

IN re KLETS

PUBLIC SERVICE BOARD OF APPEAL. 1967. 22, 23, February. Coram: Chairman, B.C. SPRING C.J. and Members, J.B. Wright and Tuiletufuga Papali'i Enele.

Appeal against appointment in Public Service - principles applicable where officers considered for appointment are in a position of equality - Samoa Amendment Act 1949 (New Zealand) s. 23.

Where two applicants for a position in the Public Service are found to be of equal standing in matters of suitability and efficiency, preference for appointment shall be given to the one with seniority.

Appeal allowed.

APPEAL against appointment to a position in the Western Samoa Public Service.

Phillips, for appellant.

Finau Tala Mallei, for Public Service Commissioner.

Cur. adv. vult.

CHAIRMAN, B.C. Spring C.J.: The Public Service Board of Appeal is now required to give its decision on the appeal which came before it yesterday and in so doing consider the evidence that was given. The Public Service Board of Appeal is constituted under the Samoa Amendment Act 1949 to deal with appeals by Public Servants. This was a proper appeal brought under the appropriate provisions of the Act. The two applicants for the position of Electrical Superintendent were both permanent employees of the Western Samoan Government and it is necessary for the Board to have regard of the provision of the Samoa Amendment Act 1949 and the Board is aware of the provisions of section 23(1) of the Samoa Amendment Act which provides:

"In the event of two or more officers being applicants for any vacancy of which notice is published as aforesaid, or in the event of two or more officers being eligible for appointment to any vacancy of which notice is not so published, preference shall be given to that officer who, in the opinion of the Public Service Commissioner, is the most efficient and suitable for appointment to the position."

That raises of course the question of the opinion of the Public Service Commissioner and it is that "opinion" of the Public Service Commissioner which is of course the matter that has to be scrutinized by this Board. It is common ground that the Public Service Commissioner preferred the appointee for the position. Now reference is also had to the provisions of Section 23 subsection 3 which defines in some measure the term "relative efficiency" of the applicants for the position and it says:

"For the purposes of this section the relative efficiency of two or more officers shall be determined by reference to their special qualifications and aptitude for the discharge of the duties of the position which is vacant, together with merit, diligence, and good conduct."

And it is necessary for the Board to consider just what is meant by that section. It is the Board's findings that so far as the words "special qualifications" is concerned, that refers, in the opinion of the Board, to the qualifications that the applicants for the position hold. There is no dispute as to what qualifications the appellant holds; there is no dispute as to what qualifications the appointee has, so the Board is seized of the facts of the "special qualifications" with respect to the applicants. So far as "aptitude" is concerned in the Board's view, "aptitude" means "natural ability" or "readiness to learn" and the Board has to determine the aptitude of the 2 applicants having regard to the above meaning to be

given to this word. So far as "merit" is concerned, in the Board's view, "merit" means deserving of reward having regard to the respective history of employment of each applicant with the Department. "Diligence" in the view of the Board means steady application and "good conduct" means exactly what it says and requires no further enlargement, and it is all these above matters that the Board has to consider. The Board has to determine all the above matters required to be considered pursuant to section 23 in relation to the applicants. If the Board's finding is that the applicants are of equal efficiency and suitability for appointment then the person who is senior in the service shall be given preference. See section 23(2) of the Act which reads as follows:

"In the event of two or more officers being deemed by the Public Service Commissioner to be equally efficient and suitable for appointment to the position which is vacant preference shall be given to the senior officer."

It is common ground that the appellant is senior so far as service is concerned having regard to the method of determining seniority pursuant to section 24(3) of the Samoa Amendment Act 1949. The onus of proof is, in the opinion of the Board, upon the appellant to show that the Public Service Commissioner was wrong in his decision to appoint Moore to this post. It is this determination or this opinion of the Public Service Commissioner with which we are concerned.

