

1986 January 11

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ANDREAS ARISTODEMOU,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE PUBLIC SERVICE COMMISSION,
2. THE MINISTER OF COMMUNICATIONS
AND WORKS,

Respondents.

(Case No. 699/84).

Public Officers—Promotions—Scheme of Service—Material date on which the qualifications required thereunder should be satisfied—Confidential Reports—S. 44(1) of the Public Service Law 33/67 refers to the eligibility of a candidate for promotion—S. 44(3) of the same Law requires that in making a promotion the P.S.C. shall have due regard to the confidential reports—The inquiry should not be confined to the last two reports—More weight should be given to the more recent ones—Recommendations of the Head of the Department—A most vital consideration relating to merit—Seniority—Governed by s. 46—It should prevail only if other things are more or less equal—Merit should carry more weight—Departmental Board—Its role is advisory—The final decision rests with the P.S.C.

By means of the present recourse the applicant, an Airport Assistant, 1st Grade, challenges the promotion of the interested parties to the post of Airport Supervisor in the department of Civil Aviation.

The relevant scheme of service made on 4.2.83 provided as a qualification at least three years' service at the post of Airport Assistant, 1st Grade. The note, however to the scheme provided that for the first three years after the approval of the scheme if there are no suitable civil servants satisfying such qualification, civil servants with at

least 10 years' total service in the post of Airport Assistant. 1st, 2nd and 3rd Grade may be promoted to the post'.

5 The requests for filling of the vacant posts of Airport Supervisor were dated 23.4.83 and 22.2.84. The interested parties were appointed to the post of Airport Assistant, 3rd Grade on 2.1.73 whilst the applicant was appointed to the said post on 1.1.70. They were all promoted to the post of Airport Assistant 2nd Grade on 1.4.77 and to the post of 1st Grade on 15.3.82.

10 The applicant complained that the interested parties were not qualified for promotion under the said scheme, that, notwithstanding equality in merit and qualifications, his seniority was disregarded without due and specific reasoning, that only the last two confidential reports ought
15 to have been taken into consideration and that the evaluation of merit of the applicant by the Departmental Board as the last but one of the 10 candidates was unwarranted.

It should be noted that the Head of the Department had recommended the interested parties.

20 *Held*, dismissing the recourse (1) The material date at which a candidate for promotion must possess the qualifications required by the scheme of service is the date on which the request for the filling of a vacancy is received by the Public Service Commission. It is obvious that the
25 interested parties possessed the qualifications provided in the note to the scheme in question.

(2) The assertion about equality in merit between the applicant and each of the interested parties is not supported by the Confidential reports and the recommendations of
30 the Head of the Department.

The Confidential reports constitute part of the overall picture of the merit of each candidate which the P.S.C. has to weigh as a whole. The provisions of s. 44(1) of Law 33/67 refer to the eligibility of a candidate and are,
35 therefore, irrelevant to the present case. Section 44(3) of Law 33/67 provides that in making a promotion the Commission shall have due regard to the annual confidential reports. The inquiry should not be confined to the last two reports, but should extend to past reports
40 though more weight should be given to recent ones. The

recommendations of the Head of the Department is a most vital consideration relating to merit. The recommendations made in this case are warranted by the confidential reports.

(3) Seniority is governed by s.46 of Law 33/67. The seniority of applicant is not in dispute. Seniority is one of the factors which should be taken into consideration when effecting a promotion but should only prevail if other things are more or less equal. Merit should carry the most weight. In this case other things were not equal as the applicant was inferior in merit to the interested parties. 5 10

(4) The role of the Departmental Board is an advisory one. The ultimate decision rests with the Public Service Commission.

Recourse dismissed. 15
No order as to costs.

Cases referred to:

- The Republic v. Katerina Pericleous* (1984) 3 C.L.R. 577;
Evangelou v. The Republic (1965) 3 C.L.R. 292;
Ioannou v. The Republic (1977) 3 C.L.R. 61; 20
Skapoullis and another v. The Republic (1984) 3 C.L.R. 554;
Georghiades v. The Republic (1975) 3 C.L.R. 143, and on appeal (1975) 3 C.L.R. 477;
Georghiou v. The Republic (1976) 3 C.L.R. 74; 25
Soteriadou v. The Public Service Commission (1983) 3 C.L.R. 921;
Philotheou and Others v. The Republic (1983) 3 C.L.R. 662;
Republic v. Harris (1985) 3 C.L.R. 106; 30
Theodossiou v. The Republic, 2 R.S.C.C. 44;
Lardis v. The Republic (1973) 3 C.L.R. 64;
HjiConstantinou v. The Republic (1973) 3 C.L.R. 65;
Petrides v. The Public Service Commission (1975) 3 C.L.R. 284; 35
Mytides and Another v. The Republic (1983) 3 C.L.R. 1096;

