

1988 March 30

[TRIANAFYLLIDES, P. , MALACHTOS, SAVVIDES, STYLIANIDES AND
KOURRIS, JJ.].

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS Z. GEORGHIOU AND OTHERS

Applicants.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondents.

(Cases Nos. 36/86, 123/86, 158/86).

*Public Officers—Promotions—Interviews, performance at—Weight—Rating
of—The task of the Commission.*

*Public Officers—Promotions—Seniority—All candidates had been appointed
to present (Senior Land Officer) and previous (Land Officer 1st Grade)
posts on the same days - Seniority of applicants by reason of having been
appointed earlier than the applicant to the post of Land Officer 2nd Grade -
In the circumstances does not tip the scale.*

5

*Public Officers—Promotions—Post high in the hierarchy—Discretion of Com-
mission—Wide.*

*Public Officers—Promotions - Confidential Reports—Preparation by ex Head
of Department at the time when he held the post of a Government Minis-
ter—Rightly Commission did not take them into consideration.*

10

*Public Officers—Appointments—Acting appointment—The Public Service
Law, 33/67, section 42—Recommendation by authority of a particular per-
son—Once such person is qualified the Commission has no discretion in
the matter—The appointment should be of a foreseeable temporary dura-
tion.*

15

By means of the above recourses the applicants challenge the validity of the promotion of interested party to the post of Chief Land Officer. This post is the second in the hierarchy of the Department of Lands and Surveys. It is a first entry and promotion post.

5 The applicants also, challenge the appointment of the interested party as acting Director of the said Department as from 1.1.86. The appointment of the applicant had been recommended to the Commission by the appropriate authority in view of the vacancy of the post stemming from the retirement of the ex Director.

10 The applicants in cases 36/86 and 123/86 and the interested party are more or less equal in merit and qualifications, but though they were all promoted to the post of Senior Land Officer and to their previous post of Land Officer, 1st Grade, the applicants were senior to the interested party as regards appointment to the post of Land Officer, 2nd Grade. The interested party was promoted to that post on 15.5.79 and to the temporary post on 1.6.78, whereas applicant Georgiou was promoted to the permanent post on 1.6.77 and to the temporary post on secondment on 1.8.73 and applicant Mouzouris was promoted to the permanent post on 15.11.78 and was seconded to the temporary post on 1.8.73.

20 The reports for 1984 were prepared by the ex Head of the Department who was, at the time of preparation, a Minister of the Government of the Republic. The Commission did not take into consideration such reports.

The Head of the Department recommended equally the applicants in cases 36/86 and 123/86 and the interested party.

25 The Commission rated the performance of the interested party at the interview as "very very good" and the performance of applicants in cases 36/86 and 123/86 as "very good".

Held, *dismissing the recourses*, Savvides and Kourris, JJ. dissenting as regards recourses 36/86 and 123/86, in so far as they relate to the validity of the promotion of the interested party to the post of Chief Land Officer.

30

(A) Recourse 158/86: It is ill founded. The interested party is clearly superior to the applicant.

35

(B) Recourses 23/86 and 123/86: (1) It is well established that the appointing Authority has a very wide discretion when making a selection for a post high in the service.

(2) The appointing Authority when weighing together the three criteria, laid by law, in order to find the most suitable candidate, may attribute such significance to them as it may deem proper, provided that it exercises correctly, in the course of doing so, its relevant discretionary powers.

(3) The Commission rightly did not take into consideration reports prepared by a political person. 5

(4) Performance at the interviews is not a separate factor, but there is nothing wrong to attach the necessary importance to it. The assessment of the performance is a task of the Commission. In this case the Commission did not attach undue weight to it. 10

(5) Seniority in this case is not such as to tip the scales in favour of applicants.

(6) Applicants failed to establish striking superiority.

(C) As regards the acting appointment: Once a person is recommended by the appropriate authority and possesses the qualifications of the post the Commission has no discretion in the matter (Section 42 of Law 33/67). In this case, it was clear that the appointment was for a temporary duration and, moreover, it was made clear to the interested party by the respondent Commission that his such acting appointment would not be taken into consideration in the filling of the vacancy. 15

Recourses dismissed. 20

No order as to costs.

Cases referred to:

Frangos v. The Republic (1970) 3 C.L.R. 312;

Ierides v. The Republic (1980) 3 C.L.R. 165; 25

Simillis v. The Republic (1986) 3 C.L.R. 608;

Georghiou v. The Republic (1976) 3 C.L.R. 74;

Republic v. Zachariades (1986) 3 C.L.R. 852;

Republic v. Panayiotides (1987) 3 C.L.R. 1081;

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

Pierides v. The Republic (1984) 3 C.L.R. 341;

Papadopoulos v. The Public Service Commission (1985) 3 C.L.R. 405;

Republic v. Mylonas (1985) 3 C.L.R. 1608;

5

Olympios v. The Republic (1974) 3 C.L.R. 17;

Tsiropoulou v. The Republic (1983) 3 C.L.R. 313;

Republic v. Kyriacou (1987) 3 C.L.R. 1189;

Triantafyllides and Others v. The Republic (1970) 3 C.L.R. 235;

Duncan v. The Republic (1977) 3 C.L.R. 153;

10

Markides and Another v. The Republic (1983) 3 C.L.R. 622;

Papadopoulos v. The Republic (1983) 3 C.L.R. 1423;

Livadas v. The Republic (1985) 3 C.L.R. 506;

Republic v. Petrides (1984) 3 C.L.R. 378;

Republic v. Mylonas (1985) 3 C.L.R. 1608;

15

Republic v. Saferides (1985) 3 C.L.R. 183;

Lambis and Others v. The Republic (1986) 3 C.L.R. 130;

Christodoulou and Another v. CYTA (1978) 3 C.L.R. 61;

Savva v. The Republic (1980) 3 C.L.R. 675;

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

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

Republic v. Vonditsianos and Others (1969) 3 C.L.R. 445;

Bagdades v. The Republic (1973) 3 C.L.R. 417;

Zaferides v. The Republic (1980) 3 C.L.R. 140;

Republic v. Rousos (1987) 3 C.L.R. 1217;

HadjiSavvas v. The Republic (1982) 3 C.L.R. 76;

5

Hadjiioannou v. The Republic (1983) 3 C.L.R. 1041.

