

1985 November 30

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ARMAND JOSEPHIN,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 65/83).

*Administrative Law—Misconception of fact—Public Officers—
Promotions—Erroneous statement before the respondent
Commission that applicant's performance for 1982 was
more or less the same as that for the previous years—In
the circumstances the Commission laboured under a ma-
terial misconception.*

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*Constitutional Law—Questions of constitutional nature are not
to be decided unless this is really necessary—Question of
constitutionality of s.4(3) of the Public Service Law
33/67 left open.*

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The applicant and the interested parties were amongst the candidates for promotion to the post of Senior Technical Superintendent in the Water Development Department. On the 16.12.82 the Director of the Department Mr. Lytras made his recommendations to the Commission regarding each one of the candidates. As the relevant confidential reports for the year 1982 were not yet before the Commission Mr. Lytras informed the Commission that the performance of the candidates in 1982 continued to be more or less the same as in previous years.

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The confidential report, however, for the applicant for 1982, which was signed by Mr. Lytras on the

13.6.83 contained a statement that the applicant "had recently shown considerable improvement". It is important to note that on the basis of the reports for the previous years the performance of the applicant was not quite satisfactory.

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Applicant was senior to the interested parties by two and a half years.

Held, annulling the sub judice decision: (1) As the above statement by Mr. Lytras was erroneous, the respondent Commission in evaluating applicant's merits laboured under a material misconception. It is very probable that the Commission would not have reached the sub judice decision, had it known the true situation regarding applicant's performance in 1982, especially as the applicant was by two and a half years senior to the interested parties. Consequently the sub judice promotions have to be annulled.

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(2) Questions of constitutional nature are not be decided, unless this is really necessary. As the sub judice promotions have in any event to be annulled for the reasons aforesaid, it is not necessary to decide the issue of the constitutionality of s. 4(3) of Law 33/67 raised by counsel for the applicant.

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Sub judice decision annulled.

No order as to costs.

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Cases referred to:

Drousiotis v. The Cyprus Broadcasting Corporation (1984)
3 C.L.R. 546;

Michael v. The Republic (1984) 3 C.L.R. 974;

Zachariades v. The Republic (1984) 3 C.L.R. 1193;

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Michaelides v. The Republic (1984) 3 C.L.R. 1522;

Pantelouris v. The Republic (1985) 3 C.L.R. 852;

Louca v. The President of the Republic (1983) 3
C.L.R. 783;

Burton v. United States, 49 L.Ed 482;

The President of the Republic v. Louca (1984) 3 C.L.R. 241;

The Board for Registration of Architects and Civil Engineers v. Kyriakides (1966) 3 C.L.R. 640.

Recourse.

5 Recourse against the decision of the respondent to promote the interested parties to the post of Senior Technical Superintendent in the Water Development Department in preference and instead of the applicant.

K. Talarides, for the applicant.

10 *G. Erotokritou (Mrs.)*, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

15 TRIANTAFYLIDIS P. read the following judgment. In the present case the applicant challenges the decision of the respondent Public Service Commission to promote, instead of him, the interested parties in the present proceedings, C. Georghiou and St. Pitsillides, to the post of Senior Technical Superintendent in the Water Development Department.

The said post is a promotion post.

20 A Departmental Board, under the chairmanship of the Director of the Department concerned, Mr. C. Lytras, was set up, and by the report of such Board, which was before the respondent Commission at its meeting on the 4th December 1982, there were recommended for promotion four candidates, including the applicant and the two interested parties.

25 Then, at the meeting of the Commission on the 16th December 1982 the Director of the Department, Mr. Lytras, made his recommendations regarding each one of the candidates. As the relevant confidential reports for the year 30 1982 were not yet before the Commission at that time Mr. Lytras informed the Commission that the performance of the candidates in 1982 continued to be more or less the same as in previous years.

The Commission, having considered all relevant mate-

rial placed before it, including the recommendations of Mr. Lytras, reached its sub judice decision to promote the two interested parties to the post concerned.