3 C.L.R. **Aristodemou v. Republic**

Gavriel v. The Republic (1971) 3 C.L.R. 186;

The Republic v. Koufettas (1985) 3 C.L.R. 1950;

Thalassinos v. The Republic (1973) 3 C.L.R. 386;

Partellides v. The Republic (1969) 3 C.L.R. 480;

5 *Smyrnios v. The Republic* (1983) 3 C.L.R. 124;

Stylianou v. The Republic (1984) 3 C.L.R. 776;

Loizidou-Papaphoti v. The Educational Service Commission (1984) 3 C.L.R. 933.

Recourse.

10 Recourse against the decision of the respondent to promote the interested parties to the post of Airport Supervisor in the Department of Civil Aviation in preference and instead of the applicant.

Th. Montis, for the applicant.

15 *M. Chappa*, (Mrs.), for the respondents.

Cur. adv. vult.

20 STYLIANIDES J. read the following judgment. By this recourse the applicant seeks the annulment of the promotion of interested parties Alexandros Nicolaides and Christodoulos Panteli to the permanent post of Airport Supervisor in the department of Civil Aviation in preference to him, published in the Official Gazette on 2.11.84.

25 By letters dated 23.4.83 and 22.2.84 addressed to the Public Service Commission the Director-General of the Ministry of Communications & Works requested the filling of 5 vacant permanent posts of Airport Supervisor to the department of Civil Aviation. This is a promotion post.

30 Among the qualifications required by the scheme of service approved by the Council of Ministers on 4.2.83 is at least three years' service at the post of Airport Assistant, 1st Grade. For the first three years, however, after the approval of the said scheme of service, if there are no suitable civil servants satisfying this qualification, civil servants with at least 10 years' total service in the post of
35 Airport Assistant, 1st Grade, 2nd Grade and 3rd Grade may be promoted to this post.

A Departmental Board was constituted according to the relevant regulations. The report of the Departmental Board was submitted on 29.5.84 to the Public Service Commission. Only three Airport Assistants, 1st Grade, satisfied the requirement of three years' service. Seven officers, including the applicant and the two interested parties, were recommended by the Departmental Board as satisfying the alternative requirement of service. 5

On 9.8.84 the respondent Public Service Commission met and, having heard the recommendations of the Head of the Department of Civil Aviation, promoted the three officers who possessed the qualification of three years' service at the lower post of Airport Assistant, 1st Grade. They then proceeded to the filling of the two remaining vacancies by promotion of the two interested parties with effect from 15.8.84. The said decision was published in the Official Gazette on 2.11.84 under Notification No. 2610. The validity of the said decision is challenged. 10 15

Counsel for the applicant submitted that the interested parties did not possess at the material time the qualifications required by the scheme of service; that the applicant and the interested parties are equal in merit and qualifications but, as the applicant is by far senior to the interested parties, he should have been preferred, and that the sub judice decision is faulty as lacking due and specific reasoning for the disregard of the seniority of the applicant. The evaluation of the merit of the applicant by the Departmental Board as the last but one of the 10 candidates is challenged as unwarranted and consequently the sub judice decision is impeached on the ground that it was taken in abuse of power and/or that it is tainted with misconception of fact. 20 25 30

The material date at which a candidate for promotion must possess the required qualifications under the relevant schemes of service is the date on which the request for the filling of a vacancy is received by the Public Service Commission under Section 17 of the Public Service Law, 1967 (Law 33/67)—(*The Republic of Cyprus, through the Public Service Commission v. Katerina Pericleous and Others.* (1984) 3 C.L.R. 577). 35 40

The applicant and the interested parties were promoted

to the post of Airport Assistant, 1st Grade, on 15.3.82. None had completed the three years' service required. The interested parties were holding the post of Airport Assistant, 3rd Grade, as from 2.1.73. They were promoted to 2nd
5 Grade on 1.4.77 and 1st Grade on 15.3.82. At the material date—23.2.84—the day the request was received by the Public Service Commission, both had completed 10 years' service, as provided in the note of the scheme that was approved on 4.2.83.

10 The assertion that the applicant and the interested parties are equal in merit is contrary to the recommendations of the Head of the Department and the findings of the Commission, which are supported by the confidential reports.

