

1987 September 11

[A LOIZOU, J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

AVRA GEORGHIOU KNAI,

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE PUBLIC SERVICE COMMISSION,

*Respondent.*

*(Case No. 868/85).*

*Public Officers — Promotions — Confidential reports — Leakage of confidential reports concerning candidate to such candidate — Does not invalidate proceedings — The Public Service Law 33/67, section 45(4) and Circular 491 of the Council of Ministers — These two provisions govern the duty of the Administration to communicate a report to the officer concerned, but do not affect the issue of «leakage» in this case.* 5

*Public officers — Promotions — Confidential reports — Complaints by officer concerned concerning their impartiality — Duty of Public Service Commission to inquire into matter — Placing before the Commission in support of such complaints of written assurances given by senior officers of the Department — As such letters were forwarded for the purpose of being used in the inquiry relating to the reports, no principle of law was offended thereby.* 10

*Public Officers — Promotions — Striking superiority — Burden of proof cast on applicant.* 15

*Administrative Law — Due inquiry — When an inquiry is considered as proper — A question of fact.*

The applicant challenges the promotion of the interested party to the post of Specialist Anaesthesiologist in the Medical Health Services.

The applicant and the interested party have equal qualifications. The interested party is senior to the applicant by about a year and a half. 20

By letters dated 3.6.86, 10.6.86 and 25.6.86 addressed to the respondent (ommission the interested party complained that her confidential reports for the years 1982, 1983 and 1984 did not reflect the real situation. In support of

her allegations she forwarded to the Commission written assurances given by three Senior Specialists as well as the officer in charge of the Anaesthesiology Department of the Nicosia General Hospital Dr. Megalemos

5 The Director of Medical and Public Health Services, who was requested by the Commission to express his views in respect of such complaints, wrote to the Commission that he came to the conclusion that the report for 1984 was not objective, that she should be rated «excellent» in all respects, and that confidential reports for 1982 and 1983 must be rated with «excellent» in all respects

10 The Director of Medical and Health Services, when he appeared before the Commission stated that both the applicant and the interested party are «noteworthy officers»

15 In the relevant minutes of the Commission it is stated that it approached the confidential reports of the interested party in the light of the result of the inquiry carried out by the Director and the three written assurances of the three specialists. Applicant was rated excellent for six continuous years, whereas the interested party was rated as such for four continuous years.

20 The Commission considered that it would not be correct to attribute particular importance to the fact that on certain paragraphs of the grading list if was rated as «very good» the last years, having also in mind that the confidential reports of the two officers were prepared by different reporting officers.

25 Finally, it must be noted that on the issue of the aforesaid confidential reports evidence was adduced before the Court. It is an undeniable fact that there was a sudden change in the rating of the interested party, for which no satisfactory explanation was given to the Court.

The applicant's complaints are:

(a) Serious violation of form or procedure by the leakage of the contents of the aforesaid confidential reports of the interested party.

30 (b) Material violation of form and procedure by the placing before the Commission of the «letters of recommendation» (as counsel described them) of the written assurances of the three senior specialists.

(c) The Commission had no competence to order an inquiry into the allegations of the interested party relating to the aforesaid reports.

35 (d) The inquiry was not, in any event, sufficient for the ascertainment of the real facts.

Held, *dismissing the recourse*: (1) Section 45(4) of the Public Service Law, 1967 provides that the person preparing a confidential report in which an officer is criticised for negligence, failures or improper behaviour in the

performance of his duties must communicate to the officer concerned that part of the report and under the Regulatory Orders made by the Council of Ministers under circular No. 491 the rating of an officer is communicated to him only when he is described as «average» or «insufficient».

