



THE APPEAL COMMISSION: „PROFESSIONALISATION“ WITHOUT MERIT

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The Appeal Commission has a very important role in the civil service system, as it protects rights and interests of civil servants, state employees and candidates for state authorities. The Law on Civil Servants and State Employees from 2017 has enabled professionalisation of the Appeal Commission. In other words, this means that all members are fully committed to work in the Commission. In the past they did it in parallel with other work and received special compensation for decision-making in the Commission. At the same time, its competences have been expanded, and instead of separate local commission, the Commission now decides on appeals of local officials, employees and candidates for jobs in local government. However, the appointment and dismissal procedures were not sufficiently elaborated, which had negative impact on practice.

On October 2, 2021, the Government, by a decision and without holding a session, dismissed the entire Appeal Commission by telephone, referring to legal provisions that indicate unprofessional and negligent performance of duties. This dismissal, was conditioned by the fact that for almost three months, by the time of writing this brief at the end of December 2021, civil service system was left without a functional second-instance body for dealing with complaints. Moreover, it showed omissions on the legal framework that have long term consequences for the effectiveness of protection of employment rights, scheduling, rewarding, termination of employment, etc. The goal of this analysis is to provide a critical review of the procedure for appointment, decision-making and dismissal of the Appeal Commission and to make lessons from month-long dysfunction of this body in order to prevent similar situations in the future.

The appointment of the Appeal Commission: Creative interpretations and differences in competitions in 2018 and 2021

The Law has prescribed that the president and members of the Appeal Commission are appointed and dismissed by the Government, at the proposal of the ministry, after a public competition. ¹The Law prescribes relatively strict conditions, so for the president is requested: high level of education, faculty of law, a bar exam

¹ Article 141 paragraph 2 of the Law on Civil Servants and Employees („Official Gazette of Montenegro“, No. 02/18, 34/19 and 08/21)

and at least ten years of work experience in the field of law, and for the member of the Commission is requested faculty of law and at least seven years of work experience in the field of law. However, the procedure for election of members of the Commission is not sufficiently elaborated. The ministry has a huge space to conduct a public competition, and politically active people can also apply for it.

The fact that the relevant ministry conducted different competitions in 2018 and 2021 shows that there is a room for creative interpretation of regulations. The first competition was conducted by a specific procedure, with oral interviews which, according to the documentation, lasted on average no more than nine minutes. They consisted of a legal framework and general discussion on the mandates, and as such, they were not a good basis for an essential aptitude test. For example, interview with the candidate that was later chosen for the president of the Commission, has started at 10.28 AM and with the next candidate at 10.36 AM.² Moreover, according to the Internet search, the former president was politically active in the then ruling Democratic Party of Socialists.³

On the other hand, the current public competition for members of the Appeal Commission was announced by the Human Resources Administration and for need of the Ministry of Public Administration, Digital Society and Media.⁴ For the president of the Commission, the announcement has predicted that examination of competencies, knowledge and abilities of candidates are performed in the same way as for head of the administrative body⁵ and for members of the Commission, the examination is performed in the same way as for senior management.⁶ Therefore, the candidates must prepare written work and pass oral interview, in accordance with the competency framework, which emphasizes the competencies of leadership, cooperation, communication, innovation and results orientation. There is no emphasis on a work of deciding on individual cases or on other important work of the Appeal Commission.

Decision-making of the Appeal Commission

The Appeal Commission decides, as a rule, no later than 30 days from the day of receipt of the appeal. Decision-making is regulated in more details by the Rules of Procedure. According to it, the Commission decides at the non-public sessions, and sessions are held at least once a week. The Commission can decide if the president of the Commission, or a member who replaces him and at least three more members are attended at the session.⁷ Cases are assigned to the members of the Commission in order of surnames of the members (hereinafter: the rapporteur). This prevents arbitrariness in the allocation of cases, but also clearly locates the responsibility for working on complaints against individual members, although the Commission makes decisions as a collegial body.

The Rules of Procedure contain a provision on the prevention of conflicts of interests, because it is regulated that the president and members of the Commission cannot take any action or provide a service which is of interest to the Commission or directly or indirectly calls into question their impartiality in the Commission. Although commendable, this provision is not fully in line with the lack of a provision that would prevent politically active persons from becoming members of the Commission at all.