15 Learned counsel for the applicant submitted that only the two last confidential reports, that is to say, those for the years 1982 and 1983, should have been taken into consideration.

20 The confidential reports constitute part of the overall picture of the merits of each candidate which the Commission has to weigh as a whole—(*Evangelou v. The Republic*, (1965) 3 C.L.R. 292; *Ioannou v. The Republic*, (1977) 3 C.L.R. 61; *Skapoullis and Another v. The Republic*, (1984) 3 C.L.R. 554).

25 The provisions of s.44(1) of the Public Service Law refer to the eligibility of a candidate for promotion. They debar a public servant from being considered for promotion if he has been reported upon in the last two annual confidential reports as unsuitable for promotion or if he has
30 been punished during the preceding two years for any disciplinary offence of a serious nature. The two years' limit refers only to the aforesaid two elements and no more.

35 Subsection (3) provides that in making a promotion the Commission shall have due regard to the annual confidential reports on the candidates. Thus the annual confidential reports by statute become an element of the picture of the merits of a candidate to which the Commission should have due regard. The Commission should not confine itself to consideration of the two last annual confidential reports
40 but should give due regard to past confidential reports, though more weight should be given to the recent ones.

In *Georghiades v. The Republic*, (1975) 3 C.L.R. 143, at p. 151, it was said:-

“In determining the merits of civil servants, whether for the purpose of secondment on merit or promotion, the whole career of a candidate has to be examined and all the factors referring to the quality, ability and merits of a candidate as a civil servant, and not those of a certain period or of a certain category have to be taken into consideration”.

On appeal in that case—(1975) 3 C.L.R. 477—Triantafyllides, P., said:-

“We do agree with both the learned trial Judge and counsel for the appellant that it is necessary, in deciding on the merits of candidates, to look at past annual confidential reports, and especially at the most recent ones, in order to evaluate the performance of the candidates during their careers as a whole”.

(See, also, *Georgiou v. The Republic*, (1976) 3 C.L.R. 74; *Soteriadou v. Public Service Commission*, (1983) 3 C.L.R. 921; *Philotheou and Others v. The Republic*, (1985) 3 C.L.R. 662, at pp. 668-670).

The Commission took into consideration the last three confidential reports for the years 1981, 1982 and 1983. The position, as depicted in these reports, is as follows:-

Year	Applicant	I.P. A. Nicolaidis	I.P. Chr. Panteli
1981	G. - (0-2-10)	V.G. - (0-09-3)	V.G. - (0-11-1)
1982	V.G. - (0-9-03)	V.G. - (0-12-0)	V.G. - (0-12-0)
1983	V.G. - (0-9-03)	V.G. - (0-10-2)	V.G. - (0-12-0)

From the above it is evident that so far as the confidential reports are concerned, the applicant is inferior to the interested parties.

The recommendations of a Head of a Department were always considered a most vital consideration—(*Theodossiou v. The Republic*, 2 R.S.C.C. 44; *Evangelou v. The Republic*, (1965) 3 C.L.R. 292).

The Public Service Law, 1967 (Law No. 33/67), s.44(3), runs as follows:-

“In making a promotion, the Commission shall

have due regard... to the recommendations made in this respect by the Head of Department in which the vacancy exists”.

5 In *Republic v. Haris*, (1985) 3 C.L.R. 106, a Full Bench case, it was said:-

10 “The Head of a Department is in a position to appreciate the demands of the post to be filled and the suitability of the candidates to discharge the duties of the post. It is well established that the Public Service Commission has to pay heed to such recommendations and if they decide to disregard them, they have to give reasons for doing so—(See, *inter alia*, *Lardis v. The Republic*, (1967) 3 C.L.R. 64; *Hji-Constantinou v. The Republic*, (1973) 3 C.L.R. 65; *Petrides v. Public Service Commission*, (1975) 3 C.L.R. 284; *Mytides and Another v. The Republic*, (1983) 3 C.L.R. 1096).

20 ‘Recommendations’ in the context of this section has to be given its popular meaning rather than taken as being used in any narrow legal or technical sense. It carries with it the duty on the Head of the Department to give a description of the merits of the candidates and by comparing their respective merits and demerits to suggest who is more qualified for the post. He has to make an assessment of the suitability of every candidate on a consideration of all factors relevant to his merits, qualifications and seniority, and then make a comparison of the candidates by reference thereto—(*Evangelou v. The Republic*, (supra); *Georghios Gavriel v. The Republic*, (1971) 3 C.L.R. 186, at p. 199; *Mytides and Another v. The Republic*, (supra)).

