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**KOSOVO OMBUDSPERSON'S LEGAL OPINION IN THE CAPACITY OF FRIEND
OF THE COURT (AMICUS CURIAE)**

**Basic Court in Prishtinë
Department of Administrative matters**

Ex officio no. 127/ 2017

and

C.no. 398/2015

Related to

The lawsuit of municipality of Ferizaj against the Ministry of Labor and Social Welfare

Prishtinë, 23 May 2017

The aim of this Legal Opinion

This Legal opinion in the capacity of friend of the court (*amicus curiae*) will be focused on clarifying of legal procedures regarding recruitment process of educational staff, according to vacancies announced by the Municipal Directorates of Education in the Republic of Kosovo

Given the fact that the Municipality of Ferizaj has filed a lawsuit in the Basic Court in Prishtina against the Ministry of Labor and Social Welfare, regarding employment of educational staff by Education Directorate of the Municipality of Ferizaj, Case A.nr.398 / 15.

Taking in consideration the fact that the Ombudsperson has initiated ex officio investigations, Case No. 499/2016, regarding disrespect of legal procedures during staff recruitment process, according to vacancies announced by the Municipal Directorates of Education in the Republic of Kosovo (MDEKR) and has drafted a Report with Recommendations for MDEKR.

Given the fact that during the investigation the Ombudsperson gained information that as per the issue handled at national level (recruitment of educational staff) a lawsuit has been filed with the Basic Court in Prishtina related to the topic addressed by the OI.

Therefore, for this purpose, the Ombudsperson submits this legal opinion in capacity of a friend of the court (*amicus curiae*), to Basic Court in Prishtina, in order to provide information about his findings.

Legal bases for Ombudsperson's actions in the capacity of a Friend of the Court

1. Article 132, paragraph 1 of the Constitution of Republic of Kosovo authorizes the Ombudsperson to: *"monitor, defend and protect the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities"*
2. Article 16 of the Law on Ombudsperson, in paragraph 4 foresees that: *"The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights."*
3. Finally, what has been stated above, attention should be given to paragraph 9 of the Article 16, which authorizes: ***The Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial processes dealing with human rights, equality and protection from discrimination***".
4. Apart above given provisions, it should be taken in consideration that based on Article 18, paragraph 1.1 the Ombudsperson has responsibility: *"to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them"*, and according to paragraph 1.2 of this Article: *"to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases"*

Summary of facts

5. On 21 of August 2016, the Ombudsperson, based on Article 16.4 of the Law on Ombudsperson no. 05/L-019, as well as on the base of Article 9, paragraph 1 and paragraph 2.3, of the Law on Protection from Discrimination no. 05/L-021, has initiated ex-officio investigations, case no.499/2016, regarding disrespect of legal procedures in the course of staff recruitment process, according to vacancies advertised by Municipal Directorates of Education in Republic of Kosovo.
6. Upon conclusion of investigations regarding the case no.499/2016, the Ombudsperson on 23 of November 2016, published Report with Recommendations, which has been delivered to the Mayor of Ferizaj and eight mayors of municipalities in Republic of Kosovo.
7. As per the municipality of Ferizaj, the Ombudsperson has found that recruitment procedures of hiring educational staff in pre-university education this municipality has developed based on the Law no. 03/L-212 on Labor and Administrative Instruction no.14/2011 on Regulation of the Procedures for the Establishment of Labor Relations in the Public Sector.
8. According to report published, a recommendation has been addressed to the municipality of Ferizaj because of setting commissions opposite to specific legal provisions: *“To ensure that the commission for teachers’ selection is established in accordance with law.”*
9. Concerning the recommendation addressed to the municipality of Ferizaj, the Ombudsperson received a response no.862, of the date 28 December 2016 from Mr. Muharrem Svarqa, the Mayor, according to which is informed that Municipal Directorate of Education in Ferizaj municipality, up to **19 December 2014, applied specific legal provisions** issued by Ministry of Education, Science and Technology (MEST), but on 19 December 2014, Executive Body of Labor Inspectorate (EBLI), has issued decision no.282/2014, according to which, *“Municipal Directorate of Education in Ferizaj is “fined with 9000 € (nine thousand euros) because has failed to implement legal provisions, thus Article 8, point 2 of the Law 03/L-212 has been violated, supported by Administrative Instruction no.14/2011 Article 2.1 and 2.2 on Regulation of the Procedures for the Establishment of Labor Relations in the Public Sector...”*
10. MDE in the municipality of Ferizaj, since has disagree with this EBLI decision, on 22 December 2014, has filed a complaint with the Ministry of Labor and Social Welfare in Prishtinë, and received a decision 18/2015, according to which *“Complaint of the Municipal Directorate of Education in Ferizaj is rejected as ungrounded”*
11. Since the decision of Labor Chief-inspectorate, as a second instance body in administrative procedure has ended, Ferizaj municipality on 19 February 2015 lodged a lawsuit in the Basic Court in Prishtinë, Department for Administrative Issues, case C.no.398/15.