2 Milena Muk (2020) *Integrity of Recruitment in State Authorities: Assessment of abilities or partisanship*, Institute Alternative, Podgorica, Page 9, available at: http://media.institut-alternativa.org/2020/02/Integritet-zaposljavanja_en.pdf

3 <https://www.dps.me/me/clanovi/vera-medojevic>

4 Human Resources Administration, public competition, No. 02-100/21-2915/2 i 02-100/21-2912/2, October 25, 2021.

5 Article 58 of the Law on Civil Servants and Employees („Official Gazette of Montenegro”, No. 02/18, 34/19 and 08/21)

6 Article 56, Ibid.

7 Article 13 of the Rules of Procedure of the Appeal Commission, No. 1/2018, November 22, 2018.

The Rules of Procedure have prescribed that the publicity of the Commission's work is ensured by issuing press releases, updating the Commission's website, providing access to information in accordance with the law and presenting and publishing work reports. Although the Commission has a separate page, since its constitution in 2018, no press release has been issued, except for the change in the way parties work due to the coronavirus pandemic.⁸ Within the site, the annual reports for 2018, 2019 and 2020 are not available, although they can be found on the Government's website. Also, although there is a section "Commission Decisions", it is empty.

Dismissal of the mandate of the Appeal Commission: "Unprofessionalism" and "negligence" at free assessment

The Law on Civil Servants and State Employees is particularly vague when it comes to the termination of mandate of the Appeal Commission. Namely, except from usual circumstances (if a member is sentenced to unconditional imprisonment for a criminal offense that makes him unfit to work in a state body), a member of the Commission may be dismissed if he performs his duties unprofessionally or unscrupulously. However, the procedure for determining incompetence or negligence is not foreseen or described in details, which in the recent case of dismissal of the entire Commission has had a particularly negative impact.

The case of dismissal of the entire Commission in October 2021

On October 2, 2021, the Government of Montenegro passed a decision on the termination of mandate of the President and members of the Appeal Commission⁹ at the proposal of the Ministry of Public Administration, Digital Society and Media, after the Ministry of Defense informed the Ministry of Public Administration, Digital Society and Media about the failures of the Appeal Commission. The decision was made by a phone, without holding a session, with the consent of the majority of members. The decision was not published in materials on the Government's website, but only as a solution, without explanation, in the Official Gazette. The insight based on our request for free access to information in the Proposal of the Ministry of Public Administration, Digital Society and Media, the reasons for the termination of mandate were that the Commission showed unprofessionalism and negligence, "because as a professional body it had to know and act within deadlines and limit their powers in accordance with the law, adhering to the principles of independence and autonomy in work."¹⁰

The termination of mandate of the Commission was preceded by the decision of the Ministry of Defense on the selection of cadets at the Aviation Academy in Greece, made on July 29, 2021, in which the dissatisfied candidates were instructed that the decision of the Ministry is not allowed to appeal, but an administrative dispute can be initiated.¹¹ In this case, the Administrative Court of Montenegro ruled that the lawsuit was inadmissible and submitted the case file to the Commission on September 2, 2021. This case was also a subject of a parliamentary question in the Parliament of Montenegro, where the Minister of Defense stated that the candidate who filed the appeal was not entitled to appeal and that the Administrative Court overlooked it, because the Commission is not competent in this case.¹²

⁸ <https://kzz.gov.me/naslovna>

⁹ The decision of the Government of Montenegro, No. 04-4676/2, October 2, 2021.

¹⁰ The proposal of the Ministry of Public Administration, Digital Society and Media, No. 01-010/21-4015/2, October 1, 2021.