Now the Board is required to examine the whole of the evidence and determine whether the Public Service Commissioner was justified in coming to the decision that he did. The Public Service Commissioner reached his conclusion upon the report which was received from the Director of Works. The Director of Works, who had only been in the country for six weeks, before giving his recommendation to the Commissioner relied in the main, in the view of the Board, on the report received from the Senior Electrical Engineer which report the Board considers was properly tendered and was quite honestly given by Mr Worrall to his immediate superior, the Director of Works. It was interesting for the Board to hear, however, although it is of little consequence, and no doubt the Public Service Commissioner was interested to learn, that the panel which interviewed these two men for the purpose of making the report to the Commissioner upon suitability or otherwise of the applicants to the position was divided, three supporting one man and three supporting the other. In the Board's view Mr McQuitty, the Director of Works, had the casting vote and determined the issue in favour of the appointee. The Board in its consideration of the evidence and having regard to the law as we have endeavoured to express it finds firstly that the special qualifications held by the appellant Kleis were higher than the qualifications held by Moore. The Board does not consider that there was any dispute about this matter and the evidence as to the qualifications and examinations held by the applicants speak for themselves. It was said by the Senior Electrical Engineer that the post of Electrical Superintendent was virtually on a tradesmen level. It was interesting for the Board to hear however that Mr Callaghan who presently holds this position is an engineer and further that the advertisement seeking applicants for this position stated that when the Electrical Superintendent retires or his term of office was determined that the person who was appointed to that office should be able to take over duties of the Electrical Engineer, and that after the departure of the Senior Electrical Engineer and in the absence of a replacement the appointee will take executive control. There was conflict upon this point between the witnesses called for the Public Service Commissioner - Mr Worrall stating in his view that the person appointed be it the appointee or the appellant would as a last resort be able to carry on for a maximum of two years until an Electrical Engineer was appointed. Mr McQuitty stated, however, quite definitely that in his view either the appellant or the appointee would not be able to carry on for more than one month without the assistance of a Senior Electrical Engineer. It is important in the Board's view, therefore, that the man who is appointed to the position of Electrical Superintendent should have the best possible qualifications for this position as the need may well arise where these special qualifications

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will be of great importance having regard to the amount of money invested in the State's power generating plant and equipment. The Board considered the matter of "aptitude" of the two persons seeking the post and was of the view that the applicants were equal in this regard, in that, they both have natural ability. So far as merit, diligence and good conduct is concerned the Board examined the reports furnished by the Department and that apart from the ability to get along with people and respect for authority the two applicants were of equal standing. It is noted that from the 1 April 1964 to 31 October 1964 there is no difference at all on any matter between these two persons, and they carried exactly the same marks for this period of six months. It is noted further that Kleis' "ability to get along with others" and "respect for authority" started to deteriorate in 1965/66 and there is no doubt in the view of the Board that Moore has by far a better record on matters of "good conduct" and "diligence". The Board was very concerned with Kleis' approach to authority and necessity for him to realize that he must obey his superior officers and was disturbed that he did not follow instructions or obey his superiors. We were told by him that he had been aggressive in his earlier life but that he was now overcoming this defect in his nature but the Board has reservations on this score. However, the Board is required to weigh up all matters and finds that the applicants are virtually equally efficient and equally suitable, but this has not been an easy decision to make. When one weighs up all these matters there is on the one hand Kleis' special qualifications which will put him ahead of Moore but Moore would counter balance this by his better diligence and good conduct. The Board finds therefore that these two men were equally suitable and equally efficient. The Board is then required to consider section 23(2) and having regard to this section there is no doubt that where they are of equal standing preference shall be given to the senior man. In this case Kleis was the senior man. Therefore, in conclusion the Board is of the opinion that in this instance the appeal should be allowed but it does give this warning to Kleis that he must mend his ways and in the view of the Board the Public Works Department should see that this employee shall observe instructions of his superiors and have respect for authority. The Board would like to make this recommendation to the Public Service Commissioner that it should be watchful of Kleis in this regard that if there is dereliction of duty in this regard then it is the Board's view and a recommendation to the Commissioner that disciplinary action should be taken against Kleis. The Board considers that with the absence of an Electrical Engineer the Electrical Superintendent may be required to be in executive control of the Electrical Section and it is important that the best qualified man should hold this position. Kleis I want you to understand that you have put your best foot forward on this matter of good conduct. The Board would also like to make this recommendation to the Commissioner that in the Board's view Moore is a man deserving of promotion - he has shown that he is a man of ability in discharging his duties and in the Board's view merits promotion and if the Senior Electrical Engineer is able to recommend to the Public Service Commissioner some position of equal standing to that of Electrical Superintendent then Moore in the opinion of the Board is the one who should, other things being equal, obtain the position. The appeal is therefore accordingly allowed but we desired that Kleis be here to hear the Board's admonition to him. We realize you are an aggressive young man but if you direct that energy into the proper channels I am quite sure that it will be to the mutual advantage of you Kleis and of the Department and of the Independent State of Western Samoa. With those few remarks we conclude the findings of the Board and thank you Gentlemen for your attendance.