During the hearing of this recourse there was produced before me the confidential report in respect of the applicant for 1982. Such report was signed by Mr. Lytras on the 13th June 1983 and it is stated therein that that applicant “had recently shown considerable improvement” (“ηαρουαίσαε τελευταία μια σημαντική βελτίωση”); and it is very important to note that on the basis of the reports for earlier years the performance by the applicant of his duties does not appear to have been quite satisfactory. 5 10

Mr. Lytras confirmed very fairly, while giving evidence before me, his aforesaid observation in the confidential report for the applicant for 1982 regarding the performance of the applicant in 1982. 15

In view of the material discrepancy between this confidential report for 1982 and the statement of Mr. Lytras before the Commission, on the 16th December 1982, that the performance of the candidates—including, of course, of the applicant—in 1982 was more or less the same as that in previous years, and inasmuch as such statement was erroneous at any rate in so far as the applicant was concerned, I have reached the conclusion that the respondent Commission in evaluating the merits of the applicant was labouring under a material misconception. As it appears from the minutes of the Commission it has placed particular weight on the confidential reports in respect of the candidates and on the views and recommendations of the Director of the Department, Mr. Lytras, and there is no doubt in my mind that because of the erroneous statement by Mr. Lytras as regards the performance of the applicant in 1982 the Commission had a distorted view about him. It is, to say the least, very probable that the Commission would not have reached the sub judice decision not to select for promotion the applicant had it known the true situation, especially as the applicant was by two and a half years senior to the interested parties (and see, in this respect, inter alia, *Drousiotis v. The Cyprus Broadcasting Cor-* 20 25 30 35

poration, (1984) 3 C.L.R. 546, *Michael v. The Republic*, (1984) 3 C.L.R. 974, *Zachariades v. The Republic*, (1984) 3 C.L.R. 1193, *Michaelides v. The Republic*, (1984) 3 C.L.R. 1522 and *Pantelouris v. The Council of Ministers*,
 5 (1985) 3 C.L.R. 852).

Consequently, the sub judice promotions of the interested parties have to be annulled.

Another argument which has been advanced by counsel for the applicant is that the composition of the respondent
 10 Commission was unconstitutional in that the provision in section 4(3) of the Public Service Law, 1967 (Law 33/67) that the President of the Republic may terminate the term of office of anyone of the members of the Commission before its expiry is inconsistent with the envisaged by Article
 15 124 of the Constitution independence of the Commission.

In *Louca v. The President of the Republic*, (1983) 3 C.L.R. 783, 789, I proceeded to give judgment on the basis that the aforesaid provision in section 4(3) of Law 33/67 might be justified by virtue of the "law of necessity",
 20 in the same context in which the setting up by means of Law 33/67 of a new Public Service Commission was found to be justified by the "law of necessity".

When, however, the *Louca* case, supra, came up before the Full Bench of the Supreme Court on the 21st March
 25 1984 (see *The President of the Republic v. Louca*, (1984) 3 C.L.R. 241) A. Loizou J. and Savvides J. referred to the issue of constitutionality of the aforementioned section 4(3) of Law 33/67 and left it open; and they stressed the need for consideration of this matter by the appropriate organs
 30 of the Republic. Moreover Pikis J. went further and opined that the said section 4(3) was unconstitutional, because its enactment was not justified by the "law of necessity".

I do not have to pronounce myself in this case on the issue of constitutionality of section 4(3) of Law 33/67 because the promotions of the two interested parties have to
 35 be annulled in any event for other reasons already stated in this judgment and, therefore, it is not necessary for me to determine such issue of constitutionality; and it is well

settled that questions of constitutional nature are not to be decided unless this is really necessary (see, in this respect, *Burton v. United States*, 49 L. Ed. 482, 485, which was referred to with approval in *The Board for Registration of Architects and Civil Engineers v. Kyriakides*, (1966) 3 C.L.R. 640, 655). 5

I thought fit, however, to take this opportunity of reiterating, in the light of the weighty dicta of my brother Judges in *The President of the Republic v. Louca* case, supra, the need for early urgent consideration by the appropriate organs of the Republic of the matter of section 4(3) of Law 33/67, in order to avoid situations such as that in the present case where a decision of the respondent Commission is challenged on, inter alia, the ground that the Commission is unconstitutionally composed due to the alleged unconstitutionality of the said section 4(3). 10 15

In the light of all the foregoing this recourse succeeds; but I will make no order as to its costs.

Sub judice decision annulled.

No order as to costs.

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