¹¹ The decision of the Ministry of Defense, No. 06012-805/21-4042/25 DATUM

¹² The response of the Ministry of Defence to the question of the MP at the session of the Parliament of Montenegro, November 26, 2021, available at: <https://www.youtube.com/watch?v=JVM9Wd2oeBU>

The reason why the Ministry of Defence interprets that the individual who complained does not have the status of a cadet, ie a military person, is because in this case the subsidiary application of regulations on civil servants and employees to military personnel provided by the Law on Army does not applied.¹³ However, despite jurisdiction dispute in this case, the Commission sent an urgency to the Ministry of Defense on September 13, 2021, to deal with the complaint within two days, which the Ministry received on September 14, 2021. On September 16, 2021, the Ministry has acted on the appeal and decided that it was inadmissible, which was submitted to the Commission a day later. On the same date, the Commission also passed a decision approving the appeal, because the Ministry of Defence did not fulfill its duty to submit the appeal to the second instance body without delay, with the case files.¹⁴

Therefore, in this case there was a different interpretation of whether the appeal was allowed at all, while the Commission, according to the dismissal proposal, before the expiration of the deadline for the emergency that sent itself, made a decision without a case file. However, even if it was "unprofessional or negligence" work, the proposal of the termination of mandate does not contain important facts. First of all, it is unclear which of the members was the rapporteur in this case, nor does it follow from the draft decision with an explanation that the members were given the opportunity to state their views or that the procedure of determining their individual responsibility was carried out.

With the dismissal of the Appeal Commission, the protection of the rights of civil servants and employees has been suspended for several months. This act of the Government has created a situation in which state bodies could have a problem with postponing the employment of civil servants and employees, if one of the candidates decides to reconsider the decision on election of a state body, because the appeal against the decision on the election of civil servants and employees postpone the decision.

In order to determine whether there were complaints in particularly important employments and scheduling procedures during the absence of a functional Appeal Commission, we requested all complaints by free access to information received by the Commission in the period between October 2, 2021 and November 19, 2021. During that period, a complaint was filed against the decision on the election in the Ministry of Defense, which means that a civil servant cannot establish an employment relationship until the complaint is processed. Also, 29 complaints related to the deployment of civil servants are currently pending, but complaints related to the deployment of civil servants do not delay the execution of the decision,¹⁵ so dissatisfied officials have to wait for the Commission to re-establish its rights. This is only a part of the complaints that officials can file, and their number in the observed period is not negligible.

Conclusion

The Appeal Commission does not function for several months and protection of the rights of civil servants and employees have been suspended. The case of dismissal of the Appeal Commission shows that non-implemented legal norms, which in principle indicate unprofessional and unscrupulous performance of work, without

13 Law on Army of Montenegro („Official Gazette of Montenegro, No. 51/2017 and 34/2019)

14 Article 125 paragraph 5 of the Law of Administrative Procedure („Official Gazette of Montenegro", No. 56/14, 20/15, 40/16 and 37/17)

15 Article 63 paragraph 6 of the Law on Civil Servants and Employees („Official Gazette of Montenegro, No. 02/18, 34/19 and 08/21)

further specifying these terms or the procedure for determining responsibility, can produce problems in practice. Another problem is the procedure for electing new members of the Commission, which is not defined enough, so the relevant ministry is left to creatively interpret the law, which is reflected in differences in the public competition for the Commission during 2018 and 2021. The previous political exposure of the former president of the Commission also did not go hand in hand with the proclaimed goal of professionalising this body. Therefore, it is necessary to develop certain legal norms and procedures, in order to fully develop process of professionalisation of the Appeal Commission.

Recommendations:

- The Law on Civil Servants and Employees should have more detailed procedure for dismissal of members of the Commission due to unprofessional and unscrupulous performance of duties, which will respect the presumption of independence of this body from undue political influence and enable consideration of all relevant facts and individual responsibilities;
- When deciding of dismissal of the member of the Commission, it is necessary to take into account the proportionality of the breach of duty and consequences it may have for the protection of the rights of employees and job candidates;
- It is necessary to prescribe the procedure for public competition of the Commission by the law, on the basis of which the competencies of members relevant to their work in individual cases would be assessed in a legally predictable manner;
- It is necessary that the president and member of the Commission are not politically active in the period preceding their appointment;
- The Appeal Commission, in cooperation with the relevant ministry, should make a catalogue of procedures and decisions for which it is responsible. In this way, all individuals would be completely informed about their rights within employees relations;
- The Appeal Commission should regularly and proactive publish information about its work and decisions on the website.



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