

1985 August 30

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

MICHAEL SPANOS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF FOREIGN AFFAIRS,

Respondent.

(Case No. 53/83).

Public Officers—Promotion—The Public Service Law 33/1967 s. 44 (3)—Meaning of—Acting Head of Department imparting views to Public Service Commission pursuant to s. 44 (3)—Entitled to do so—S. 44 (3) does not limit the Public Service Commission to the reception of the views of permanent holders of the post of the particular Head of Department. 5

Public Officers—Promotions—Applicant must establish a case of striking superiority to interested parties—Though merit is the first consideration to which regard should be had, the interplay of the facts relating to the three statutory criteria, i.e. merit, qualifications and seniority is very much a matter for the Public Service Commission. 10

Qualifications—Additional academic qualifications not specifically stipulated in the scheme of service—Only of very marginal importance. 15

Recommendation of Head of Department—An independent factor in the definition of a candidate's merit.

The applicant in this recourse sought the annulment of the promotions by the respondents of the five interested parties to the post of Counsellor or Consul General, a 20

promotion post in the diplomatic service of the Republic.

5 The Departmental Committee appointed to make a preliminary examination of the eligibility and suitability of the applicants for promotion recommended, in alphabetical order, 14 of the 15 candidates, including the interested parties and the applicant.

Thereafter, the respondents directed their attention to the filling of the five vacant posts on two occasions, on the 4th and 19th of August, 1982.

10 At the second meeting the views of Mr. Markides. Acting Director-General of the Ministry, were received pursuant to the provisions of s. 44 (3) of the Public Service Law, 33/1967.

15 Mr. Markides expressed preference for the five interested parties. At the end the Commission chose the five interested parties as best suitable for appointment. It is evident that they attached serious importance to the views of the Departmental Head as they were on authority entitled or indeed bound to do.

20 Counsel for the applicant mainly contended

(a) That it was improper or erroneous on the part of the respondents to receive the views of the Acting Director-General of the Ministry, and

25 (b) That the respondents overlooked applicant's glaring superiority to each and everyone of the interested parties.

30 *Held*, dismissing the recourse (1) The submission of counsel that only permanent holders of a post can impart their views as Head of Department to the Public Service Commission under s. 44 (3) of Law 33/67 has no substance. The ambit and limitations of the statutory power and duty in question should be sought in the Statute that imposes it. Section 44 (3) refers to the Head of a Department descriptively connoting the Head at any one time
35 of the appropriate department of the Civil Service. The only other provision with a bearing on the subject is s.2 of the same Law defining "Head of Department". The

heading of a department is again in no way connected to the permanency of the status of the holder and his establishment in that post. On a broader view the law does not require as a prerequisite for the reception of the views of a department specific knowledge by the Head of the candidates. It does not tie the reception of his views to the length of time during which he heads the department. 5

(2) The question raised at a belated stage as to the validity of the appointment of Mr. Markides cannot be gone into in these proceedings as such issue had not been raised in the application nor had any attempt been made to amend the application and raise it; further hardly any facts were placed before the Court to support and far less to substantiate this allegation; and the respondents were not bound to make a reasoned reply thereto. 10 15

(3) The process of review of promotions in the Public Service under Art. 146 of the Constitution is confined to the legality of the decision and not its correctness from the view point of a subjective evaluation by the Court. To make out a case of striking superiority it must be established that the applicant's superiority was so glaring as to provide an objective basis for interference. Striking superiority must be established by reference to the statutory criteria of merit, qualifications and seniority and emerge on consideration of the facts of the case. Although merit is the first consideration to which regard should be had, the interplay of the facts relating to merit, qualifications and criteria is very much a matter for the Public Service Commission. In the absence of a stipulation for additional qualifications, academic qualifications additional to those required by the scheme of service are a factor of very marginal importance. The recommendations of a Head of a Department constitute an independent factor in the definition of a party's merit. In this case the applicant failed to establish a case of overwhelming superiority entitling the Court to intervene, notwithstanding the adequacy of the factual inquiry and professed adherence to the statutory criteria for promotion. 20 25 30 35

Recourse dismissed.

No order as to costs. 40

Cases referred to:

- Hadjiconstantinou v. The Republic* (1973) 3 C.L.R. 65;
Petrides v. The Public Service Commission (1975) 3
 C.L.R. 284;
- 5 *Constantinou v. The Republic* (1984) 3 C.L.R. 498;
Makrides v. The Republic (1983) 3 C.L.R. 622;
Hadjisavva v. The Republic (1982) 3 C.L.R. 76;
Hadjiloannou v. The Republic (1983) 3 C.L.R. 1041;
Larcos v. The Republic (1982) 3 C.L.R. 513;
- 10 *Papadopoulos v. The Republic* (1982) 3 C.L.R. 1070.

Recourse.

