CHAPTER 8

THE POSITION OF EMPLOYERS' AND WORKERS' ORGANISATIONS

399. The employers' and workers' organisations that provided information to the Commission differed on whether the Federal Republic was securing the effective observance of Convention No. 111. Several organisations considered that legislation and current practice were in full conformity with the provisions of the Convention. These organisations were the employers' confederation, the Bundesvereinigung der Deutschen Arbeitgeberverbände; the Deutscher Beamtenbund, which has 800,000 members, mostly officials; the Deutscher Lehrerverband (114,000 members); and the Deutsche Angestellten-Gewerkschaft, which has some 170,000 members in the public services, virtually all of them salaried employees. Several other organisations felt that the manner in which the legislative and other provisions relating to the duty of faithfulness of public servants were currently being applied was not wholly consistent with the requirements of Convention No. 111. These organisations were the International Confederation of Free Trade Unions; the Deutscher Gewerkschaftsbund, whose reply was made in agreement with its public-service affiliates, and, in separate supplementary replies, three of these affiliates: the Deutsche Postgewerkschaft (450,000 members), the Gewerkschaft Erziehung und Wissenschaft (200,000), and the Gewerkschaft der Eisenbahner Deutschlands (400,000). The positions taken by these various organisations are summarised below.

The position of organisations which consider legislation and current practice to be consistent with Convention No. 111

400. The Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA) stated that it had nothing to add to the historical and factual indications previously presented by the Government to show why the requirement of faithfulness to the Constitution of public servants who had the status of officials was not in conflict with Convention No. 111. It also considered the Government's legal and political evaluation to be comprehensive and correct. The BDA made some additional remarks to express the specific views of employers' organisations. It considered as particularly dangerous for the social partners the rejection by the advocates both of communist systems and of neo-Nazi ideologies of a strict separation of powers and an independent judiciary, as well as their endeavour to remove social pluralism in so far as affecting autonomy in collective bargaining and the multi-party system. The

BDA observed that the Federal Republic's social partnership was based to no small extent on the fact that in cases of dispute not only labour and social legislation but also uncertain points in labour-management relations could be examined by independent courts. Accordingly the BDA considered the exclusion of representatives of Marxist-Leninist and neo-Nazi ideologies from the public service, the backbone of this constitutional order, to be fully justified, as those ideologies rejected the separation of powers and the independence of the judiciary. The Basic Law supposed the existence of a pluralistic society. The ideologies in question and their practice had inevitably led in the past (National Socialism) and in present times (Communism) to a one-party system. The existence of different interests was denied, differing interests were suppressed; differing views were forbidden, being regarded as "socially pernicious" or "counter-revolutionary". Also the autonomy of trade unions and employers' organisations, which in the Federal Republic was guaranteed in an exemplary manner, was foreign to this view of society. Conflicting interests and autonomous settlements had no place in a State without pluralism. Therefore, in the opinion of the BDA, representatives of such ideologies should not be given the opportunity to undermine these essential elements from within the State.

401. The BDA stated that the Federal Republic, unlike most other countries in the world, allowed also those who opposed the constitutional order to participate in elections and to engage in agitation against that order. It observed that nearly all the other countries in the European Communities had rules similar to those of the Federal Republic, although generally without the obligation for the State to give reasons for its decision to reject a candidate for the public service and without legal protection in such a case. The very extensive legal protection in the Federal Republic should be given greater attention if the inquiry were to include comparisons with other countries.

402. The Deutscher Beamtenbund (DBB) likewise pointed to the legal protection enjoyed in the Federal Republic of Germany by candidates for the status of official. It stressed that an established official might not be dismissed at the discretion of his superiors. An official for life might be dismissed only as a result of disciplinary proceedings before independent courts.

403. The DBB, as well as the Deutscher Lehrerverband, stated that the duty of political faithfulness constituted an indispensable condition for employment in the public service. The employment in the public service of persons hostile to the Constitution endangered the foundations of the free democratic State and the rule of law. A State that admitted enemies of its Constitution to the public service would abandon itself. No one could be both servant and enemy of the Constitution.

