

<sup>22</sup> ILO: ILC, 56th Session, RCE, Report III (Part 4B), para. 38.

<sup>23</sup> See note 5.

<sup>24</sup> ILO: ILC, 56th Session, RCE, Report III (Part 4B), para. 38.

<sup>25</sup> GB. 229/5/11 (Feb.-Mar. 1985), para. 46.

#### CHAPTER 4

##### EARLIER EXAMINATION OF THE SITUATION BY ILO SUPERVISORY BODIES

97. The questions which the Commission was called upon to examine have previously been considered by the bodies responsible for regular supervision of the application of ratified Conventions (Committee of Experts and Conference Committee on the Application of Conventions and Recommendations) and also within the framework of the examination by the Governing Body of an earlier representation made in pursuance of article 24 of the ILO Constitution.

98. Comments concerning the rules and practices in force in the Federal Republic of Germany as regards verification of loyalty to the basic order of applicants for employment in the public service and of public officials were addressed to the ILO in November 1975 by the World Federation of Trade Unions and in January 1976 by the World Federation of Teachers' Unions. In 1976, referring to these comments, the Committee of Experts on the Application of Conventions and Recommendations requested the Government of the Federal Republic to indicate, on the basis of court decisions and administrative instructions at the federal, Länder and communal levels, the criteria applied in assessing loyalty to the Constitution. It also asked whether these requirements were the same for all public service posts, and what procedural safeguards and avenues of appeal were available to those concerned.<sup>1</sup>

99. In an observation in 1977, the Committee of Experts noted with interest that the principles governing verification of loyalty to the Constitution approved on 19 May 1976 prescribed procedural guarantees, in particular, regarding notification to interested parties of facts held against them, their right to submit observations and to be assisted by a legal adviser, and various conditions designed to facilitate exercise of their right of appeal to the courts. The Committee noted that the Government had undertaken to compile information on the regulations applied in the Länder, and expressed the hope that the Government would forward this information as well as information on the nature of requirements regarding loyalty to the Constitution to be satisfied for the various types of public service jobs concerned.<sup>2</sup> In a direct request addressed to the Government, the Committee referred to the principles for verifying loyalty to the Constitution, laid down in the decision by the Federal Constitutional Court of 22 May 1975 (reaffirmed in a Bundestag resolution of 24 October 1975). It considered that these principles by themselves did not provide sufficiently specific criteria regarding the relationship

to be established between requirements as to loyalty and considerations deriving from political opinions which depended on the nature of the public service or employment in question. It asked the Government to indicate the steps taken to lay down more specific criteria in the matter.

100. On 24 January 1978, the World Federation of Trade Unions presented a representation under article 24 of the Constitution alleging the widespread application of the so-called "work ban" in the public service in the Federal Republic of Germany. The WFTU referred, more particularly, to the adoption on 28 January 1972 of a decree by the Prime Ministers of the Länder and of a common declaration with the Federal Chancellor, to the judgment of the Federal Constitutional Court of 22 May 1975, and to the principles for investigating loyalty to the Constitution adopted on 19 May 1976.

101. In its report of 1978, the Committee of Experts noted that a representation had been made by the World Federation of Trade Unions, and indicated that it was deferring examination of the matter until the consideration of the representation had been completed.<sup>3</sup>

102. The committee set up by the Governing Body to examine the representation adopted its report on 15 June 1979. It noted that the decision of the Federal Constitutional Court of 22 May 1975 regarding the obligation of loyalty in the public service did not specify the nature of the elements which might be taken into consideration in individual cases and left wide discretion to the employing authorities in this respect. The committee noted that a new version of the principles for verification of loyalty to the Constitution for the federal administration had been adopted on 17 January 1979. It considered that these procedural principles appeared likely to limit the powers in question, by establishing a presumption of loyalty and by abandoning the practice of systematic inquiries. The committee noted that the explanatory statement of the new principles indicated that it appeared necessary to abandon rules of procedure which implied that applicants could be rejected on the basis of an abstract criterion such as membership in an organisation with objectives regarded as hostile to the Constitution. The committee concluded that the effect of the 1979 procedural principles would depend on their future practical application, which would be subject to examination in accordance with established ILO procedures. It observed that this examination would also cover the evolution of the situation at the level of the Länder, which had been able to apply different principles and where cases involving inquiries had been proportionally more numerous than in the federal administration.<sup>4</sup> At its 211th Session (November 1979), the Governing Body took note of the committee's report and declared the closure of the procedure.