- Recourse against the decision of the respondent to promote the interested parties to the post of Counsellor or Consul General in the Ministry of Foreign Affairs in preference and instead of the applicant.
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N. Clerides, for the applicant.

S. Georghiades, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

- 20 PIKIS J. read the following judgment. At issue is the validity of the decision of the Public Service Commission, the respondents, to promote the five interested parties⁽¹⁾ to the post of Counsellor or Consul General, a promotion post in the diplomatic service of the Republic.
- 25 The challenge comes from M. Spanos, the applicant, one of the unsuccessful candidates for appointment to the above position. The decision is mainly questioned as defective because of:
- 30 (a) Impropriety or error on the part of the respondents in receiving the views and recommendations of

(1) Ph.^s Anthoullis, Pl. Kyriakides, C. Malliotis, A. Papadopoulos, and I. Stephanides.

Mr. Markides, then Acting Director-General of the Ministry, and

- (b) Disregard or misapplication of the statutory criteria for selection having regard to the record of the parties in the service. 5

The case for the applicant in this regard, vaguely outlined in the application, crystalized in his written address into a case of striking superiority, the respondents allegedly having ignored or overlooked his glaring superiority to each and everyone of the interested parties, in breach of the norms of sound administration. 10

For the respondents, it was submitted, the procedure followed for making the promotions was consonant with law and the decision reached within the limits of the discretionary powers of the Public Service Commission. Hence they prayed for the dismissal of the recourse. 15

The Departmental Committee appointed to make a preliminary examination of the eligibility and suitability of the applicants for promotion recommended, in alphabetical order, 14 of the 15 candidates as both eligible and suitable for appointment, including interested parties and the applicant. Thereafter, the respondents directed their attention to the filling of the five posts on two occasions, on the 4th and 19th August, 1982. At the second meeting the views of Mr. Markides, Acting Director-General of the Ministry, were received pursuant to the provisions of s. 44 (3) of the Public Service Law(1). 20
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While Mr. Markides commended favourably upon the performance in the service of all candidates, he expressed preference for the five interested parties who were in consequence recommended for promotion. After due reflection on the data in the personal files and files of confidential reports of the candidates and consideration of the recommendation of Mr. Markides, the Public Service Commission, as minuted in their decision, chose the interested parties as best suitable for appointment. It is evident they attached serious importance to the views of the Depart- 30
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(1) Law 33/67.

mental Head as they were on authority(1) entitled or indeed bound to.

5 The views of the Head of a Department are an important pointer to the suitability of candidates for promotion, in themselves a separate factor of the suitability of the candidates for promotion. The Public Service Law aimed by the introduction of the provisions of s.44(3) to graft into the law appropriate procedure for benefiting the Public Service Commission with the views of functionaries of the
10 administration on the needs of the service and the way to satisfy them without undermining either its independence or ultimate responsibility for the decision taken(2).

15 The issue raised with regard to the views of Mr. Markides is primarily confined to his temporary status as Director-General allegedly rendering him incompetent to act in the capacity of Departmental Head under s. 44 (3). Only permanent holders of a post can, in the submission of counsel, impart their views as Heads of Department under s. 44 (3). Though raised in the address of counsel, the point
20 was hardly articulated leaving it to the Court to discern its significance in the context of the law. As we are referring to a statutory power, as well as a statutory duty, its ambit and limitations must be sought in the statute that imposes it. Subsection 3 of s. 44, the pertinent provision of the Public Service Law, does not in terms limit the duty of the
25 Public Service Commission to the reception of the views of permanent holders of the post of particular departments of the civil service. It refers to the Head of a Department descriptively connoting the Head at any one time of the appropriate department of the civil service. The only other
30 provision of the Public Service Law with a bearing on the subject is, to my comprehension, s. 2 of the law defining "Head of Department". The heading of a department is again in no way dependent on the permanency of the status of the holder and his establishment in that post. On a
35 broader plane the law does not require as a prerequisite for the reception of the views of a department specific

(1) See, inter alia, Hadjiconstantinou v. The Republic (1973) 3 C.L.R. 65; Petrides v. The P.S.C. (1975) 3 C.L.R. 284. Constantinou v. The Republic (1984) 3 C.L.R. 498.

(2) Makrides v. The Republic (1983) 3 C.L.R. 622, 632.

knowledge by the Head of the candidates. It does not tie the reception of his views to the length of time during which he heads a department. Of course if he has no knowledge of the candidates or some of them, he will either refrain from expressing an opinion about their suitability or seek to bridge the gap in his knowledge by an appropriate inquiry. I find, therefore, no substance in the submission that Mr. Markides was incompetent on account of the temporariness of his position as Director-General to advise the Public Service Commission under s. 44 (3) of the Public Service Law. No suggestion has been made that the reception of the views of Mr. Markides was for any other reason improper except that at a belated stage the validity of his acting appointment was questioned. In the first place the validity of his appointment, a subject not made an issue by the questioning of the decision of the Public Service Commission, was not raised in the application nor was any attempt made to amend the application and raise it as an issue affecting the legality of the decision. Consequently, it is not an issue in the proceedings and cannot as such be examined nor were the respondents bound to make a reasoned reply thereto. Moreover, hardly any facts were placed before the Court to support and far less substantiate this allegation. For these reasons the validity of the appointment of Mr. Markides cannot be gone into in these proceedings.