404. In evidence before the Commission, the representative of the DBB[1] stressed that one of the distinctive features of the Constitution of the Federal Republic was that it entrusted the exercise of sovereign powers to a special status group, namely, officials. The intention expressed by the Basic Law was clear: all tasks closely connected with the exercise of State powers and with the capacity of the State to function were to be reserved for those State employees bound by a special relationship to the State and its fundamental principles. This "organisational safeguard" of the principles of the Constitution was peculiar to the Federal Republic as compared to other countries.

405. In its written communication the DBB expressed the view that Convention No. 111 could not be used as a standard of interpretation for officials in the Federal Republic, because the duty of political faithfulness was imposed by Article 33, paragraph 5, of the Basic Law; in case of conflict, constitutional law took precedence over international treaties, which under the German legal system ranked as ordinary legislation. The DBB considered that the same applied to contractual employees in so far as the duty of political faithfulness was part of the aptitutde required of all candidates for employment in the public service under Article 33, paragraph 2, of the Basic Law. Irrespective of this question, the DBB was of the opinion that Convention No. 111 had not been violated, having regard to Article 1, paragraph 2, and Article 4 of the Convention.

406. The DBB observed that Article 33, paragraph 2, of the Basic Law, under which every German had equal access to any public office according to his aptitude, qualifications, and professional attainments, does not differentiate according to the type of employment relationship; it applies to all applicants for employment in the public service, regardless of whether the relationship to be concluded is to be governed by labour law or is to be that of an official. However, according to the case law of the Federal Labour Court, the degree of political faithfulness that may be demanded of a contractual employee is not in all cases the same as for officials. In the case of salaried employees there is differentiation according to duties, functions in the State, and therefore - within the meaning of Article 33, paragraph 2, of the Basic Law - according to the particular post. A salaried employee in the occupation of teacher, for example, because of his responsibilities and the importance of teaching for the general welfare, has to fulfil the same requirements as an official.

407. The DBB rejects the idea of differentiating the verification of faithfulness to the Constitution in the case of officials according to the functions exercised, because this would violate the law and the Constitution. It considers that the general responsibilities of an official in the administration of the provision of services are not less than those of an official in security-sensitive areas. In his evidence before the Commission, the representative of the DBB[2] observed that the smooth functioning of the State infrastructure depended on the conduct of those who actually delivered the services.

The "small officials", whether they be engine drivers, postal officials, or municipal employees, were those who, in all public service sectors, have their "hands on the levers". There were, moreover, no evident criteria for grading the duty of faithfulness according to posts and functions.

408. Asked whether any members of the DBB had been the subject of measures to exclude them from the public service on grounds related to their political activities, the DBB representative stated that there had been no cases in recent years, and he knew of no earlier cases. The reason was that the DBB had at an early date decided to refuse membership to members of extremist organisations. Consequently, those who wanted to engage in extremist activities joined other unions that permitted its members to engage in such activities.[3]

409. A representative of the Deutsche Angestellten Gewerkschaft (DAG),[4] in evidence before the Commission, observed that the State could not be compelled to employ its enemies. Although in normal times they might pretend to respect the Constitution, nobody would be able to rely on them in times of crisis. The identification with the constitutional order was a requirement for appointment as an official, within the meaning of Article 1, paragraph 2, of Convention No. 111. Anyone who did not in his entire conduct bear witness to his support for the free democratic basic order could also not serve the State faithfully as a contractual employee. In their case, it was not necessary to go so far as to demand a guarantee that they would at all times actively defend that order, as was the case for officials. The purpose, however, was the same. The representative of the DAG pointed out that under Article 33, paragraph 4, of the Basic Law, the exercise of sovereign powers as a permanent function should as a rule be entrusted to officials. That meant that also persons employed under private law might temporarily exercise sovereign powers. For that reason, as well as because of their close relation to the State and its functions, clause 8 of the federal collective agreement for salaried employees required such employees by their entire conduct to bear witness to their support for the free democratic basic order.

