

1986 March 15

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LIZA SAVVA,

Applicant,

v.

THE PORTS AUTHORITY OF CYPRUS,

Respondent.

(Case No. 202/84).

Executory act — New decision giving retrospective effect to sub judice promotion — Sub judice decision retained its executory character.

5 *Administrative Law — Due inquiry — Receiving both written and oral explanations relating to confidential reports of the candidates for promotion from both the reporting and the countersigning officer — In the circumstances the course adopted was required by the notion of due inquiry.*

Public Corporations — Promotions — Sub judice promotion taken at a time when the General Manager was under interdiction — Latter's views could not and ought not to have been taken into account.

10 *Public Corporations — Promotions — Decision taken in 1984 — Later on, it was given retrospective effect as from 1.1.83 — Notwithstanding such retrospectivity, the performance of the candidates in 1983 was correctly taken into account, because the decision had to be taken on the basis of all available information at the time of its issue.*

15 *Public Corporations — Promotions — Confidential reports — Reporting and Countersigning Officer — More weight attached to the views of the reporting officer than to those of the countersigning officer — Reporting officer the immediate superior of the candidates — Course adopted reasonably open to the Board of the respondent.*

20 *On 21.10.83 the Board of the respondent decided to promote the applicant to the post of Accounting Officer, 1st Grade. On 31.10.83 the said decision was revoked, because of information that the confidential reports of the applicant and the interested party had not been prepared in accordance with the proper procedure.*

As a result both the reporting officer and the countersigning officer submitted to the Board of the respondent written explanatory reports and appeared before the Board for further oral explanations as well as for evaluation of the applicant and the interested party in respect of their performance in 1983

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On 21 3 84 the Board of the respondent decided to promote the interested party to the aforesaid post Hence the present recourse

It must be noted that on 28 8 84 the Board of the respondent decided to give retrospective effect to the sub judice promotion as from 1 1 83 This decision is the subject of a new recourse by the applicant (see *Savva v The Ports Authority of Cyprus* (1987) 3 C L R 722)

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Held, *dismissing the recourse* (1) The decision of 28 8 84 only amended the sub judice decision and therefore, it cannot be treated as abrogating entirely the sub judice decision which, consequently, retained its executory character

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(2) The course adopted by the Board in respect of the confidential reports was clearly required and fully compatible with the basic principle of administrative law with regard to the need of due inquiry in order to ascertain the correct facts

(3) When the sub judice decision was taken the General Manager of the respondent was under interdiction and therefore, the Board could not and ought not to ask his views As regards the General Manager's views expressed before his interdiction in the confidential reports of the candidates, it must be taken on the strength of the presumption of regularity that such views were before the Board

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(4) The fact that later on it was decided to give retrospective effect to the sub judice decision does not alter the situation that the Board had a paramount duty to take into account all material information as on 21 3 84 and, therefore, it correctly took into account the evaluation of the performance of the candidates in 1983

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(5) The reporting officer was the immediate superior of the candidates It was reasonably open to the Board to attach to his views more weight than to the views of the countersigning officer

(6) In any event the applicant failed to establish striking superiority to the interested party

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Recourse dismissed No order as to costs

Recourse.

Recourse against the decision of the respondent to promote the

interested party to the post of Accounting Officer 1st Grade in preference and instead of the applicant

A S Angelides, for the applicant

N Papaefstathiou, for the respondent

5 *Chr Triantafyllides*, for the interested party

Cur adv vult

10 TRIANTAFYLLIDES P read the following judgment By means of the present recourse the applicant is challenging the decision of the Board of the respondent Ports Authority on the 21st March 1984, to promote, instead of her, to the post of Accounting Officer 1st Grade, V Zannetti, who, therefore, is an «interested party» in these proceedings

15 Subsequently, on the 28th August 1984, it was decided to give retrospective effect, as from the 1st January 1983, to the sub judice promotion of the interested party and the applicant filed recourse No 621/84* against such decision, and the judgment in that case is to be given today, too, after the delivery of the present judgment

20 It has been contended that as a result of the subsequent decision regarding the retrospectivity of the promotion of the interested party the sub judice in the present case decision to promote her has lost its executory nature by merging in the said later decision but I do not agree that this is so because, in my opinion, the subsequent decision only amended the initial decision to promote the interested party as regards the date on which her promotion was to take effect and, consequently, it cannot be treated as abrogating totally the initial decision to promote the interested party

30 The process of filling the post concerned was set in motion on the 26th August 1983 and on the 21st October 1983 the Board of the respondent decided to promote the applicant, but, later on, at its meeting on the 31st October 1983, the Board annulled its said decision because it was informed that the proper procedure-envisaged by relevant regulations - for the preparation of confidential reports regarding the applicant and the interested party had not been followed

35 After the Board had, on the 30th November 1983, dealt further with the matter of the preparation of the confidential reports about

* See (1987) 3 C L R 722

the two candidates in question, the Senior Accountant of the respondent, as the reporting officer, and the Financial Manager of the respondent, as the countersigning officer, submitted to the Board written explanatory reports dated the 8th December 1983 and 21st December 1983, respectively, about the manner in which the confidential reports in respect of 1982 about the applicant and the interested party had been prepared. 5

The Board, also, called the said two officers to give before it further oral explanation and to submit, too, their evaluation in respect of 1983 regarding the applicant and the interested party. 10

The two officers supported orally the contents of their written explanatory reports and in respect of 1983 the Senior Accountant, as reporting officer, placed first the interested party, and the Financial Manager, as countersigning officer, though he improved his evaluation of the interested party for 1982, placed first in respect of 1983 the applicant. 15