Recourses.

Recourses against the decision of the respondents to promote the interested party to the post of Chief Land Officer in the Department of Lands and Surveys in preference and instead of the applicants. 10

K. Talarides, for the applicant in Case No. 36/86.

N. Zomenis, for the applicant in Case No. 123/86.

C. Loizou, for the applicant in Case No. 158/86.

P. Hadjidemetriou, for the respondents.

15

A. S. Angelides, for the interested party.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The Judgment of the majority of the Court (Malachtos, J., Stylianides, J., and myself) will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: The applicants by these recourses seek the annulment of the promotion of Andreas Kotsonis (the interested party) to the post of Chief Land Officer in preference to each one of them, and further the annulment of the acting appointment of 20

the interested party to the post of Director of the Department of Lands and Surveys as from 1.1.86.

The post of Chief Land Officer is a first entry and promotion post.

5

In response to advertisement of the post there were 12 applications.

10 A Departmental Board, in pursuance of section 36 and the relevant circular of the Council of Ministers, was set up. The Departmental Board recommended four candidates, including the applicants in Cases Nos. 36/86, 123/86 and the interested party. They, however, added in their report that applicant in Case No. 158/86, though he was inferior in merit, might, also, be considered by the Commission.

15 The Commission interviewed six candidates in the presence of the Head of the Department, the Director of Lands and Surveys. At the interviews the Head of the Department, the Chairman and the Members of the Commission put to the applicants questions on general subjects and mainly on subjects related to the duties of the post, as they are set out in the Scheme of Service. The Head
20 of the Department, ultimately, made his assessment of the performance of the candidates at the interview, and, having made a comparison of all the candidates, he equally recommended the applicants in Cases Nos. 36/86, 123/86 and the interested party and he left it to the Commission to select anyone of the three. He concluded as follows:-
25

30 "Taking into consideration the performance at the interview, their performance in the service, qualifications and seniority, Georghiou, Mouzouris and Kotsonis are better than Panayiotou, Panayides and Pantazis, and is up to the Commission to select any of the three for the vacant post."

The Commission made their own assessment of the performance at the interview. The interested party was rated "very -

very good", applicants Georghiou and Mouzouris "very good" and applicant Panayiotou "good".

The Commission went into the confidential reports of the candidates and took into consideration, also, the performance of the candidates during 1985, as stated to them by the Director. They dealt with the qualifications and seniority, and finally decided to promote, as the most suitable on the basis of all the established criteria, the interested party with effect 1.1.86.

We consider it convenient to deal first with Case No. 158/86. This is manifestly ill founded. The interested party is strikingly superior to the applicant. The interested party was rated "excellent" for the last six years, whereas the applicant simply "good" for four years and "very good" for two years. The interested party was recommended by the Head of the Department whereas the applicant was not. The performance of the applicant at the interview fell far short to that of the interested party, in the assessment, both of the Director and the Commission. His seniority alone does not suffice to grade him even equal to the interested party. This recourse fails.

Counsel for the applicants in Cases Nos. 36/86 and 123/86 submitted that the Commission wrongly did not take into consideration the confidential reports for 1984. They attributed undue weight to the evaluation of the performance of the candidates. They disregarded and/or they failed to give due weight to the seniority of the applicants, and/or they gave no cogent reasons for not selecting the applicants, who were senior to the interested party: and their seniority establishes striking superiority over the interested party.

The post of Chief Land Officer is the highest in the Department of Lands and Surveys, next to the Director. As it emerges from the duties and the responsibilities of the post - set out in the Scheme of Service - it is a post with wide administrative responsibilities. His duties are to assist the Director in the organization, administration and proper functioning of the Department, the for-

5 mulation and application of the Government policy in respect of the competence of the Department, as well as the application of the necessary decisions. He prepares programmes, coordinates and supervises the function of two or more branches of the Department.

10 It is well established that the appointing Authority has a very wide discretion when making a selection for a post so high in the service - (*Frangos v. The Republic* (1970) 3 C.L.R. 312; *Ierides v. The Republic* (1980) 3 C.L.R. 165; *Simillis v. The Republic* (1986) 3 C.L.R. 608).

15 The claim of civil servants for promotion shall be considered on the basis of merit, qualifications and seniority. The appointing Authority when weighing together the said three criteria, laid by Law, in order to find the most suitable candidate, may attribute such significance to them as it may deem proper, provided that it exercises correctly, in the course of doing so, its relevant discretionary powers - (*Georghiou v. The Republic* (1976) 3 C.L.R. 74 and *Republic v. Zachariades* (1986) 3 C.L.R. 852).

20 The first complaint is that the respondent Commission did not take into consideration the confidential reports for 1984. The Head of the Department in 1984 was Mr. Nicolaides. On 7.1.1985 he left the service and took up a political post, that of the Minister of the Interior. Whilst being a Minister, a member of the executive power of the State, he prepared the confidential reports for 1984.

25 In the confidential reports for 1984 applicant Georghiou (No. 36/86) was rated "11-1-0", applicant Mouzouris (No. 123/86) "10-2-0" and Kotsonis, the interested party, "11-1-0".

30 Certain remarks were written by Mr. Nicolaides, which are almost identical, with the exception that he wrote for the interested party that he is suitable for promotion to "ανώτερες" (higher) posts and for the applicant Georghiou suitable for promotion to "ανώτατες" (highest) posts.

The two applicants and the interested party were holding the post of Senior Land Officer. They were very high up on the ladder of their department and the only two posts over them were that of the Chief Land Officer and the post of the Director.

In our view the Commission rightly, on the advice of the Attorney-General, did not take into consideration the confidential reports prepared by a person who was at the material time a political person - Minister of the Interior. Even if they took this into consideration, there would be no difference at all, having regard to the grades of the applicants in the confidential reports for 1984. Therefore this ground fails.