410. The representative of the DAG recalled that the Federal Chancellor and the heads of government of the Länder had agreed on 28 January 1972 to a decision that was supposed to promote the harmonisation of the application of the legal provisions concerning the duty of faithfulness to the free democratic basic order. However, the decision had not produced the desired harmonisation. Recently one Land had expressly withdrawn from observance of the decision. All public service employers nevertheless remained bound by the requirements defined by the Federal Constitutional Court in its decision on the matter of 22 May 1975. According to that decision, membership in an organisation hostile to the Constitution was not a sufficient ground for disciplinary action; there had also to be activities within or outside the service. The representative of the DAG did not consider it to be contrary to Convention No. 111 to treat the fact of standing as a candidate for an extremist organisation or party as a decisive factor of doubt as to a person's identification with the

constitutional order so as to lead to his exclusion from employment in the public service. The DAG representative said he had no evidence to suggest that the current practice of the administration, controlled by the courts, was excessive. On the contrary, it was less rigid than the letter of the provisions governing civil servants. The numbers of refusals to engage persons and of dismissals in recent years were limited. Various efforts to liberalise the practice had been made such as the new principles for the verification of faithfulness to the Constitution adopted by the Federal Government on 17 January 1979.

411. The representative of the DAG stated that his organisation excluded from membership persons who were members of organisations that intended to eliminate the constitutional order of the Federal Republic. That exclusion applied to right- and left-wing extremist parties. In reply to a question of the Commission, the DAG representative said he was aware of only one case in which a member of his union had been the subject of measures to exclude him from the public service on grounds related to his political activities; it had occurred a long time ago, and the witness did not know the details of the case.[5]

The position of organisations which do not consider the situation in the Federal Republic as wholly consistent with Convention No. 111

412. The International Confederation of Free Trade Unions expressed general agreement with the conclusions reached by the committee set up by the Governing Body to examine the representation made under Article 24 of the ILO Constitution (namely, that the duty of faithfulness to the free democratic basic order imposed on officials in the Federal Republic of Germany, by reason of the generality of its scope and as currently applied, goes beyond what is authorised by Article 1, paragraph 2, and Article 4 of Convention No. 111).

413. The Deutscher Gewerkschaftsbund (DGB) communicated a statement made in agreement with those member unions which the Commission had invited to present information. In separate communications, the Gewerkschaft Erziehung und Wissenschaft (GEW), the Gewerkschaft der Eisenbahner Deutschlands (GdED), and the Deutsche Postgewerkschaft (DPG) associated themselves with the DGB's statement, and transmitted certain resolutions or statements adopted by their organisations. Information on a number of individual cases compiled by the DPG, the GEW, and the Gewerkschaft Öffentliche Dienste, Transport und Verkehr (ÖTV) was subsequently communicated by the DGB. Representatives of the DPG and of the GEW gave evidence before the Commission.

414. The statement communicated by the Deutscher Gewerkschaftsbund was as follows:

(Translation)

The DGB and its member trade unions have followed developments in the Federal Republic of Germany with growing concern.

In 1975 the Federal Constitutional Court rendered a judgement on this question; it laid down principles from which in recent times administrative practice as well as the courts, especially the administrative courts, have increasingly departed.

The social-liberal Federal Government on 16 June 1982 introduced a bill in this connection, which sought, by means of appropriate substantive and procedural provisions, to orientate the verification of faithfulness to the Constitution in accordance with the principle of proportionality and to ensure the individual examination of each case. This was also announced to the ILO Conference.

Since October 1982 we have had a new Federal Government, composed of other political forces. This Government has not pursued the adoption of the draft legislation envisaged by its predecessor.

Under the new Government, the administrative practice of the authorities has become markedly more severe.

After the change of government which resulted from a constructive vote of no-confidence, the SPD group of the Federal Diet (Bundestag) on 27 October 1982 introduced a bill identical to the previous Government bill; however it did not succeed.

As a result of these developments, delegates at recent conferences of member unions of the DGB have protested against discrimination and disciplinary measures on account of political opinions and activity and have called for appropriate measures to be taken.

The Federal Constitutional Court in its leading decision of 22 May 1975 set out in detail its view of the content and scope of the duty of faithfulness to the Constitution owed by officials, namely:

1. The mere fact of holding an opinion and of making this known can never be a violation of the duty of faithfulness imposed on officials.

