicant and drew, as one may infer from their reasoning, inferences adverse to the applicant. In attaching importance to the unauthorised comments of the Director of the Department of Social Welfare Services, they took into consideration improper material that evidently led them to a misconception about the merits of the applicant.

A misconception of the facts on an area of the factual situation vitiates the decision provided it is material in the sense that it influenced the decision taken.

As Triantafyllides, P. pointed out in *Nicolaos Ekkeshis v. The Republic* (1972) 3 C.L.R. 87, the sub judice decision must be annulled if there is a real probability that it is founded upon a factual misconception. It is the Court's duty to rid an administrative decision of every suspicion that it is fraught with the founded upon a misconception. Faced with such a probability, the Court's duty is to set aside the decision complained of. In *Constantinos Ioannides v. The Republic* (1972) 3 C.L.R. 318, a detailed analysis is made of the impact of a factual misconception upon the fate of an administrative decision.

A study of the jurisprudence of the Greek Council of State establishes that, for a factual misconception to vitiate the

decision, it must be objectively supported and not rest on subjective considerations and the view taken by the Court of the assessment of the factual situation made by the administrative body concerned. A factual misconception may arise either  
5 where relevant facts are omitted from consideration or where irrelevant facts are taken into consideration. (See, *Conclusions from jurisprudence of Greek Council of State*. 1929–1959, pp. 267, 268).

Confidential reports are a principal guide to the assessment  
10 of the merits of a candidate. Misconception as to their effect is apt to result in a serious misappreciation of the merits of the candidates, a matter of great importance for. the merits of a candidate are the first consideration to which regard should be paid in effecting promotions. (See, *section 44(2) — Law*  
15 *33/67*). If the misconception is material in the sense that it is really probable that it had a bearing on the decision taken, the decision must be set aside. (See, *Niki Ioannou v. The Republic* (1976) 3 C.L.R. 431 and, *Niki Ioannou v. The Republic* (1977) 3 C.L.R. 61).

20 As observed in *Papadopoulos v. The Republic* (Recourse No. 488/81—delivered on 29.10.1982, unreported yet).\* “The value of confidential reports as a guide to one’s service would be neutralized contrary to the letter and spirit of the law if we were to accept the submission of counsel .....”.  
25 The submission was that confidential reports are of limited value to the comparative merits of candidates where they are prepared by different officers. Confidential reports are an irreplaceable guide to the overall picture of the merits of a candidate, as proclaimed by the Supreme Court in *Evangelou v. The Republic*  
30 (1965) 3 C.L.R. 292. Although greater flexibility is allowed in the comparison of confidential reports prepared by different reporting officers, confidential reports remain the first pointer to one’s merits as revealed from his service record.

Guided by the above principles, we must resolve whether the  
35 misconception of the Public Service Commission, as to the merits of the applicant arising from the unauthorised comments of the countersigning officer, was material in the sense that had the Commission not taken the remarks into account, there is a real probability they would arrive at a different decision. The

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\* Now reported in (1982) 3 C.L.R. 1070.

ultimate question is whether we can predict what the decision of the Public Service Commission would be had it not been for the aforementioned misconception. If such a decision can be envisaged with a degree of certainty from the reasoning of the decision and can be asserted that the decision would be the same, the misconception cannot be deemed to have been material. If the opposite is the case and we are unable to depict what their decision would be, the answer must be that the misconception was material and, as such, it vitiates the decision taken. I am totally unable to make any predictions about what the decision of the respondents would be had it not been for the misconception under which they laboured. The seniority of the interested party was so marginal that could not have had any decisive bearing on the decision of the respondents. In my judgment, the decision of the Commission was taken while they laboured under a material misconception as to the facts and must, consequently, be annulled so far as the applicant and the interested party are concerned.

Perusing the confidential reports, it came to my notice that in some of them, comments are made about the political loyalties of civil servants. There is no authority either in the law or the General Orders applicable until 1979, or the Regulations that replaced them under Circular No. 491, for an evaluation of the political loyalties of civil servants. Hopefully this practice has been discontinued for, in recent confidential reports no mention is made of the political loyalties of officers. If not, it must be discontinued for it is arbitrary and tends to undermine the stature of the public service.

For all the above reasons, the recourse of the applicant in Case No. 42/82 succeeds and the subject decision, so far as it concerns the applicant and interested party, is annulled. There shall be no order as to costs.

*Recourse No. 487/81 dismissed.*

*Recourse No. 42/82 succeeds.*

*No order as to costs.*