Interviews, though not provided by the Law, they received repeatedly expressed recognition in the Case-Law of this Court, as a course which is open to the Commission, for the purpose of evaluation of the suitability of candidates. The process of performance of candidates when interviewed is a process helping in the evaluation of candidates, mainly from the point of view of merit and, also, to a certain extent of qualifications as well - (*Republic v. Michael Panayiotides*, (1987) 3 C.L.R. 1081).

The performance of the interviews cannot be taken as a separate factor by itself and undue weight should not be given to the performance. There is nothing wrong, however, in Law to attach the necessary importance to them, as such interviews reveal a candidate's personality and abilities which in instances as the present one are important qualities, in order to ascertain whether such candidates should be suitable in the post in question.

The assessment of the performance at the interviews is within the powers and the task of the Commission and no-one else. We do not agree that the respondent Public Service Commission has attributed undue weight to the evaluation of the performance of the candidates in question; it took into account such evaluation properly as part of the overall assessment of the candidates.

It is common ground that the applicants and the interested par-

ty were all promoted to the previous post of Senior Land Officer on 15.2.84 and the post of Land Officer, 1st Grade, on 1.12.81. It is only in the permanent post of Land Officer 2nd Grade that the applicants had seniority over the interested party. The interested party was promoted to that post on 15.5.79 and to the temporary post on 1.6.78, whereas applicant Georghiou was promoted to the permanent post on 1.6.77 and to the temporary post on secondment on 1.8.73, and applicant Mouzouris was promoted to the permanent post on 15.11.78 and was seconded to the temporary post on 1.8.73. It may be noted that secondment is not a promotion and it does not change the substantive status of a public officer - (*Republic v. Koufettas*) (1985) 3 C.L.R. 1950). Therefore, according to section 46 of the Law, the applicants are senior to the interested party. Seniority is one of the criteria which the appointing Authority has to take into consideration in reaching its decision.

The seniority of the applicants was taken into consideration in the overall assessment of the candidates and it is expressly so stated in the sub judice decision. Their seniority in the circumstances was not of significant weight and could not tip the scales in their favour.

The Administrative Court does not annul a decision of an appointing Authority, such as the respondent Commission, which, in accordance with the Law applicable to, and the facts of a particular case, was reasonably open to such Authority - (see inter alia, *Georghiou v. The Republic* (supra); *Petrides v. The Republic* (1984) 3 C.L.R. 341, 350; *Papadopoulos v. The Republic Service Commission* (1985) 3 C.L.R. 405, 413; *Republic v. Zachariades* (supra)).

The duty of this Court is to see whether the Authority exercised its discretionary power in conformity with the statutory provisions and the rules and requirements of Administrative Law in general, including good faith. So long as the Authority acted within those limits, the Court cannot interfere. It cannot substitute its own opinion as to the merits of the candidates for that of the

Authority.

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 made the selection for the purpose of an appointment or promotion is deemed to have exceeded the outer limits of its discretion and then, therefore, to have acted in excess or abuse of this power; 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.

Considering the case as a whole we have come to the conclusion that the applicants did not discharge the onus cast on them of satisfying the Court that they were strikingly superior to the interested party. Even if the applicants could argue that they were merely superior to the interested party, because of their seniority, to which reference is made above, that would not be enough for this Court to conclude that the respondent Commission had acted in abuse or excess of power.

In our opinion, in all the circumstances of this case, it was reasonably open to the respondent Public Service Commission to select for promotion the interested party, instead of the applicants, on the reasoning set out in its minutes and to be derived, also, from the relevant administrative records.

Applicants in Cases Nos. 36/86 and 158/86 seek, also, the annulment of the acting appointment of the interested party to the post of the Director of the Lands and Surveys Department.

The Head of the Department was due to retire on 1.1.86. On 21.12.85, after the promotion of the interested party to the post of Chief Land Officer, the Director General of the Ministry, as the

appropriate Authority, requested the acting appointment of the interested party with effect 1.1.86 as Director of the Department in addition to his duties.

5 The respondent Commission on 27.12.85, having taken into consideration that the process for the filling of the post of the Director would commence and be completed in a short time and that the interested party, who would be the holder of the post of Chief Land Officer as from 1.1.86, possessed the required qualifications under the Scheme of Service, under section 42 made the sub
10 judice appointment. The appointment was of a foreseeably temporary duration in order to remedy a necessity until in the near future the vacant post was otherwise filled. (*Republic v. Mylonas* (1985) 3 C.L.R. 1608. See, also *Andreas Olympios v. The Republic* (1974) 3 C.L.R. 17 and *Tsiropoullou v. Republic* (1983)
15 3 C.L.R. 313).

Furthermore, it was made clear to the interested party by the respondent Commission that his such acting appointment would not be taken into consideration in the filling of the vacancy.

20 Under section 42, sub-section 2, an acting appointment shall be made on the recommendation of the appropriate Authority concerned. From the wording of this sub-section it is clear that once the appropriate Authority recommends any person, who is possessed with the necessary qualifications for the post, the Public Service Commission is bound to make such appointment and cannot invite applications from other persons in order to make a
25 selection. There is no power under section 42 for the Commission to take that course. The recommendation does not refer only to the act of recommendation, but, also, to the person who was recommended.

30 In the present case, the acting appointment came to an end when the substantive appointment was made in June 1986.

The Commission acted properly in conformity with the Law and the appropriate Authority recommended the civil servant who

would be the holder of the post of Chief Land Officer, the one next to the Director.

For all the foregoing, the recourses fail and are hereby dismissed with no order as to costs.