These two provisions clearly cast a duty on the appropriate officer to communicate to the officer concerned the contents of what may be described as an adverse report, but the gist of the issue is whether the knowledge of the contents of a confidential report from whatever source - and in any event such knowledge was derived not from the Public Service Commission or its officers - invalidates the proceedings and the decision reached therein. This cannot be so as the Commission cannot be found at fault regarding the procedure followed or in the discharge of its duties under the Law and the exercise of its discretionary powers. 5 10

(2) The letters of the three specialists were not mere letters of recommendation that were forwarded to the respondent Commission by themselves but to be used for the purposes of an inquiry into her allegations about the report. As such they offended no principle of Law. This ground of Law also fails. 15

(3) The Commission had a duty to inquire into the allegations of vindictiveness and unfairness promoted by personal reasons as claimed by the interested party regarding her confidential reports. It is wrong to assert that the inquiry was carried out by the Director. On the contrary, it was carried out by the Commission, which thought fit to bring certain matters to his knowledge. 20

(4) What is proper inquiry depends on the circumstances of each case and there is no reason to conclude that the one carried out in the present case was not a proper one. 25

(5) The applicant failed to discharge the burden of proof that she was strikingly superior to the interested party.

*Recourse dismissed. No order as to costs.* 30

*Cases referred to:*

*HadjiGeorghiou v. The Republic* (1977) 3 C.L.R. 35.

**Recourse.**

Recourse against the decision of the respondent to promote the interested party to the post of Specialist Anaesthesiologist in the Medical and Public Health Services in preference and instead of the applicant. 35

*K. Talarides*, for the applicant.

*A. Papasavvas*, Senior Counsel of the Republic, for the respondent.

*N. Zomenis*, for interested party.

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*Cur. adv. vult.*

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks a declaration of the Court that the decision of the respondent Commission by which it promoted Nina Iosif, - (hereinafter to be referred to as the interested party) -  
10 to the post of Specialist Anaesthesiologist in the Medical and Public Health Services, published in the official Gazette of the Republic of the 20th September 1985, Notification No. 2407, is null and void and with no legal effect.

15 There were at the time two vacant posts of specialist in the Medical Services and in accordance with the note to the relevant Scheme of Service (Appendix «C»), one was allocated to Anaesthesiology and the other to Surgery, hence the reference which is to be found to both of them in the several documents which in due course will be examined.

20 In compliance to the provisions of section 36 of the Public Service Laws 1967-1983, and the Regulatory Orders made thereunder, a Departmental Board was set up under the Chairmanship of the Director of the Medical and Public Health Services, which examined, in accordance with the prescribed  
25 procedure, the position as regards the various candidates and submitted its report to the respondent Commission by its letter dated the 22nd June 1985, appendix thereto the minutes of its meeting of the 7th June, 1985 (Appendix 4).

30 The Departmental Board considered that thirteen of the candidates possessed the required qualifications under the Scheme whereas the remaining twelve did not qualify as they did not have at least three years service in the post of Registrar. The Board thereby having examined all the material before it selected and recommended four of them for selection for promotion. Out  
35 of them one was the sole person recommended for the specialisation of Surgery and the remaining three for Anaesthesiology who in alphabetical order were the following: (1)

Josef Nina, (the interested party), (2) Knai Avra (the present applicant) and (3) Spanos Chrysostomos.

The respondent Commission at its meeting of the 3rd July 1985, decided to consider for the specialisation of Anaesthesiology in addition to the candidates recommended by the Departmental Board, Anna Achilleoude and Pantelitsa Nicolaidou, who had high confidential reports for the last years (Achilleoude being rated «Excellent» for the last three years and Nicolaidou «Very Good» in 1982 and «Excellent» in 1983 and 1984) (Appendix 4).

The interested party by letters dated the 3rd June 1986, 10th and 25th June 1985, addressed to the respondent Commission complained that the confidential reports on her for the years 1982, 1983, 1984, did not reflect the real situation and in support of her allegations she sent written assurances given by three Senior Specialists as well as the officer in charge of the Anaesthesiology Department of the Nicosia General Hospital, Senior Specialist Dr Megalemos, (Appendices 6, 7, 8). I need not refer to their contents now as I shall do so in due course and in connection with the evidence adduced before me. Upon that the respondent Commission invited the Director of Medical and Public Health Services to express his views regarding the allegations of the interested party contained in the aforesaid letters (Appendices 9 and 10).