After having received, too, legal advice that in case of conflict between the reporting officer and the countersigning officer more weight was to be given to the evaluation of the officer who had direct supervision of, and responsibility for, the work of the candidates concerned - who in the present instance was the Senior Accountant, who was also the reporting officer - the Board, on the basis of all relevant material before it, and having in mind that the reporting officer in respect of 1981, 1982 and 1983 had evaluated the interested party as being the best, reached the conclusion that the interested party was the most suitable for promotion and, on the 21st March 1984, decided to promote her to the post concerned as from that date. 20
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The interested party accepted her promotion with reservation of her right to claim that it should be made retrospectively as from the 1st January 1983. Her claim was based on the terms of an agreement which was entered into between the Ministry of Communications and Works - under which comes the respondent Authority - and the trade union of the employees of the respondent. 30
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On the 28th August 1984 the Board of the respondent decided to make the promotion of the interested party retrospective as from the 1st January 1983, on the condition that recourse No. 289/84 which had been filed in the meantime by the interested

party against the non-retrospectivity of her promotion would be withdrawn; and such recourse was withdrawn on the 17th September 1984.

5 Counsel for the applicant submitted that the Board of the respondent was not empowered to intervene in the matter of the preparation of the confidential reports and give directions which resulted in the submission of explanatory reports by the reporting officer and countersigning officer.

10 The course adopted by the Board in this respect was, in my view, clearly required by, and fully compatible with, the basic principle of administrative law that the Board had to carry out a due inquiry in order to ascertain the correct facts and to avoid acting under any misconception.

15 Counsel for the applicant has argued, also, that the recommendations of the General Manager of the respondent, Mr. Payiatas, ought to have been sought by the Board, especially in view of the conflict between the evaluations of the reporting officer and of the countersigning officer, and he has pointed out, too, that no reference has been made by the Board to the views
20 expressed by Mr. Payiatas about the two candidates in question in the relevant confidential reports about them; and counsel for the applicant has argued that his shows that the Board did not carry out a due inquiry into this aspect of the matter.

25 When the sub judge decision to promote the applicant was taken on the 21st March 1984 the General Manager of the respondent was under interdiction, as from the 1st July 1983, and was not performing his duties, because of an investigation which had been set in motion against him for alleged disciplinary offences. I do not think, therefore, that at the material time the
30 Board could, or ought to, have sought his recommendations as regards the candidate to be promoted. It is correct that by the 28th August 1984, when the decision as regards the retrospectivity of the promotion of the interested party was taken, the interdiction of the General Manager had ceased, but it was not open to the Board
35 to seek on that occasion the recommendations of the General Manager about its decision to select for promotion the interested party which had been taken on the 21st March 1984 when the General Manager was, as already stated, under interdiction.

40 Regarding the views expressed prior to his interdiction by the General Manager in confidential reports about the two candidates

concerned it must be observed that, in the absence of any proof to the contrary, and on the strength of the presumption of regularity, it must be taken that the said views of the General Manager were before the Board with all other relevant material and must have been duly considered; and it is to be pointed out, in any event, that these views of the General Manager regarding the applicant and the interested party were on the whole of such nature that it cannot be said that they ought to have tilted the scales in favour of the applicant and against the interested party as regards suitability for promotion.

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Counsel for the applicant has complained that the performance of the candidates in 1983 ought not to have been taken into account as it was subsequent to the promotion which was made retrospective as from the 1st January 1983; and, counsel for the applicant has, furthermore, contended that the past services as a whole of both candidates concerned ought to have been duly considered.

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In my view since the personal files and the confidential reports files of the candidates containing all relevant material regarding their services were before the Board it must be taken that the Board in arriving at the conclusion that the most suitable candidate for promotion was the interested party had before it all necessary information regarding her service and that of the applicant.

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Also, I am of the opinion that there was rightly taken into account by the Board the performance of the candidates in 1983 when, on the 21st March 1984, it decided whom out of them to select as the most suitable for promotion; and, in my view, the fact that later on it was decided to make the promotion of the interested party retrospective as from the 1st January 1983 does not alter the situation that the Board had a paramount duty to take into account all material information about the candidates which was available on the 21st March 1984 when it reached its sub judice decision to select the interested party for promotion.

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Lastly, it was argued by counsel for the applicant that the Board ought not to have undertaken the task of assessing the weight of the evaluations of the candidates by the reporting officer and by the countersigning officer and it ought not, eventually, have placed greater weight on the views of the reporting officer.

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In my opinion it was perfectly legitimate for, and reasonably

open to, the Board to place greater weight on the evaluation of the Senior Accountant, as reporting officer, who was the immediate superior of the candidates and who was fully aware of their abilities and performance; and the propriety of the course adopted by the
5 Board in this respect is not vitiated by the fact that the Board had, also, received legal advice indicating that such course was a correct one.

in any event, from a perusal of the confidential reports files as they were originally prepared, as well as on the basis of the
10 evaluations of the candidates which were made later by means of the aforementioned explanatory reports, and, also, in the light of all other relevant material which was placed before this Court, I have not been persuaded that the applicant was a candidate strikingly superior to the interested party and that, therefore, it was
15 not reasonably open to the Board to select the interested party for promotion instead of her. It was within the discretionary powers of the Board to choose the most suitable candidate for promotion to the post concerned and it has not been shown to my satisfaction that such powers were exercised in a defective manner in any way.

20 In the light of all the foregoing this recourse fails and has to be dismissed; but with no order as to its costs.

*Recourse dismissed.
No order as to costs.*