5

SAVVIDES J.: The applicants by these recourses, which were heard by the Full Bench together as presenting common questions of law and fact, challenge the decision of the respondent Commission to promote Andreas Kotsonis (the interested party) to the post of Chief Land Officer in the Department of Lands and Surveys as from 1st January, 1986, which was published in the official Gazette of the Republic of the 4th January, 1986, under Notification No. 1. 10

Furthermore applicants in cases Nos. 36/86 and 158/86 challenge also the decision of the respondent for the acting appointment of Andreas Kotsonis to the post of Director of the Department of Lands and Surveys as from 1st January, 1986, which was published in the official Gazette of the Republic of the 4th January, 1986, under Notification No. 2. 15

These cases were originally referred to one of the Judges of the Supreme Court, namely, Kourris J., under the provisions of s. 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64). 20

In view of the fact that an important constitutional issue, the constitutionality of the composition of the Public Service Commission, was raised, the learned Judge formed the opinion that it was more appropriate that these cases should be dealt with by the Full Bench under s.11 of Law 33/64. The matter was judicially considered by the Full Bench after hearing counsel appearing for all parties and by majority (Pikis, J. dissenting) decided on 4th June, 1987, to refer the cases for trial by the Full Bench under s.11 of Law 33/64. 25 30

In the meantime and before the hearing of these cases the ques-

tion of the constitutionality or not of the composition of the Public Service Commission came up for consideration by the Full Bench on appeal in *The Republic v. Kyriacou* (1987) 3 C.L.R. 1189 and in which it was held by majority that the terms of service laid down in s.4(3) of the Public Service Law (Law 33/67), under which the members of the Public Service Commission serve were not contrary to the Constitution. As a result the present cases were heard with regard to the remaining issues.

I need not embark on the facts of the cases which led to the sub judge decision as they have been explicitly narrated in both the judgments of my brothers Stylianides, J. and Kourris, J. with the contents of which I had the opportunity of getting acquainted. I am also in agreement with the opinions expressed in both the aforesaid judgments that case No. 158/86 fails and should be dismissed. The applicant in such case, notwithstanding his seniority of two years over the interested party was not recommended either by the Departmental Committee or the Head of the Department. On merit, as disclosed in the confidential reports, the interested party was by far superior to the applicant. In addition the interested party had the recommendations of the Head of the Department and a better performance at the interview as assessed by the Director of the Department and the Public Service Commission (subject to the principles emanating from our case law as to the weight to be attached to interviews of candidates. (See in this respect *Triantafyllides and Others v. The Republic* (1970) 3 C.L.R. 235; *Duncan v. The Republic* (1977) 3 C.L.R.153; *Marikides and another v. Republic* (1983) 3 C.L.R. 622; *Papadopoulos v. The Republic* (1983) 3 C.L.R. 1423; *Livadas v. The Republic* (1985) 3 C.L.R. 506).

Bearing in mind all criteria to be taken into consideration and in view of the superiority of the interested party on merit, the seniority of the applicant by itself was not sufficient to establish any superiority over the interested party, let aside that according to the well established principles emanating from our case law what has to be established is striking superiority and nothing less.

The position however of the applicants in the remaining two cases 36/86 and 123/86 is different. The two applicants and the interested party were holding the post of Senior Land Officer. A perusal of the confidential reports of the two applicants and the interested party for the years 1979 - 1983 discloses that all three of them were more or less equal on merit. Rightly the respondent did not take into consideration the confidential reports for 1984 as such reports were prepared by a person who was not holding any post in the Department at the time, having resigned and having been appointed as a Minister. For all these years applicant Mouzouris and the interested party were evaluated as "excellent" in respect of each particular year. On the totality of the various items the interested party had 44 "excellent" , 15 "very good" and one "good". Mouzouris had 43 "excellent" and 17 "very good". Applicant Georghiou was evaluated "excellent" for all years with the exception of the year 1980 when he was evaluated as "very good" (six items "excellent" and six "very good") and the total for all years in question was 40 excellent and 20 very good.

The recommendations of the Head of the Department were to the effect that, all three of them were excellent in the discharge of their duties and all of them suitable to fill the post of Chief Land Officer. As to their performance at the interview the assessment of the Head of the Department was the same in respect of all three of them. According to the minutes of the meeting of the respondent Commission, the Director of the Department of Lands and Surveys is recorded to have said the following in respect of the two applicants and the interested party:"In the one category are Georghiou, Kotsonis and Mouzouris whose replies were substantive and clear not only on questions relating to their respective Branches but also on matters concerning other Branches. All three of them were very good."

The questions which were put to them according to the aforesaid minutes were on "general matters and on matters related to the duties of the post which are mentioned in the scheme of service."

The assessment of the three candidates at the interview by the respondent Commission was "very good" in respect of the two applicants and "very very good" in respect of the interested party.

5 As to qualifications the respondent Commission found that all three candidates were possessing the qualifications as well as the additional qualifications required by the scheme of service.

As to seniority it is not in dispute that the two applicants have an overall seniority of nearly five years compared with the interested party.

10 One of the factors taken into consideration by the respondent Commission, bearing in mind the fact that in merit and qualifications the candidates were more or less equal, was "the impression formed by the Commission at the interview, to which it attached the proper weight in view of the duties of the post".

15 Nothing is mentioned in its conclusions as to why the evaluation of the candidates at the interviews by the Director of the Department who was in a better position to assess the performance of the candidates once most of the questions put to them were on matters related to the duties of the post and the operation of the various branches of the Lands Office, which was different from
20 the respondent's evaluation was completely ignored and the respondent solely relied on its own evaluation to which it gave such weight as to bring the scales down in favour of the interested party.

25 Notwithstanding the fact that it was quite obvious that the two applicants were by far senior to the interested party, nothing appears on the record indicating why such seniority was ignored once on merit and qualifications the candidates were more or less equal and more weight was attached to a marginal difference in the assessment
30 at the interviews, by the respondent between the two applicants, having been assessed as "very good" and the interested party as "very very good". As already mentioned the assessment of the Director of the Department was in respect of all three candidates

equal.

I need not reiterate the principles concerning the weight to be attached to interviews as these matters have been expounded by my brothers Judges Stylianides and Kourris in their respective judgments which I had the opportunity to peruse.