The Director by letters dated 26th June 1985, and 16th July, 1985, (Appendices 11, 12), conveyed his views regarding the confidential reports on the interested party for the years 1982, 1983, 1984.

In his letter of the 26th June (Appendix 11) he stated the following:-

«I refer to your letter under reference number P. 14765 dated 6th June, 1985, regarding the allegations of Mrs. Nina Iacovidou - Iosif, Registrar in the Medical and Public Health Services, that her confidential report for the year 1984 does not reflect the real situation.

2. In this respect, I wish to report that I investigated Mrs. Iosif's contentions and that I discussed the whole matter with the Chief Medical Officer Nicosia, Dr. P. Eliades as well as with the surgeons of the Nicosia General Hospital, Messrs An. Papanastassiou, Senior Medical Specialist (Surgeon), P.

Theodondes, Senior Medical Specialist (Urologist) and Nikos Spanos, Senior Medical Specialist (Neurosurgeon) All the above mentioned assured me that she is a perfectly well qualified Anaesthesiologist, competent, and very cooperative with increased supervisory abilities

3 In view of all the above and the written confession of the ex Director of the Department Mr Megalemos, who has already retired, that Mrs Iosif has always been excellent in all respects, I have come to the conclusion that Mrs. Iosif's confidential report for the year 1984, was not objective and that she should be rated with 'excellent' in all respects

4 In the meantime I forward Mrs Iacovidou's new letter regarding her confidential reports for the years 1982 and 1983 and inform you that the investigation I made on this subject covers also this period Her confidential reports for these years must be rated with 'excellent' in all respects »

The respondent Commission at its meeting of the 16th July 1985, heard the views of the Director after he was asked to take also into consideration for the specialisation of Anaesthesiology in addition to the candidates recommended by the Departmental Board, also Anna Achilleoude and Pantelitsa Nicolaidou

He is recorded in the relevant minutes (Appendix 13) to have said the following

«For the post of Specialist in Anaesthesiology I cannot recommend only one, but I shall refer to two Iosif Nina and Knai Avra They are both noteworthy officers from the point of view of work and it is left to the Commission to select between them

From the point of view of qualifications certain facts are mentioned. Iosif Nina graduated the University of Athens in 1965 and specialised in Athens She came to Cyprus in 1972 and she was appointed on daily wages Anaesthesiologist In 1973 she became permanent She obtained her specialisation from Greece on the basis of the experience she had, she sent her documents and her specialisation was recognized in 1974 and as from that time she practices the profession of Anaesthesiologist in the Nicosia General Hospital From her reports her colleagues and superiors are pleased She was promoted to the post of Registrar as from 1st April 1977

Knai Avra graduated the University of Australia in 1965. In 1965-1966 she went to England and specialised in Anaesthesiology. In 1967 she was appointed on daily wages in Cyprus and consequently her career starts long before that of Iosif Nina. Afterwards she was appointed permanent in the Government service in 1969 and practiced the profession of Anaesthesiologist. She attended also a course in Copenhagen for a whole year, she brought a diploma and her specialisation was recognised on the basis of that diploma and her service and so she secured that specialisation. 5  
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These are the qualifications of the two candidates, who from the point of view of qualifications are of equal value. The only difference is that Knai Avra was appointed as a Registrar as from 15th December 1978, whereas Iosif Nina as from 1st April 1977. 15

Iosif Nina serves in Nicosia, Knai Avra at the Lamaca Hospital, Chrysostomos Spanos, in Nicosia, Anna Achilleoude in Nicosia and Pantelitsa Nicolaidou in Larnaca.»

He then referred to candidate Ioannides, for the specialisation of surgery and after the respondent Commission dealt with that candidate it selected him as the most suitable for that post. 20

The respondent Commission then reverted to the post of Anaesthesiology and its minutes read as follows:

«As regards the post of specialisation of Anaesthesiology, the Commission after comparing all the candidates came to the conclusion that the selection has to be made between the two candidates whom the Director gave for selection, namely Iosif and Knai. 25

The Commission approached the confidential reports of the two candidates with particular attention taking into consideration that they were prepared by different reporting officers. 30

Especially in the case of Iosif, the Commission approached her reports in the light of (a) the result of the inquiry carried out by the Director of Medical and Health Services after a written complaint by Iosif regarding her Confidential reports for the years 1982, 1983, 1984, and (b) the written assurances regarding her performance at work which three Senior 35

Specialists gave and with whom Iosif cooperated all this time in the performance of her duties in the post of Anaesthesiology.