Coming to the merits of the case, we must examine whether the material before the P.S.C. bears out the case of the applicant of striking superiority. Another contention relevant to the reasoning of the decision is that it was not properly or adequately reasoned, a submission raised with little enthusiasm and one that cannot stand the test of scrutiny. Examination of the decision itself suggests respondents took stock of the material facts and directed themselves properly respecting the criteria for selection. The process of review under Art. 146 is confined to the legality of the decision and not its correctness from the view point of a subjective evaluation by the Court. To make out a case of striking superiority it must be established that applicant's superiority was so glaring as to

provide an objective basis for interference⁽¹⁾. A decision reasonably open to the P.S.C. is not vulnerable to be set aside on this ground i.e. a decision they could have bona fide reached in the exercise of their discretionary powers. Striking superiority must be established by reference to the statutory criteria for selection—namely, merit, qualifications and seniority—and emerge on consideration of the facts of the case. Although merit is the first consideration to which regard should be had, the interplay of the facts relevant to merit, qualifications and seniority is very much a matter for the P.S.C., the body ultimately responsible for defining one's suitability to promotion by relevance to the sum total of the facts bearing on the competence and capability of candidates to carry out the duties of the new post with success.

Closer examination of the facts relevant to the candidates' merits, qualifications and seniority included in the files before the P.S.C. reveals the following:

On evaluation of the confidential reports on the applicant, the principal pointer to a candidate's merit (in the statutory sense) it emerges he was an excellent candidate for appointment; his services were very highly rated. The same can be said of some of the interested parties. Taking as a yardstick the confidential reports of the six candidates from 1977 onwards, the year from which interested parties held the post of Secretary "A" or Consul, we have the following picture:-

The reports on Mr. Anthoullis were equally good with those of the applicant, if not better. Almost as good as the reports of the applicant were those on Mr. Maliotis and Mr. Kyriakides.

Broadly the aforementioned four candidates were equally good in terms of merits as elicited from their confidential reports. On the other hand, the confidential reports on the applicant were better than those on Mr. Papadopoulos and Mr. Stephanides. However, with regard to the latter the edge is somewhat blunted by the fact that in the year immediately preceding the promotions, Mr. Ste-

⁽¹⁾ Hadjisavva v. The Republic (1982) 3 C.L.R. 76, 78; Hadjiannou v. The Republic (1983) 3 C.L.R. 1041.

phanides had performed extremely well and had an excellent rating. The edge over Mr. Papadopoulos, though sharper, the overall performance of Mr. Papadopoulos in the service was by no means unsatisfactory. The rival merits of the three candidates from the view point of their confidential reports are reflected in the table attached to this judgment. 5

Respecting qualifications all six candidates possessed the academic qualifications envisaged by the scheme of service. In the absence of a stipulation for additional qualifications as an advantage, academic qualifications additional to those required by the scheme are a factor of very marginal importance⁽¹⁾. From the view point of qualifications, the applicant did not enjoy superiority over anyone of the interested parties; if anyone did possess an advantage in this regard, for what little weight such factor may carry, in the context of comparison, it was Mr. Papadopoulos. 10 15

Lastly, each one of the interested parties was senior to the applicant by what may be described as an appreciable margin. Interested parties Anthoullis, Maliotis and Papadopoulos were appointed to the post of Counsellor or Consul on 1st April, 1977, while the other two interested parties were appointed on 1st October of the same year. As earlier indicated, the impact of different facts defining candidate's merit, qualifications and seniority in the shaping of the overall suitability of a candidate for appointment is very much a matter for the P.S.C. Merit carries, as often said, the greatest weight but it is not a factor to be judged in isolation nor are the confidential reports the sole indicator of a party's merit in the statutory sense. The recommendations of the Departmental Head constitute an independent factor in the definition of a party's merit. 20 25 30

The ultimate question is whether the applicant established a case of overwhelming superiority entitling this Court to intervene notwithstanding the adequacy of the factual inquiry and professed adherence to the statutory criteria for promotion. The answer is in the negative. The decision taken was one reasonably open to the Commission, the body charged under the Constitution with the manning of the public service. That being the case the recourse must necessarily be dismissed. 35 40

(1) Larkos v. The Republic (1982) 3 C.L.R. 513; Papadopoulos v. The Republic (1982) 3 C.L.R. 1070.