5

On the material before me and in the light of the observations already made by me I have come to the conclusion that the respondent completely disregarded the substantial seniority of the two applicants and failed to give any reasoning why, bearing in mind the fact that the candidates were more or less equal in merit and qualifications, their seniority over the interested party was completely ignored. Furthermore from the whole record of the minutes of the respondent it appears that the respondent Commission gave undue and disproportionate weight to the impressions formed at the interviews which led to a wrong exercise of its discretionary powers.

10

15

In the result the recourses in cases Nos. 36/86 and 123/86 succeed in this respect and the promotion of the interested party is hereby annulled.

20

Finally I shall deal briefly with the prayer for the annulment of the acting appointment of the interested party as Director of the Department of Lands and Surveys. Such appointment was effected soon after the appointment of the interested party to the post of Chief Land Officer which is the immediately lower post to that of the Director of Lands and Surveys. The acting appointment was of a limited duration and in fact came to an end in June, 1986, when a substantive appointment to the post was made. Such acting appointment was made at the recommendation of the appropriate authority in accordance with the provisions of s. 42 of the Public Service Law, 1967. This section reads as follows:

25

30

"42.- (1) Όταν θέσιν κενούται δι' οιονδήποτε λόγον ή ο κάτοχος αυτής απουσιάξη επ' αδεία ή τελή εν ανικανότητι, δύναται να διορισθή έτερον πρόσωπον όπως ενεργή ανα-

πληρωτικώς εν τη θέσει ταύτη υπό τοιούτους όρους ως ήθε-
λον καθορισθή.

(2) Αναπληρωτικός διορισμός γίνεται τη συστάσει της
ενδιαφερομένης αρμοδίας αρχής."

5 And the translation in English:

"42(1). When a post becomes vacant for any reason or its
holder is absent on leave or incapacitated, another person may
be appointed to act in that post under such terms as may be
prescribed.

10 (2). An acting appointment shall be made on the recommen-
dation of the appropriate authority concerned."

The power of the Public Service Commission to effect an act-
ing appointment and the question as to whether a decision for
15 such appointment can be challenged by a recourse have been con-
sidered by this Court in a series of cases. In *Olympios v. The Re-
public* (1974) 3 C.L.R. 17 though the Court found that the appli-
clicant had a legitimate interest to challenge an acting appointment,
nevertheless dismissed the recourse on its merits. Malachtos, J.
had this to say at p. 27:

20 "What really matters in these acting appointments is only
the interest of the public service and the object of making an
acting appointment is simply to remedy a temporary necessity
25 and avoid unnecessary difficulties so that the smooth running
of the public service as a result of the vacancy created in the
relative post will continue. Under section 42, subsection 2, an
acting appointment shall be made on the recommendation of
the appropriate authority concerned. From the wording of this
30 subsection it is clear that once the appropriate authority recom-
mends any person who is possessed with the necessary quali-
fications for the post, the Public Service Commission is bound
to make such appointment and cannot invite applications from
other persons in order to make a selection. There is no power

under section 42 for the Commission to take that course."

The above opinion was adopted by me in *Tsiropoullou Kyrilou v. The Republic* (1983) 3 C.L.R. 313 in which at p. 319 I said the following:

"It is clear from the wording of the law that an acting appointment is made on the recommendation of the appropriate authority and the Educational Service Committee is bound to accept such recommendation and has no discretion in the matter. It is also clear that the term 'recommendation' does not refer only to the act of recommendation but refers also to the person so recommended."

In the above case, however at pp. 320, 321 I made the following observations:

".....
I share the observations of Mr. Kallis, the member of the respondent Committee who withdrew from the meeting after he made his observations and before the sub judge decision was taken, to the effect that if the practice of the Ministry of Education which has been described as a standing practice to make acting appointments renewable annually instead of filling the vacant posts in the proper way continues, it will inevitably lead to a defeat of the discretionary power of the Educational Service Committee to select and promote the most suitable candidates for filling the vacant posts, and will turn the Committee to a mere organ of confirming decisions of the Minister who is the appropriate authority under the law to recommend such acting appointments. I expect that the appropriate authority should take these observations into consideration and discontinue such practice and when the possibility of filling vacant posts does exist, to proceed with the filling of same in the prescribed way and avoid as far as possible the practice of the temporary solution of an acting appointment."

The dicta in both the aforesaid cases were approved by the Full

Bench in the case of *Republic v. Mylonas* (1985) 3 C.L.R. 1608 in which it was held that:

5 (1) The object of an acting appointment is to remedy a temporary necessity. The provisions of section 42 of Law 33/67 may be used only for an acting appointment of a foreseeable temporary duration in order to remedy a necessity until in the foreseeable near future either the holder of the post resumes his duties or the vacant post is otherwise filled.

10 (2) The nature and scope of an acting appointment and the provision for 'recommendation' in the above section, not only do not cast a duty on the Public Service Commission to make a selection but, on the contrary, it is impermissible for it to do so. Hence, no question of selection of the most suitable candidate arises.

15 Bearing in mind the above dicta and the fact that the acting appointment was of a limited duration and came to an end with the filling of the vacant post I find that the prayer in this respect fails.

20 In the result cases 36/86 and 123/86 succeed to the extent they challenge the promotion of the interested party to the post of Chief Lands Officer and the sub judice decision for such promotion is hereby annulled. There will be no order for costs. Case 158/86 is dismissed with no order for costs.

25 KOURRIS J.: Applicants in the above intituled recourses which were heard together as presenting common legal and factual issues, challenge the decision of the Public Service Commission to promote the interested party, namely, Andreas Kotsonis, to the post of Principal Land Officer, ("Protou Ktimatologikou Litourgou"), in the Lands and Surveys Department as from 1st January, 1986, in preference and/or instead of the applicants.

30 The post is a first entry and promotion post and at the time of the sub judice decision all the applicants and the interested party were holding the post of Senior Land Officer.

An issue of great constitutional importance was raised, inter alia, by the applicants, challenging the constitutionality of the Public Service Commission, the appointing authority, and the Judge who had to try these cases was of the opinion that it was more appropriate to adjudicate this issue before more than one Judge of the Supreme Court and referred the cases for trial by the Full Bench under s.11 of the Administration of Justice (Miscellaneous Provisios) Law, 1964 (Law 33/64).