2. One aspect of the conduct which can be relevant for the evaluation of the personality (of an applicant for employment) may also be the fact of joining or membership of a political party which pursues objectives hostile to the Constitution, irrespective of whether the party has been found to be contrary to the Constitution by judgement of the Federal Constitutional Court.

3. In the case of officials appointed for life, dismissal is possible only if a specific breach of duty has been committed. In this connection, one must take into account that a minimum of weight

and evidence of a violation of duties is required to establish the existence of a breach of the duty of faithfulness.

Conclusions:

The foregoing principles do not permit any automaticity or general presumption that the mere membership of a party alleged to have objectives hostile to the Constitution generally justifies doubt as to faithfulness to the Constitution, nor can mere membership, activity or standing as candidate for such a party constitute a breach of duty which would justify the dismissal of an official. This was also the purpose of the above-mentioned bills, which provided that in disciplinary proceedings for violation of the duty of faithfulness to the Constitution based on the conduct of officials outside their service all relevant circumstances should be taken into account and that in particular due regard should be had to the functions assigned to the official and to his right to freedom of expression.

It is to be concluded that, according to these principles, political opinions or convictions alone cannot justify a refusal to appoint an applicant or the dismissal of or other discrimination against established officials.

Administrative practice is increasingly departing from that position.

This is the case above all in the federal administration, for which the Federal Government is responsible, and in the administrations of those Länder of the Federal Republic of Germany in which political authority is exercised by the same political parties as on the federal level.

Those administrations are adopting a purely automatic approach, contrary to the principles laid down by the Federal Constitutional Court (examination of each case individually, overall evaluation of the personality of the official). According to this practice, mere activity for a party considered hostile to the Constitution - even if it is not prohibited - and in quite a number of cases standing as a candidate for public offices on behalf of such a party suffice for dismissal even of a long-serving official appointed for life, even where there is not the slightest ground for doubting the integrity of the person concerned in his work.

In our opinion, this practice can hardly be compatible with ILO Convention No. 111.

From the foregoing, it will already be seen that the DGB and its member unions cannot agree with the comments of the Federal Government on the representation. This follows more specifically from recent decisions of trade union bodies. Thus, the 12th Congress of German officials of the DGB on 27 to 28 November 1985 adopted a resolution on

disciplinary measures on account of political activity which had been proposed by the Deutsche Postgewerkschaft (DPG). It reads as follows:

The 12th Congress of German officials decides:

The Federal Council of the DGB is invited, on the basis of the decision of the DGB Federal Committee of 8.6.1977, strongly to press for the final ending at federal and Länder level of the practice of disciplinary measures and destruction of occupational existence solely on the grounds of membership in a lawful political party or of activity for such a party outside the service, and for the rehabilitation of those affected.

The Congress of officials of the DGB also adopted a proposal by the Gewerkschaft Erziehung und Wissenschaft (GEW), worded as follows:

The 12th Congress of German officials decides:

The DGB is invited, in collaboration with its subordinate bodies and member trade unions, to make available to the ILO detailed material based on individual cases for the deliberations of the Commission of Inquiry which is to examine practice under the decree against radicals ("Radikalenerlass") in the Federal Republic and its compatibility with several Conventions of the ILO.

Both proposals were adopted by the Congress of officials by large majorities.

The Government's assertion, in its statement of 18 December 1984 in reply to the representation, that the courts would examine all elements and approve the action of the authorities only if the various relevant circumstances are of general significance, is at least misleading. The same applies to the assertion that in the Federal Republic no one is removed from the public service solely because of his political convictions. On the basis of the decisions of the Federal Administrative Court, there is in fact a purely schematic evaluation. If a political party is considered hostile to the Constitution, the mere fact of being a member of that party and holding office in or being a candidate for that party leads almost automatically to removal from the service. In judging the matter, regard is not had to other acts or statements by the official concerned which are relevant from the point of view of disciplinary law, nor is consideration given to the question whether the behaviour of the party and of the particular member concerned are in fact identical. This approach negates the pronouncement of the Federal Constitutional Court that the holding and stating of a belief can never be a violation of the duty of faithfulness calling for disciplinary punishment. This point has been stressed by one of the judges who participated in the decision of the Federal Constitutional Court of 1975, namely Seuffert, in an article in a legal journal (Deutsches Verwaltungsblatt, 15 December 1984, p. 1218).