This submission is based on legal instruments applicable in the Republic of Kosovo as follows:

12. Constitution of Republic of Kosovo (hereinafter Constitution), Article 24, Equality before the Law, reads: *“All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination”*(par.1).
13. Article 49, paragraph 1, of the Constitution, stipulates that: *“The right to work is guaranteed.”*
14. Law no.03/L-212 of Labor, Article 2, paragraph 2, determines that: *“Provisions of this Law*

shall be applicable for employees and employers, whose employment is regulated through a special Law, if the special Law does not provide for a solution for certain issues deriving from employment relationship.”

15. Administrative Instruction no.14/2011 on Regulation of the Procedures for the Establishment of Labor Relations in the Public Sector determines procedures for establishment of labor relations in the public sector according to the Law on Labor.
16. Article 3, par. 1.17, determines that: “**Discrimination** - any discrimination including exclusion or preference made on the basis of race, color, sex, religion, age, family status, political opinion, national extraction or social origin, language or trade-union membership which has the effect of nullifying or **impairing equality of opportunity or treatment in employment or occupation capacity building** is prohibited ”
17. While Article 5, par.1, stipulates that: “*Discrimination is prohibited in employment and occupation in respect of recruitment, [...] or other matters arising out of the employment relationship and regulated by Law and other Laws into force.*”
18. Whereas Article 8, par.2, reads: “*The competition must be equal for all aspirant candidates, without any kind of discrimination, as defined by this Law and other applicable acts..*”
19. Law no.04/L-032 on Pre-University Education in Republic of Kosovo, Article 35, par.1, on election of teachers, explicitly determines that: “[...] teachers, shall be selected through a public advertisement based on personal merit, with no direct or indirect discrimination of any kind for real or presumed reasons on grounds of gender, race, marital status, sexual orientation, national community background, disability, property, birthplace, political or philosophical views or other situations.”

“Appointing authorities as defined in this Law shall establish fair, open and transparent recruitment procedures based on the qualifications and the needs of the post.” (par 3).

*“Teachers shall be appointed by a committee established by the MED including the **director of the educational institution** and representatives of the governing board in accordance with the applicable law.”(par.4).*

20. Law no.03/L-068 on Education in the Municipalities of Republic of Kosovo, Article 4, par.1, determines responsibilities of municipalities: “*Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in applicable legislation with respect to the provisions of public pre-primary, primary and secondary education, including registration and licensing of educational institutions, **recruitment**, payment of salaries and training of education instructors and administrators.*”

According to Article 5, is defined that: “*Competencies referred to in Article 4 of this law shall include the following specific municipal competencies in public education at levels 0 (pre-primary), 1 (primary), 2 (lower secondary) and 3 (upper secondary), **in accordance with general guidelines** and/or procedures and standards **promulgated** by the Ministry of Education, Science and Technology (MEST):*

Also point c) of this Article stipulates that the municipalities are responsible for “*employment of teachers and other school personnel **in accordance with legal procedures for the recruitment, selection and employment of public employees;**”*

21. Based on Article 5, point c), MEST has issued Administrative Instruction no.17/2009, selection procedure of educational staff at school, according to Article 3, paragraph 1, composition of the commission for educational staff selection is determined, it explicitly states that: *“Two representatives of Municipal Education Directorate”(par.1.1) and “Principal of the Respective School” (par.1.2).*