5

Before the hearing of these cases the Full Bench resolved this issue on appeal in Revisional Appeal No. 733, *The Republic v. Kyriakos Kyriakou*, (1987) 3 C.L.R. 1189). It was held by majority that the terms of service laid down in s.4 (3) of the Public Service (Law 33/67) under which the members of the Public Service Commission serve were not contrary to the Constitution. Consequently, the cases proceeded to hearing with regard to the remaining issues.

10

15

Pursuant to a request made by the Director - General of the Ministry of Interior for the filling of a vacancy in the post of Principal Land Officer in the Lands and Surveys Department, the respondent Commission referred the matter to the Departmental Committee which was set up for that purpose in accordance with the provisions of s. 36 of the Public Service Law, 1967 (Law 33/67). By its report which was submitted to the respondent Commission by letter dated 29th October, 1985, the Departmental Committee recommended four candidates for promotion to the post in question in alphabetical order including the interested party and all the applicants, Georghiou, Mouzouris and Tryfon Panaghides.

20

25

The respondent Commission at its meeting of 11th December, 1985, after hearing the recommendations of the Head of Department, proceeded in his absence to evaluate and compare the candidates; after examining their confidential reports and their personal files, and taking into consideration the recommendations of the Head of Department and the performance of the candidates at the interviews, the Commission reached the decision which appears in Appendix 9 by virtue of which it promoted to the said post, the interested party. The promotion was published in the Official Gazette of the Republic on the 4th January, 1986, as a re-

30

35

sult of which the applicants filed the present recourses.

5 Applicant in Case No. 36/86 is Andreas Georghiou. He was first appointed in the public service on 1.12.57 as a Land Clerk, 2nd Grade, and on 1.6.68 he was seconded to the post of Land Clerk, 1st grade; and on 15.12.69 he became permanent in the post of Land Clerk, 1st Grade. On 15.5.71 he was promoted as Assistant Land Officer, and on 1.8.73 he was seconded to the post of Land Officer; and on 1.6.1977 he was promoted to the post of Land Officer and the title was changed to Land Officer 2nd Grade as from 1.1.80. On 1.12.81 he was promoted to Land Officer, 1st Grade (Lands Branch) and on 15.12.84 he was promoted to the post of Senior Lands Officer.

15 Applicant in case No. 123/86 is Christos Mouzouris. He was first appointed in the public service on 15.2.54 and on 1.10.56 he was promoted to the post of Land Clerk, 2nd Grade and on 1.8.1969 he was seconded to the post of Land Clerk 1st Grade and on 15.5.71 he became a permanent Land Clerk, 1st Grade. On 1.12.72 he became an Assistant Land Officer; on 1.8.1973 he was seconded to the post of Land Officer and on 1.6.1977 he became a permanent Land Officer. On 15.11.78 he was promoted to the post of Land Officer and the title of this post was changed to Land Officer 2nd Grade as from 1.1.1980. On 1.12.81 he was promoted to the post of Land Officer 1st Grade, and on 15.2.1984 he was promoted to the post of Senior Land Officer.

25 Applicant in Case No. 158/86 is Kyriakos Panayiotou. He was first appointed in the public service on 1.12.1957 as Surveyor 2nd Grade and on 1.12.1970 he was promoted to the post of Surveyor 1st Grade. On 15.5.71 he was promoted to Senior Surveyor and on 15.11.76 he was promoted to the post of Land Officer and the title of this post was changed to Land Officer 2nd Grade as from 1.1.1980. On 1.12.1981 he was promoted to the post of Land Officer, 1st Grade (Survey Branch - Surveys Office) and on 15.12.1984 he was promoted to the post of Senior Land Officer.

35

The interested party is Andreas Kotsonis. He was first appointed in the public service on 1.4.1955 as Clerical Assistant and on 1.1.1956 he was promoted to the post of Land Clerk, 2nd Grade. On 1.6.1968 he was seconded to the post of Land Clerk, 1st grade and on 1.7.1969 he became a permanent Land Clerk, 1st Grade. On 1.12.1977 he was promoted as Assistant Land Officer and on 1.6.1978 he was seconded to the post of Land Officer and on 15.11.1978 he was promoted to the post of Land Officer and the title was changed to Land Officer, 2nd Grade as from 1.1.1980. On 1.12.1981 he was promoted to the post of Lands Officer, 1st Grade, (Lands Branch) and on 15.12.1984 he was promoted to the post of Senior Land Officer.

The main complaint of the applicants is to the effect that the respondent Commission attributed undue weight to the impressions created by the candidates at the interviews and it was submitted that such impressions became a decisive factor which brought about the decision to promote the interested party in preference to and instead of the applicant.

I propose to deal first with applicant in case No. 158/86, namely Kyriakos Panayiotou. This applicant is senior to the interested party by almost 2 years but he was not recommended for promotion either by the Departmental Committee or by the Head of Department, and in these circumstances, I am of the opinion that this applicant failed to establish striking superiority and it was reasonably open to the respondent Commission to promote the interested party instead of this applicant. Therefore his recourse 158/86 fails.

I shall now revert and examine Case No. 123/86 and case 158/86 with regard to applicants Andreas Georghiou and Christos Mouzouris respectively.

INTERVIEWS:

It should be noted that there is no specific provision in the Public Service Law 1967 (Law 33/67) authorising the Public Ser-

vice Commission to conduct interviews of candidates for appointment or promotion and the only direct reference to interviews is to be found in the proviso to s.35(6) of Law 33/67 in relation to advisory committees for specialized posts. (See R.A. 589 *The Republic v. Panayiotides* (1987) 3 C.L.R. 1081).

5

But, it was held in the *Panayiotides* case (supra) at p. 5 as follows:-

10

15

"Notwithstanding the absence of express statutory provision in Law 33/67, or in any other relevant enactment, empowering the Public Service Commission to interview candidates, there has been established a practice of the Public Service Commission to interview candidates for the purpose of evaluating their suitability, and this practice has received repeatedly express recognition in the case-law of this Court as a course which is open to the Commission or other appointing authority, but which the Commission is not bound to adopt in all cases."