5 From the confidential reports on the two candidates the Commission noted that they are two officers with high performance during the whole of their service.

10 The Commission noted that Knai during the last six years (since the new type of confidential reports was introduced) was continuously 'Excellent' with analytical grading in 1979, 1980, 1982, 1983 and 1984 12-0-0 and in 1981 10-2-0.

15 On the other hand Iosif was 'Excellent' for four continuous years. More correctly she had in 1979, 1980, 1981, analytical grading 12-0-0 and in 1982, 8-4-0. For the last two years there was observed in the grading of this officer some reduction ('Very Good' with analytical grading 5-7-0, in 1983 and 7-5-0 in 1984).

20 In the light of all hereinabove mentioned the Commission considered that it would not be correct to attribute particular importance to the fact that on certain paragraphs of the grading Iosif was rated as 'Very Good' the last years, having also in mind that the confidential reports of the two officers were prepared by different reporting officers. In any event, the general grading of Iosif in 1982, continued to be 'Excellent' and in 1983, 1984, was high, in fact in 1984 she was short of being 'Excellent' by one only paragraph.

25 From the point of view of qualifications the two candidates are about equal, whereas from the the point of view of seniority Iosif is ahead of Knai by one and a half and more years, given that she had been promoted to the post of Registrar as from 30 1st April 1977, whereas Knai Avra was promoted to the same post as from 15th December 1978.

35 In the light of all material before it the Commission did not consider safe to give undue weight to the analytical grading of Iosif during the last years but on the basis of the totality of established criteria came to the conclusion that Iosif has more claims for promotion.

40 In conclusion the Commission taking into consideration all the material factors before it, decided on the basis of the established criteria in their totality, (merit, qualification, seniority),



(a) that Andreas Ioannides is suitable for promotion to the post of specialisation in Surgery, and

(b) that Nina Iosif is superior to all other candidates for the specialisation of Anaesthesiology,

and decided to promote them as the most suitable to the Permanent (Ordinary Budget) post of Medical Specialist in the Medical and Public Health Services as from the 1st August 1985, Ioannides for the post of Specialisation in Surgery and Iosif for the post of Specialisation in Anaesthesiology.» 5

In order to complete the picture as regards the factual background of this recourse reference has to be made to the evidence called before me. 10

Dr. Costas Megalemos, a Senior Specialist Anaesthesiologist in the Medical Services of the Republic who retired on the 1st July 1985, gave evidence on behalf of the applicant. He was the reporting officer for interested party Nina Iosif since 1977. For that year she was rated as «Excellent» on all rateable items except two, namely devotion to duty and ability to co-operate with colleagues, for which she was rated as «Very Good». For the year 1978 she was again reported upon and rated by him as an «outstanding officer» on all rateable items. The countersigning officer, the Director of Medical Services Dr. A. Markides rated her as an excellent officer. For the year 1979 she was rated as «Excellent» on all rateable items, an assessment with which the countersigning officer also agreed. The same rating is found in the reports for the years 1980, 1981, 1982. In the report for the year 1980 there appears a comment that «she is hard working, cooperative with all her colleagues and performs her duties in an impeccable manner. She is devoted and she never refuses to discharge the duties with which she is entrusted». Similar comments appear in the reports for the following two years. There are different countersigning officers for the years 1979, 1980, 1981, who agree with the rating of this witness. The confidential reports for the year 1983 once more prepared by Dr. Megalemos, are, however different. She is rated as «Excellent» on five rateable items and «Very Good» on seven, thus making the total of «Very Good».

