

1984 April 7

[TRIANAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ACHILLEAS LOIZIDES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,*Respondent.*

(Cases Nos. 240/83, 357/83).

Public Officers—Promotions—Additional documents in file of interested party which had effect of making him appear a public official of great merit—But copies of documents from files of the appropriate Department, which contained high praise of the work done by applicant at various stages of his career not found in his personal file—Respondent Public Service Commission prevented from taking duly into account all material considerations—And thus its relevant discretionary powers were exercised in a defective manner—Sub judice decision annulled. 5

Administrative Law—Discretionary powers—Defective exercise of—Through failure to take duly into account all material considerations. 10

The applicant and the interested party were candidates for promotion to the post of the Director of the Department of Lands and Surveys. The Public Service Commission promoted the interested party and hence these recourses. 15

Though in the file of the confidential reports regarding the interested party there were to be found additional documents regarding an offer that had been made to him to appoint him to another very high post and which had the effect of making him appear to be a public official of great merit, there were not to be found in the personal file of the applicant, which was placed before the respondent Public Service Commission, copies of documents from files of the Department of Lands and Surveys 20

which contained high praise of the work done by him at various stages of his career and which could influence favourably the view of the Commission as regards his suitability for promotion to the post of the Director of the said Department, for which there was preferred by the Commission the interested party even though he was junior to the applicant.

Held, that the Commission, in reaching its sub judice in the present proceedings decision, was prevented from taking, and thus failed to take, duly into account all material considerations and, consequently, its relevant discretionary powers were exercised in a defective manner; accordingly the sub judice decision must be annulled.

Held, further, that the defective exercise of the powers of the Commission assumes even more decisive significance in view of the fact that, as it appears from all the material before the Court, the margin by which the interested party was found to be more suitable for promotion than the applicant was, quite small.

Sub judice decision annulled.

Cases referred to:

- 20 *Michael v. Republic* (1982) 3 C.L.R. 1123 at p. 1129;
Ioannou v. Republic (1983) 3 C.L.R. 75 at p. 79;
Smyrnios v. Republic (1983) 3 C.L.R. 1202 at p. 1210;
Constantinou v. Republic (1983) 3 C.L.R. 136 at p. 142;
25 *Ioannou v. Public Service Commission* (1983) 3 C.L.R. 449 at
pp. 458, 459;
Kyprianides v. Republic (1965) 3 C.L.R. 519 at pp. 527, 528;
Paphitis v. Republic (1967) 3 C.L.R. 300 at pp. 305, 306;
Andreou v. Republic (1973) 3 C.L.R. 101 at p. 108.

Recourses.

30 Recourses against the decision of the respondent to promote the interested party to the post of Director of the Department of Lands and Surveys in preference and instead of the applicant.

A. Dikigoropoulos, for the applicant.

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

A. Triantafyllides with *G. Triantafyllides*, for the interested party.

Cur. adv. vult.

TRIANTAFYLIDIS P. read the following judgment. By means of these two recourses the applicant challenges, in effect, the decision of the respondent Public Service Commission to promote, instead of him, Rois Nicolaides (to be referred to hereinafter as the "interested party") to the post of the Director of the Department of Lands and Surveys, as from the 1st July 1983. 5

Counsel for the applicant filed, initially, on the 7th June 1983, recourse 240/83 against the said decision of the respondent Commission, which had been taken on the 30th May 1983 and which was publicized in the daily press on or about the 5th June 1983. 10

Then, after such decision was published in the Official Gazette of the Republic on the 8th July 1983, counsel for the applicant filed, on the 8th September 1983, recourse 357/83, challenging once again the promotion of the interested party. 15

It was directed by the Court, with the consent of counsel for all the parties, that both recourses were to be heard together and that the pleadings which were filed in case 240/83 would be considered as filed, also, in respect of case 357/83.

A preliminary issue which has been raised in these proceedings was whether the first recourse, 240/83, is premature, because it was filed before the publication in the Gazette of the promotion of the interested party. 20

I do not consider that this issue is of decisive significance in this instance, because only if case 357/83 had not been also filed the dismissal, possibly, of case 240/83 as being premature would have entailed the end of the judicial process against the promotion of the interested party. Since, however, such promotion has been challenged too by case 357/83 and as, with the consent of all parties, both cases - 240/83 and 357/83 - were heard together, it is really immaterial whether or not case 240/83 is premature. 25 30

I must, in any event, point out that it was not only prudent, but also advisable, in my view, to challenge the promotion of the interested party by means of case 357/83, because, on the basis of the provisions of subsections (5) and (6) of section 44 of the Public Service Law, 1967 (Law 33/67), the process of making such promotion was formalized by its publication in the Official 35

Gazette of the Republic; and, indeed, in my opinion, there can be no doubt, when Article 146.3 of the Constitution and section 44(6) of Law 33/67 are read together, that the period of seventy-five days which is prescribed in Article 146.3 did not
5 begin to run against the applicant until the aforesaid publication in the Gazette.