And at p. 6 it is stated as follows: -

20

"It is thus overwhelmingly established, on the basis of the aforesaid case-law, that the interviews of candidates for appointment or promotion is firmly embedded and legitimate, though not an exclusive mode of assessing the suitability of candidates."

25

It should also be noted that interviews do not constitute a criterion by itself separate from the merit, qualifications and experience of the candidates but it is merely a means of forming an opinion and evaluating the merits notwithstanding the fact that it is not the safest one. See *The Republic v. Petrides*, (1984) 3 C.L.R. 378.

30

In the case of *The Republic v. Saferides*, (1985) 3 C.L.R. 163, it was held that impressions formed by a collective organ at interviews of candidates do not constitute facts but they constitute the subject of evaluation connected with the persons of which the col-

lective organ concerned is composed at the material time. It was further held in that case that findings made by the Commission itself, subjective in that they reflect the personal reactions of members of the Commissions, and because of that they have no objective foundation.

5

In the case of *Lambis and Others v. The Republic* (1986) 3 C.L.R. 130 at p. 141, it is stated: -

"It has been held time and again by this Court that interviews do not constitute a criterion by itself separate from merit, qualifications and experience of the candidates, but it is merely a means of forming an opinion and evaluating the merits, notwithstanding the fact that it is not the safest one. See *Triantafyllides and Others v. The Republic*, (1970) 3 C.L.R. 235; *Makrides and Another v. The Republic*, (1983) 3 C.L.R. 622, and *Papadopoulos v. The Republic*, (1983) 3 C.L.R. 1423, where it was held that although the impressions gained at the interview as to the personality of candidates are relevant to the choice of a candidate for promotion, especially if the post carries, as the post of a District Officer does, serious administrative responsibilities, they cannot be decisive ... The fact that the interviews played an out-weighting factor in the assessments of the candidates is evidenced by the exclusion of the two applicants Lambis and Papadopoulos from consideration for the sub judge post notwithstanding the fact that both of them had higher qualifications and longer experience in the district administration. The undue weight attached by the respondent to the interviews, taints the exercise of its discretionary power with irregularity and lack of due inquiry. Furthermore, in the light of the substantial superiority of applicant Lambis and Papadopoulos over the interested party concerning qualifications, seniority and longer experience, assuming that they were equal in merit, the Commission should have stated the reasons for ignoring such factors which operate in favour of the two applicants. (*Livadas v. The Republic*, (1985) 3 C.L.R. 506).

10

15

20

25

30

35

5 In cases where the relevant scheme of service makes provision for possession by the candidates of organizing and administrative ability and ability to supervise and guide subordinate staff, due regard should be paid to the evaluation of candidates made through the interview because their personality is an important factor to be weighed by the respondent Commission. This is supported by the case of *Duncan v. The Republic*, (1977) 3 C.L.R. 153 where at p. 163 it is stated as follows.

10 "Furthermore, the respondent Commission gave due regard to the performance of the candidates at the interview and both interested parties were found to have given very satisfactory replies to questions put to them and generally they proved to be the best candidates for appointment or promotion to the post in question. This was proper, in the circumstances, because
15 their personality was an important factor to be weighed by the respondent Commission, particularly so, in view of the qualifications required under the schemes of service for possession of organizing and administrative ability and ability to supervise and guide subordinate staff, for which the personality of the leader is most significant."

20 Again, in the case of *Christodoulou and Another v. The Cyprus Telecommunications Authority*, (1978) 3 C.L.R. 61, it was held that due regard should be paid to interviews because the factor of personality is something which does count quite a lot for a post such as that of a telephone supervisor, which involves the
25 supervision of subordinate staff.

30 It should be observed, however, that it is well settled that impressions created by candidates at the interview should not be given undue and disproportionate weight (*Triantafyllides v. The Republic*, (1970) 3 C.L.R. 235; *Savva v. The Republic*, (1980) 3 C.L.R. 675; *Smyrnios v. The Republic*, (1983) 3 C.L.R. 124).

In the present case the Head of Department who was present at the interviews of the interested party and the two applicants conducted by the respondent Commission, rated the interested party

and the two applicants concerned as "very good". The respondent Commission after the departure of the Head of Department, made its own assessments of the performance of the candidates and rated the two applicants as "very good" ("poli kalos") and the interested party as "very very good" ("para poli kalos"). It should be noted that all candidates were asked questions of a general nature but mainly questions about the duties envisaged by the scheme of service for the said post.

5

SENIORITY:

With regard to seniority, our case-law for the past 27 years has been to the effect that if all other things being more or less equal the seniority ought to prevail and that cogent reasons should be given for disregarding such seniority. See, inter alia, *Partellides v. The Republic*, (1969) 3 C.L.R. 480, where at p. 484 it is stated:

10

"In the circumstances, we are of the opinion that it was not reasonably open to the respondent Commission to promote interested party Gregoriades instead of the appellant. All other things being equal the appellant's seniority ought to prevail. It follows that the relevant discretionary powers of the respondent were exercised in an erroneous manner."

15

20

And again at p. 483 it is stated: -

"The respondent Commission has, nevertheless, promoted to the post of Postal Officer, 2nd Grade, interested party Gregoriades instead of the appellant, in spite of the substantially greater seniority of the appellant, and without any really cogent reason for disregarding such seniority."

25

The *Partellides* case was decided by the Full Bench and another case decided by the Full Bench tackling the same point is *The Republic v. Vonditsianos and others*, (1969) 3 C.L.R. 445. These cases were followed, inter alia by the case of *Bagdades v. The Republic*, (1973) 3 C.L.R. 417, and *Zaferiades v. The Republic*, (1980) 3 C.L.R. 140.