His version in evidence before me was that during the period of his leave prior to retirement he was approached by the said interested party who complained to him that the confidential

reports prepared by him were not as he said they were. Later in May, 1985, whilst still on leave prior to retirement he was once more approached by this interested party and her husband and the latter asked him to meet them outside the office of the Public Service Commission in order to see what they could do with the reports. He claims to have been told that they should find somebody to change the reports but he refused. Instead he suggested that he might write a letter to the Chairman of the Public Service Commission and say that as he was retiring, after so many years that they had together, he recommended Mrs. Iacovidou for promotion. Later he was presented with a duly typed letter and he signed it. This letter dated the 21st May, 1985, is appended to a letter dated the 3rd June, 1985, addressed by the interested party to the Chairman of the Public Service Commission (Appendix 6). The witness alleged that the interested party accused him of being vindictive and that he was not reporting her properly as he wanted to favour other officers.

He was cross-examined on the contents of a letter of the interested party, dated 25th June 1985 (Appendix 8) and he denied that as she claimed therein the confidential reports changed after 1982 because he wanted to take revenge on her. He said that the contents of the letter of the 21st May, 1985, were true but exaggerated and that he did it in order to help her with her promotion. He also said that he was not approached by Mr. Markides as to the contents of the confidential reports.

I shall not deal with the lengthy cross-examination of this witness and the answers he gave, nor is it necessary for me to pronounce on the allegations made in the course of the cross-examination that he changed his rating on her in order to favour another lady anaesthesiologist, working under him at the same time but who in any event is not the applicant. It is an undeniable fact that there was a sudden change in the rating of the interested party for which no satisfactory explanation has been given to me that might justify it.

The interested party and her husband also gave evidence and both gave a different version. They claimed that it was Dr. Megalemos who visited them at their home with a handwritten letter explaining that he wanted to make amends for the reporting he had done on her, which might affect her promotion.

It is unfortunate that Dr. Plegalemos has contradicted so much himself by his own conflicting statements that has rendered his testimony unacceptable. I can only say that he has not impressed me with his conduct. Needless to say that the respondent Commission directed its mind on the issue and in their minutes they devoted a whole paragraph on this change of rating

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The first ground of Law relied upon by the applicant is that there has been a serious violation of form or procedure by the leakage of the contents of certain confidential reports of the interested party, after same had been sent to the Director of Medical Services. It was argued that it made no difference through whom this leakage occurred but that it destroyed the correctness of the procedure and being of a material nature it affected the sub-judice decision subsequently taken which consequently should be annulled

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It was urged that the only instances for which communication of the contents of a confidential report to the officer affected is permissible is (a) under section 45(4) of the Public Service Law, 1967, which provides that the person preparing a confidential report in which an officer is criticised for negligence, failures or improper behaviour in the performance of his duties must communicate to the officer concerned that part of the report and (b) under the Regulatory Orders made by the Council of Ministers under circular No. 491 (file No. 619/61/III) the rating of an officer is communicated to him only when he is described as «average» or «insufficient»

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These two provisions clearly cast a duty on the appropriate officer to communicate to the officer concerned the contents of what may be described as an adverse report. This implicitly carries the element of authorisation but it does not take the case any further. The gist of the issue before me is whether the knowledge of the contents of a confidential report from whatever source—and in any event such knowledge was derived not from the Public Service Commission or its officers—invalidates the proceedings and the decision reached therein. In my view this cannot be so as the Commission cannot be found at fault regarding the procedure followed or in the discharge of its duties under the Law and the exercise of its discretionary powers. What it did in the present case in consequence of the complaint of the interested party was to

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carry out an inquiry into the matter complained of This ground therefore fails

This brings me to the second ground of law namely that there has been a material violation of form or procedure by the placing  
5 before the respondent Commission of the «letters of recommendations» as they were described by counsel for the applicant of three members of the departmental Board, as under section 44 of the Law no such procedure is provided for and that  
10 even if it was considered that the necessary inquiry was permissible in respect of the complaint of the interested party, yet these three «letters of recommendation» were not given for the purposes of the inquiry but for the use whenever needed and their submission to the respondent Commission constituted an  
15 improper interference with its functions of a material nature as they were indeed as it is claimed taken into consideration and affected the result of the administrative process