The Federal Government and the courts accordingly attribute to the party member concerned the entire programme of the party which is considered to be hostile to the Constitution, without entering into and examining the actual conduct of the person concerned. For example, in the judgements concerning the postal officials Meister and Peter, the Federal Administrative Court did not take account of their long period of irreproachable service or of the fact that they had at no time actively pursued the objectives of their party by statements or conduct in their service. The trade unions agree that political views of officials which are not compatible with the free democratic basic order in the Federal Republic should not enjoy protection if violent or unconstitutional means are used or advocated. The mere membership of or candidature for a political party should, however, not be regarded as constituting such conduct, even if the party pursues objectives hostile to the Constitution. In addition there must be specific forms of conduct against the constitutional order, such as agitation or incitement, which have to be proved against the person concerned and which lead to the conclusion that he actively combats the constitutional order of the Federal Republic of Germany. There was however no question of this in any of the 24 cases of disciplinary measures for political reasons with which, for example, the Deutsche Postgewerkschaft has been concerned. The trade unions too emphasise the obligation of faithfulness to the Constitution for everyone employed in the public service. However, to justify any removal from the service, proof must be required of specific conduct hostile to the Constitution by the person concerned, that is, an activity against the free democratic basic order within the meaning of the Constitution, and not a mere political belief as expressed by membership in or candidature for a party. Here lies the decisive difference as compared with the views of the Federal Government.

415. The Deutsche Postgewerkschaft (DPG) communicated a resolution adopted by its Federal Committee on 21 June 1985, which stated that an appraisal of the conduct of officials or contractual employees in the public service must be based not only on purely formal criteria or merely on active membership in a party considered to be hostile to the Constitution. It must, as required by constitutional law, be based on an examination of each individual case taking account of the personality and the actual past conduct of the individual concerned within and outside his service. In particular - contrary to the case law of the Federal Administrative Court - irreproachable conduct acknowledged by superiors and colleagues should not be swept aside. In a statement addressed to the Federal Minister of Posts and Telecommunications in August 1984, the DPG referred to the decision of the Federal Constitutional Court of May 1975, which prohibited any schematic treatment of officials and ruled that membership of and activities for a party hostile to the Constitution were not a sufficient reason to reject applications for employment in the public service. If this criterion was to be applied to applicants, it ought all the more to be applied to efficient officials with a clean record, some of whom had been in the service for many years. The current measures in the Federal Postal Service did not respect the criteria laid down by the Federal Constitutional Court.

416. In his evidence before the Commission, the representative of the DPG[6] observed that if the above-mentioned principles were applied, by administrations as well as by the Federal Administrative Court, then all the cases currently pending known to the DGB would be decided in favour of the individuals concerned, because none of them had been the subject of reproach for his conduct either within or outside his service, other than for his political activities. That would solve the problem before the Commission of Inquiry. The Federal Government and the courts could, without losing face, change a practice that not only the trade unions considered to be damaging. Apart from the opinions manifested in the decisions of trade unions, there was less and less sympathy among the colleagues and superiors of those against whom disciplinary measures were being taken and whose existence was being destroyed. Länder with governments led by the Social Democrats no longer took measures against those in their service solely because of membership of, or candidature or activities for a party considered to be hostile to the Constitution. It was difficult to explain why a particular teacher could not, because of his political activities for the DKP, obtain an appointment in Rhineland-Palatinate, but could become a teacher in the neighbouring Länder, the Saarland and Hessen.