Legal analyses

22. Constitutional guarantee for work is explicitly ensured (Article 49, paragraph 1), but always in compliance with the Law, so its content is not determined in details. Such guarantee is done in general and principal manner, while making concrete this constitutional provision, the Constitution leaves it to respective law.
23. In the current case since the teachers are public employees, the Law on Labor is applicable, but according to Article 2, paragraph 2 of this Law, it is determined that this Law is applicable solely *“[...] if the special Law does not provide for a solution for certain issues deriving from employment relationship”*.
24. Based on specific provisions, according to the Law on Pre-University Education, the issue of appointing of candidates' interviewing commissions is explicitly determined by Article 35, paragraph 4, which reads that: *“Teachers shall be appointed by a committee established by the MED including the **director of the educational institution** and representatives of the governing board in accordance with the applicable law”*.
25. Simultaneously according to the Law on Education in the Municipalities of Republic of Kosovo is determined the responsibility of the municipalities for recruitment of teachers, while according to Article 5 of the Law, it is determined that responsibility of the municipalities ought to be performed *“[...] in compliance with guidelines and/or procedures and general standards promulgated by MEST:”*
26. According to decision no.282/14, of the date 19.12.2014 issued by EBLI in Ferizaj, according to enacting close of the decision it is determined that *“ Fine with 9000 € (nine thousand euros) Municipal Directorate of Education- Ferizaj because is responsible for failure to implement legal provisions, which has resulted with violation of Article 8, point 2 of the Law 03/L-212 supported by Administrative Instruction no.14/2011 Article 2.1 and 2.2 on Regulation of the Procedures for the Establishment of Labor Relations in the Public Sector [...]”*.
27. Thus, based on Article 2, paragraph 2, of the Law no.03/L-212 on Labor, it is stipulated that: *“Provisions of this Law shall be applicable for employees and employers, whose employment is regulated through a special Law, **if the special Law does not provide for a solution for certain issues deriving from employment relationship.**”* The Ombudsperson ascertains that this legal provision, determines whether one specific law predicts solution for specific issues from employment relationship, specific law is applied, in the current case, the issue of hiring school staff by schools, is regulated according to specific laws.
28. It is uncontestable the fact that majority of MDEs in the Republic of Kosovo, according to published vacancy announcements for teachers apply the Law on Labor, candidates' selection criteria in some municipalities is done according to specific legal provisions while in some other municipalities based on provisions of the Law on Labor, specifically based on

Administrative Instruction no.14/2011 Article 2.1 and 2.2 on Regulation of the Procedures for the Establishment of Labor Relations in the Public Sector, thus public institutions which implement laws ought to implement them equally towards everyone and offer to everyone equal protection.

Indisputably, such an example contributes on distrust of citizens to justice, therefore, based on these facts, implementation of various legal provisions by the municipalities leads to situations which are opposite with rule of law principle, principle that is sanctioned with the highest legal acts as well as the international legal instruments that Kosovo authorities have an obligation to abide with without exception.

CONCLUSION

29. That based on Article 2, paragraph 2, of the Law on Labor, MDEs in Kosovo ought to implement specific legal provisions which regulate the issue of employment of educational staff in institutions of Pre-University Education, such are: Article 35, of the Law on Pre-University, Article 4, of the Law on Education in the Municipalities of Republic of Kosovo, Administrative Instruction no.17/2009, The selection procedure of education staff at schools¹ and Administrative Instruction no.26/2013, Selection of Employees for Provision of Professional Services in Pre-University Educational institutions.²
30. Selection of educational staff for all school subjects is done based on Administrative Instruction no.05/2015, Normative for teachers of vocational education,³ and Administrative Instruction no.06/2015, Normative for teachers of general education,⁴ and all provision mentioned above foresee solution for specific issues from employment relationship in educational institutions and **constitute sufficient legal base** which is specifically requested according to Article 2.2 of the Law on Labor.

Recruitment of educational staff in educational institutions ought to be done in compliance with instructions, procedures and general standards issued by MEST⁵.

Sincerely,

Hilmi Jashari
Ombudsperson

Attached: Report with Recommendations, *Ex officio*, Case no. 499/2016, published on 23.11.2017.

¹ <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=7744> dhe at <http://masht.rks-gov.net/>

² <https://gzk.rks-gov.net/ActDetail.aspx?ActID=10072> dhe at <http://masht.rks-gov.net/>

³ http://masht.rks-gov.net/uploads/2015/07/ua-05-2015-normativi-per-mesimdhenesit-e-arsimit-profesional-final-ilovepdf-compressed_1.pdf

⁴ <http://masht.rks-gov.net/uploads/2015/07/convert-jpg-to-pdfnet-2015-07-30-16-32-24.pdf>

⁵ Article 5, of the Law No.03/L-068 for Education in Municipalities of Republic of Kosovo