As it has already been mentioned earlier in this judgment these letters were appended to the letters (Appendices 6 and 7) that the interested party addressed to the respondent Commission by  
20 which she complained about the correctness of the confidential reports and they were not mere letters of recommendation that were forwarded to the respondent Commission by themselves but to be used for the purposes of an inquiry into her allegations about the report As such they offended no principle of Law This ground  
25 of Law also fails

The third ground is that the respondent Commission had no competence to order an inquiry into the allegations of the interested party as neither the Law nor the Regulatory Orders provide for such an inquiry itself being a matter within its own  
30 competence and not to ask the Director of the Department of Medical Services who had no competence in the matter

In my view the respondent Commission had a duty to inquire into the allegations of vindictiveness and unfairness prompted by personal reasons as claimed by the interested party regarding the  
35 rating of her in the confidential reports and so long as it carried out a proper inquiry in the circumstances I see no reason why they should not bring in also the Director of Medical Services who was both the countersigning officer on these reports and the Head of the Department It is wrong to assert that the inquiry was carried  
40 out by the Director of Medical Services Far from it The inquiry

was carried out by the respondent Commission which thought fit to bring certain matters to his knowledge. He was asked to express his views regarding the allegations contained in the letter of the interested party (see Appendix 9). This inquiry was necessitated by the conduct of Dr. Megalemos, the reporting officer. Had the respondent Commission turned a deaf ear I can hardly see how the sub judice decision taken in such circumstances would have been found untenable. 5

The fourth ground of law relied upon by the applicant is connected with the third one in the sense that the inquiry, it is claimed, was not sufficient for the ascertainment of the real facts, as the Director of Medical Services, as per his letter of the 26th June 1985 (Appendix 11) never examined the circumstances under which Dr. Megalemos signed the letter of the 21st May, 1985, and never inquired into the conflict between the contents of the letter and the allegation of the interested party that Dr. Megalemos acted out of personal and vindictive reasons; that the respondent Commission never asked the Director of Medical Services as to why he countersigned the three confidential reports without objection or comment, obviously agreeing with their contents, and that there was never given to Dr. Megalemos the opportunity to give his version on his alleged confession or repentance which he made to the interested party and so the respondent Commission acted on facts which were unsafe and which affected the result of the administrative process. 10 15 20 25

It is clear from the documents already referred to in the relevant minute of the respondent Commission that Dr. Megalemos was asked to examine and answer the pertinent questions and give the necessary explanations for all matters in issue.

Dr. Megalemos had already retired from the service and respondent Commission had before it all the confidential reports prepared by him in respect of the interested party including his ratings in the confidential reports, the subject of the complaint of the interested party, his subsequent letter, and of course the allegations of the interested party in respect of them. In the circumstances there was nothing in my view which had been omitted to be done by the respondent Commission. 30 35

What is a proper inquiry depends on the circumstances of each case and I find no reason to conclude that the one carried out in the

present case was not a proper one. This ground therefore should also fail.

- Help in respect of the aforesaid grounds may be derived from the case of *HadjiGeorghiou v The Republic* (1977) 3 C L R 35 where at p 45 Tnantafyllides P, said after dealing with the question of professional friction and bias between a public officer and his superior that «it was up to the Commission to decide once it knew about the nature of such relations whether any further inquiry into this aspect was necessary »
- 10 The last ground of law is that the applicant is strikingly superior to the interested party. The burden of establishing striking superiority is on the person alleging same. In the present case considering the totality of the circumstances and comparing the relevant material from the file, I have come to the conclusion that
- 15 the applicant has failed to discharge the burden of proof that was cast upon her. It was reasonably open to the respondent Commission to arrive at the decision that it did which was taken in the proper exercise of its discretionary powers on the matter.

For all the above reasons the recourse is dismissed but in the

20 circumstances there will be no order as to costs.

*Recourse dismissed*  
*No order as to costs*