35 The recommendations of a Director, when he gives reasons for such recommendations, are subject to judicial review by this Court”.

(See, also, *Republic v. Antonios Koufettas*, R.A. 358, not yet reported).*

The Head of the Department in the present case recommended the two interested parties. He said that the appli-

* (1985) 3 C.L.R. 1950.

cant in comparison is on merit inferior to the others, though there is no difference with regard to the qualifications. The recommendations of the Director and the finding of the Commission on the factor of merit are well warranted by the documentary evidence—confidential reports.

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With regard to the complaint about the report of the Departmental Board, it must be observed that the Board established under s. 36 of the Public Service Law, 1967 (Law No. 33/67) has an advisory role and takes a preparatory decision when there are many candidates. The ultimate decision rests with the Public Service Commission which is entrusted with the power of promotion—(*Thalassinos v. Republic*, (1973) 3 C.L.R. 386; *Soteriadou and Others v. Republic* (supra)).

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In view of the above the Commission rightly decided that the two interested parties were better in merit to the applicant.

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Seniority is governed by s. 46 of the Civil Service Law, 1967 (Law No. 33/67), as amended by s. 5 of Law No. 10/83. Subsections (1), (2) and (7) thereof contain the relevant provisions for this case and run as follows:-

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“46 (1) - Seniority between officers holding the same permanent or temporary office or grade of the same office, either permanently or temporarily from month to month or on secondment to the particular office or grade, or on contract is determined according to the effective date of appointment, promotion or secondment to the particular office or grade according to the circumstances, independently of the mode of the holding thereof.

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(2) - In the case of simultaneous appointment, promotion or secondment to the particular office or grade of the same office, seniority shall be determined according to the officers' previous seniority.

(7) - In this section -

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‘previous seniority’ means seniority of the officers concerned in the grade or office held by them immediately before they entered their present grade or office, and if such seniority is the same, previous seniority shall be determined by the same process back

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to the first appointments of the officers in the Public Service. In case seniority in the first appointments is the same, then previous seniority shall be determined by the age of the officers”.

- 5 At the material time the applicant and the interested parties were holders of the post of Airport Assistant, 1st Grade, having been promoted on 15.3.82; all of them were promoted to Airport Assistants, 2nd Grade, on 1.4.77. The applicant, however, was holding the post of Airport Assistant, 3rd Grade, as from 1.1.70 whereas the two interested parties were appointed to the same office on 2.1.73. Furthermore the applicant entered the Civil Service as Airport Guard on 18.6.61. The seniority of the applicant is undisputed; it was considered extensively by the respondents and was duly taken into consideration, as it is apparent in the sub judice decision.

- Seniority is a factor not to be disregarded. Seniority is not a decisive factor which governs promotions but one that should be duly taken into consideration and should only prevail if all other things are more or less equal— (*Partellides v. Republic*, (1969) 3 C.L.R. 480; *Smyrnios v. Republic*, (1983) 3 C.L.R. 124; *Stylianou v. Republic*, (1984) 3 C.L.R. 776; *Elli Loizidou-Papaphoti v. The Educational Service Commission*, (1984) 3 C.L.R. 933).

- 25 Merit should carry the most weight because the functions of a public office are better performed in the general interest of the public by a public officer better in merit than seniority or qualifications. The paramount duty of the Commission in effecting promotions is to select the most suitable candidate in all the circumstances of each particular case for the post in question.

- The Commission in the due performance of their duty and power in conformity with the statutory provisions and the rules of administrative law generally, in reaching the sub judice decision took into consideration all relevant factors and not only they did not disregard the seniority of the applicant but, on the contrary, they made rather an extensive reference thereto - (See page 14 of Appendix 8).

An administrative Court cannot intervene in order to set

aside the decision regarding such selection unless it is satisfied, by an applicant in a recourse before it, that he was an eligible candidate who was strikingly superior to the one who was selected, because only in such a case the organ which has made the selection for the purpose of an appointment or promotion is deemed to have exceeded the outer limits of its discretion and, therefore, to have acted in excess or abuse of its powers; also in such a situation the complained of decision of the organ concerned is to be regarded as either *lacking due reasoning* or as *based on unlawful or erroneous* or otherwise invalid reasoning. The onus of establishing striking superiority lies always on the applicant in a recourse. 5 10

I was not persuaded by the applicant that the sub judice decision is in any way faulty or that he is strikingly superior to any of the candidates selected for promotion. 15

For all the above reasons this recourse fails and it is hereby dismissed.

Let there be no order as to costs.

Recourse dismissed. 20
No order as to costs.