On the other hand, I think that it may be usefully observed that the provisions of Article 146.3 of the Constitution should not be construed as excluding the filing of a recourse against a
10 promotion before its publication in the Gazette, because such a course may become necessary in a situation such as the present one where the applicant filed together with case 240/83 an application for a provisional order seeking a stay of the decision of the respondent Commission to promote the interested party
15 (even though, eventually, such application has not been pursued).

The promotion post in question was to be vacated on the 1st July, 1983, but as the Director-General of the Ministry of Interior, under which comes the Department of Lands and Surveys, had requested its filling by the respondent Commission
20 by a letter dated the 30th April 1983, and as the outgoing holder of the post was to be on leave prior to his retirement as from the 10th May 1983, the Commission, at its meeting on the 12th May 1983, decided, in view of the provisions of section 21 of the Interpretation Law, Cap. 1, to set in motion the process for the
25 filling of the post.

As a result, it proceeded to interview, on the 30th May 1983, in the presence of the Director-General of the Ministry of Interior, three candidates who were eligible for promotion and were holding the immediately lower post of Senior Land Officer,
30 namely the applicant, the interested party and Andreas Mavreas.

The most senior of the three in the post of Senior Land Officer was Mavreas who had been promoted to such post on the 1st June 1968, then there followed the applicant and the interested party who had been promoted to the said post on the
35 15th December 1969 and the 15th June 1972, respectively.

The respondent Commission found the interested party to be superior to the other two candidates and decided to promote him to the post of Director of the Department of Lands and Surveys as from the 1st July, 1983.

On the basis of the contents of the relevant minutes of the respondent Commission, which are dated 30th May 1983, and of the material which is referred to therein and which was placed before this Court during the hearing of these cases, I have reached the conclusion that this is, essentially, an instance in which, even though by a quite small margin, the Commission found the interested party to be on the whole superior to the applicant, notwithstanding the seniority of the latter over the former. 5

Consequently, in a case such as the present one, I could not interfere with the sub judice decision of the Commission since I have not been satisfied that such decision was not reasonably open to it (see, in this respect, inter alia, *Michael v. The Republic*, (1982) 3 C.L.R. 1123, 1129, *Ioannou v. The Republic*, (1983) 3 C.L.R. 75, 79, and *Smyrnios v. The Republic*, (1983) 3 C.L.R. 1202, 1210); and as it was not found by the Commission that the applicant and the interested party were more or less equal in every other respect it could not be held that the seniority of the applicant over the interested party ought to have decisively prevailed in his favour (see, in this respect, inter alia, the *Smyrnios* case, supra, at p. 1208, *Constantinou v. The Republic*, (1983) 3 C.L.R. 136, 142 and *Ioannou v. The Public Service Commission*, (1983) 3 C.L.R. 449, 458, 459). 10 15 20

What has turned in the end the scales in favour of the applicant and has led me to the conclusion that the promotion of the interested party should be annulled is the fact that, though in the file of the confidential reports regarding the interested party there were to be found additional documents regarding an offer that had been made to him to appoint him to another very high post and which, naturally, had the effect of making him appear to be a public official of great merit, there were not to be found in the personal file of the applicant, which was placed before the respondent Public Service Commission, copies of documents from files of the Department of Lands and Surveys which contained high praise of the work done by him at various stages of his career and which could, obviously, influence favourably the view of the Commission as regards his suitability for promotion to the post of the Director of the said Department, for which there was preferred by the Commission the interested party even though he was junior to the applicant. 25 30 35 40

As a result I felt clearly constrained to conclude that the Commission, in reaching its sub judice in the present proceedings decision, was prevented from taking, and thus failed to take, duly into account all material considerations and, consequently,
5 its relevant discretionary powers were exercised in a defective manner (see, inter alia, in this respect, *Kyprianides v. The Republic*, (1965) 3 C.L.R. 519, 527, 528, *Paphitis v. The Republic*, (1967) 3 C.L.R. 300, 305, 306 and *Andreou v. The Republic*, (1973) 3 C.L.R. 101, 108).

10 The aforesaid defective exercise of the powers of the Commission assumes even more decisive significance in view of the fact that, as it appears from all the material before me, the margin by which the interested party was found to be more suitable for promotion than the applicant was, as already
15 stated, quite small.

In the light of the foregoing it follows that the decision of the respondent Commission to promote the interested party has to be annulled.

20 I shall not, however, make any order as to the costs of these proceedings.

Sub judice decision annulled. No order as to costs.