30

5 In the case in hand the two applicants were promoted to the post of Land Officer on 1.8.1973, whereas the interested party was promoted to the same post on 1.6.1978. Thus, the two applicants are of equal seniority and they are by almost 5 years senior to the interested party. And this in accordance with the provisions of s. 46(2) of the Public Service Law, 1967 (Law 33/67). The seniority of the two applicants over the interested party by almost 5 years is not disputed by the respondents.

10 Another point raised by learned counsel for the applicants is that the respondent Commission has not exercised its discretion properly in selecting the most suitable candidate for promotion in that the applicants are strikingly superior to the candidates selected.

15 It is well-settled that the paramount duty of the Public Service Commission is to select the most suitable candidate and the Court will not interfere with the exercise of such discretion or substitute its own discretion if it was reasonably open to the respondent Commission to reach the decision it did. The Court will only interfere where the Commission exercises its discretion in an erroneous manner. Furthermore, the appointing authority in selecting
20 the most suitable candidate for appointment or promotion to high office in the administrative structure has quite wide discretionary powers (See *Frangos v. The Republic* (1970) 3 C.L.R. 312 at p. 343, and *Ierides v. The Republic*, (1980) 3 C.L.R. 168 at p.
25 183).

The criteria which the Public Service Commission have to take into consideration when reaching a decision have been expounded in the case of *Republic v. Rousos* (1987) 3 C.L.R. 1217 decided by the Full Bench of the Supreme Court which at pp. 1222-1223
30 reads as follows: -

"On the other hand, there is nothing in the *Zachariades* case to prevent giving effect to the dictum in the *Menelaou* case (*supra*) which was adopted by the *Charis* case that 'merit should carry the most weight', so long as this is not misunderstood to

mean that merit should invariably be treated, in an inflexible way, as being exclusively the decisive criterion because in view of the Judgment in the *Georghiou, Ierides and Christou* cases (supra), there may exist situations in the special circumstances of which, and provided there are not over-stepped the limits of the proper exercise of the relevant discretionary powers, a criterion other than merit may be found to be more important than the other. But it is, indeed, obvious that cogent reasons should be given in order to justify why merit has not been treated in a particular case, in view of the existence of special circumstances, as carrying the most weight." 5 10

An administrative Court will not interfere with the decision of the respondent Commission if it was reasonably open to it. An applicant can succeed if he establishes striking superiority over the candidate promoted. The meaning of striking superiority was expounded in the case of *Hadjisavvas v The Republic*, (1982) 3 C.L.R. 76, and was adopted by the Full Bench in the case of *Hji-oannou v The Republic*, (1983) 3 C.L.R. 1041. 15

In the *Hadjisavva* case at p. 78 it is stated -

"As the expression 'striking superiority' suggests, a party's superiority to validate an allegation of this kind, must be self-evident and apparent from a perusal of the files of the candidates. Superiority must be of such a nature as to emerge on any view of the combined effect of the merits, qualifications and seniority of the parties competing for promotion; in other words, it must emerge as an unquestionable fact, so telling as to strike one at first sight." 20 25

To sum up:

The duty of the respondent Commission is to select the best candidate and in doing so it should take into consideration merit, qualifications and seniority. In selecting the most suitable candidate for appointment or promotion to high office in the administrative structure, as in the case in hand, it has quite wide discre- 30

tionary powers. In cases where the scheme of service requires qualifications for organizing and administrative ability to supervise and guide subordinate staff, as in the present case, then the Commission should pay due regard to the interviews but it should
5 not give undue and disproportionate weight. Where all things are more or less equal, seniority ought to prevail.

In the case before us, it is not in dispute that the qualifications and merit of the two applicants and the interested party are more or less equal. It is also not in dispute that the two applicants are
10 senior to the interested party by almost 5 years though, the seniority was acquired not in the immediately lower post. The two applicants and the interested party were rated by the Head of Department at the interviews as "very good" whereas the respondent Commission assessed the performance at the interviews of the
15 two applicants as "very good" and the performance of the interested party as "very very good".

I have perused the material which was before the Public Service Commission and which is also before us and I am of the view that the respondent Commission has not given cogent reasons for disregarding the substantial seniority of the applicants
20 since all other things were equal. I have no doubt in my mind that the decisive factor for promoting the interested party instead of the applicants was his performance at the interviews. In my opinion the performance at the interviews owing to its small duration and also owing to the fact that the candidates are asked questions
25 mainly with regard to their duties, the members of the Respondent Commission were not in a position to assess the performance of the candidates better than the Head of Department who is an expert in the field and he is acquainted with the duties envisaged by the scheme of service. It appears that on the basis of this
30 marginal difference, the Commission proceeded to find that the seniority of the applicants which was very substantial was neutralized by the slightly better performance of the interested party at the interview. In the circumstances, I am of the opinion that the Public Service Commission gave undue and disproportionate
35 weight to the impressions created by the candidates. Further, one

should not forget what was rightly pointed out in *Smyrnios v. The Republic*, (1983) 3 C.L.R. 124, that there is an undeniable possibility that an adroit candidate, when he is being interviewed, may make the Commission think more highly of him than he deserves, and on the other hand, a timid or nervous candidate may not be able to show his real merit. 5

In view of the above, I am of the opinion that the respondent Commission, in the sub judice decision, exercised its discretion in an erroneous manner. I am satisfied that the two applicants established striking superiority over the interested party and the sub judice decision should be annulled. 10

The sub judice decision should be annulled for each and all of the following reasons:

(a) The respondent Commission failed to give cogent reasons for disregarding the substantial seniority of almost 5 years of the two applicants which operated in favour of the two applicants since all other things were more or less equal. 15

(b) The respondent Commission gave undue and disproportionate weight to the impressions created by the interested party at the interview which tainted the exercise of its discretionary power, which was very wide in the circumstances of this case in view of the high office in the structure of the public service with irregularity and lack of due inquiry. 20

In the result, case No. 158/86 fails and is dismissed. The recourse succeeds with regard to cases Nos. 36/86 and 123/86 and the promotion of the interested party is set aside, but in the circumstances, I do not propose to make any order as to costs. 25

*Recourses dismissed by
majority with no order
as to costs.* 30