103. In comments made in 1980, 1981 and 1982, the Committee of Experts, having noted the report of the Governing Body committee, resumed its examination of the question. Referring to the above-mentioned principles concerning verification of 1979, it asked the

Government to supply detailed information on the practical application of these rules and on developments in the situation in the Länder.<sup>5</sup>

104. The Committee on the Application of Conventions and Recommendations examined the matter at the 67th and 68th Sessions of the Conference (1981 and 1982). At the latter session, it expressed the hope that detailed information would be supplied to the Committee of Experts to enable it to continue its examination of the compatibility of national law and practice with the Convention.<sup>6</sup>

105. In comments made in 1983, the Committee of Experts recalled that it had asked the Government to supply information on the investigations carried out, the points taken into consideration and the decisions reached in cases of exclusion from the public service that had occurred since April 1979, as well as copies of any provisions or directives newly adopted, in particular by the Länder, and of recent decisions by administrative courts and the Constitutional Court in the matter. The Committee observed that in the absence of the details requested concerning the cases of exclusion from public service, both as regards candidates for employment and persons already in employment who were dismissed, at the federal level and in the various Länder, it remained unable to carry out a full examination of the situation, as contemplated by the Governing Body committee.

106. Having examined four judgments of the Federal Administrative Court rendered in November 1980 and October 1981, copies of which had been supplied by the Government, the Committee of Experts noted that in the cases concerned the grounds for exclusion from public employment did not relate to the inherent requirements of particular jobs. The Committee expressed the hope that measures would be taken to bring legislation and practice into conformity with the Convention, both with regard to public servants and candidates for public service, and whether they were employed under a labour contract or as civil servants. The measures to be taken should not only redefine the criteria for exclusion from the public service, but also ensure that the burden of proof regarding a person's integrity did not lie upon him and that the evaluation of his integrity made by administrative authorities was subject to full judicial review.<sup>7</sup>

107. At the 69th Session of the Conference (1983), the Committee on the Application of Conventions and Recommendations stressed the importance of the measures called for by the Committee of Experts.<sup>8</sup>

108. In its report of 1985, the Committee of Experts noted that a representation alleging non-observance of the Convention as regards equality of opportunity and treatment in public employment had been made by the World Federation of Trade Unions under article 24 of the ILO Constitution and was still being examined by the Governing Body. In accordance with established practice, the Committee deferred further comment on the matter pending conclusion of that procedure.<sup>9</sup>

## Notes

<sup>1</sup> Report of the Committee of Experts on the Application of Conventions and Recommendations (hereafter "RCE"), Report III (4A), International Labour Conference, 62nd Session, 1976, p. 175 and direct request.

<sup>2</sup> ILO: RCE, *ibid.*, 63rd Session, 1977, p. 228.

<sup>3</sup> ILO: RCE, *ibid.*, 64th Session, 1978, p. 196.

<sup>4</sup> Official Bulletin (Geneva, ILO), 1980, Series A, Vol. LXIII, No. 1, pp. 45-46.

<sup>5</sup> ILO: RCE, International Labour Conference, 66th Session, 1980, p. 171; 67th Session, 1981, pp. 174-175; 68th Session, 1982, pp. 199-200.

<sup>6</sup> ILO: Record of Proceedings, ILC, 68th Session, 1982, pp. 31/60-61.

<sup>7</sup> ILO: RCE, ILC, 69th Session, 1983, pp. 216-219.

<sup>8</sup> ILO: Record of Proceedings, ILC, 1983, pp. 31/60-61.

<sup>9</sup> ILO: RCE, ILC, 71st Session, 1985, pp. 288-289.

## CHAPTER 5

### STRUCTURE OF THE PUBLIC SERVICE AND THE LEGISLATION GOVERNING THE PUBLIC SERVICE IN THE FEDERAL REPUBLIC OF GERMANY

109. This chapter reviews the constitutional structure of the State; the structure of the public service; the fundamental rights guaranteed by the Constitution; and the public service legislation, in particular the definition of public service and the rights and duties of officials; the concept of the duty of faithfulness to the free democratic basic order, its application in guide-lines at federal and Land level and its interpretation by the courts.

#### Constitutional structure of the State

110. Division of powers between the Federation and the Länder. The Constitution (Basic Law) of the Federal Republic of Germany institutes a federal State. The Constitution is based on the principle that competence vests in the Länder, the Federation being competent only to the extent recognised by the Constitution (see in particular Articles 30 and 70 of the Constitution). The Constitution (Articles 70-75) defines and enumerates the fields of exclusive competence, those of concurrent competence and those in which the Federation is competent to enact outline legislation. Article 31 of the Constitution provides that federal law shall override Land law. The Federation has the exclusive power to legislate on, inter alia, the Federal Railways, the Federal Postal Service and the legal status of persons in the service of the Federation and of corporations under public law directly subordinate to the Federation. It has concurrent legislative powers, in so far as it does not possess exclusive powers, with regard to the remuneration of members of the public service serving under a relationship governed by public law. The Federation has outline legislative powers - the right to lay down basic rules - concerning the legal relationships of persons in the public service of the Länder, local authorities and other public bodies. The Federation also possesses outline legislative powers with regard to the general principles of higher education. The effect of these provisions is that, subject to the outline legislative powers of the Federation, the Länder are competent, inter alia, in matters of education.

111. Legislative and executive powers. At the federal level legislative power vests in the Federal Diet (Bundestag), elected by universal suffrage, and the Federal Council (Bundesrat), whose members