417. The Gewerkschaft Erziehung und Wissenschaft (GEW) attached to its communication several resolutions on occupational bans adopted by the union's Congress of 1983. In a general resolution, the Congress protested against the tendency to undermine the basic rights guaranteed by the Basic Law, and demanded that the exercise of civil and political rights, including membership of and activities for a party or organisation, should not constitute evidence of conduct contrary to the Constitution. All performance appraisals ought to be based on the actual conduct of the individual within the service. Prognoses of an individual's possible future conduct were inadmissible. The offices for the defence of the Constitution should be excluded from the procedures for the engagement and appraisal of officials and salaried employees. Occupational bans imposed and proceedings initiated in violation of these principles should be terminated, complaints and appeals made by the authorities withdrawn, and those already affected rehabilitated.

418. The representative of the GEW, in evidence before the Commission,[7] referred to the comment by the Committee set up by the Governing Body to examine the representation made by the WFTU that in the modern State the public service embraced a wide range of functions, many of them unrelated to the administration of the State, such as education, transport and other services of an essentially technical nature. By contrast, an examination of the decisions of the courts in the Federal Republic of Germany showed that particularly strict demands were made in regard to the political faithfulness of teachers. According to a judgement of the Federal Administrative Court of 6 February 1975, teaching comprised duties of great significance for the State because schools had an exceptionally important role in making adolescent citizens aware of the values of the State order and because this responsibility was placed upon each

teacher as part of his tasks. The Federal Labour Court had established a corresponding duty of faithfulness for teachers working as salaried employees. However, teachers too should be entitled to have their own views, distinct from those of the Government or of the majority, which they should also be able to manifest by participation in elections. In practice, contrary to the Federal Constitutional Court's decision of 22 May 1975, there was no real examination of the facts of individual cases or of the personality of the official concerned; reliance was placed solely on activity for a party considered to be hostile to the Constitution, even when there were no factors justifying doubts about the professional integrity of the individual concerned. It would be wrong to consider that the conflict with the provisions of Convention No. 111 was due only to the particular nature of the German law governing officials, all the more because the employment of teachers was increasingly being based on labour-law contracts.

419. Referring to the cases that the GEW had submitted to the Commission through the DGB, the GEW representative pointed out that in none of them was there any allegation of specific misconduct related to the employment relationship. Although in the Eckartsberg case the Lower Saxony Disciplinary Court had decided in favour of the official, this was due to the attitude adopted by the Land authorities in the past; subsequently a circular had been issued to make clear the intention, on the basis of this judgement, to dismiss any official who in future stood as candidate for a party considered hostile to the Constitution. In the case of Rüdiger Quaer, although ultimately he was dismissed, he worked as a teacher for 12 years while the proceedings against him were going on. If such employment had been inappropriate, the authorities could have sought his removal while the proceedings were pending but they did not do so. This showed that the reason for dismissal was Quaer's opinions and their manifestation outside the service and that his conduct within the service did not justify such a decision. A particularly noteworthy point in the case of Friedrich Sendelbeck was that, while proceedings were pending, the legislation in Bavaria had been changed to require preparatory service to be performed solely with the status of official; only these provisions had made it possible to prevent Sendelbeck from completing his training.

420. The Gewerkschaft der Eisenbahner Deutschlands (GdED) communicated resolutions adopted by its Congresses in 1972, 1976 and 1980 relating to the Common Declaration of the Federal Chancellor and the Länder Prime Ministers of 28 January 1972 and the practices resulting therefrom. The 1976 resolution condemned the 1972 Declaration and the occupational bans in the public service which in practice resulted in some cases, as violating the constitutionally guaranteed right that no one should be placed at an advantage or disadvantage as a result of his religion or political opinion (Article 3 of the Basic Law), except where the Federal Constitutional Court had imposed a deprivation of basic rights (Article 18). According to the resolution, the Declaration had the effect of stifling criticism of social conditions and created a general atmosphere of intimidation and opportunism in

public administrations and schools. In 1980, the Congress welcomed the decision of 1 April 1979 of the Federal Government to refrain as regards employment in the public service from addressing inquiries to the Office for the Defence of the Constitution as a matter of routine.

Notes

[1] Krause, XV/18.

[2] Krause, XV/19.

[3] Krause, XV/25-26.

[4] Halberstadt, XIII/24-27.

[5] Halberstadt, XIII/24, XIV/2.

[6] Ratz, VI/16-18.

[7] Ortmann, VII/12-15.