Federal Republic of Germany (ratification: 1961)

1. In the years up to 1983, the Committee had examined the compatibility with the Convention of the measures taken in application of the provisions on the duty of faithfulness to the free democratic basic order of public servants and applicants for employment in the public service. Subsequently, it deferred further comment on this

question, while it was being examined, first, under the representations procedure provided for in article 24 of the ILO Constitution and, then, by a Commission of Inquiry established by the Governing Body under article 26 of the Constitution.

2. The report of the Commission of Inquiry was presented in February 1987 (see ILO Official Bulletin, Vol. LXX, 1987, Series B, Supplement 1). The Commission of Inquiry concluded that the measures taken in respect of employment in the public service in application of the duty of faithfulness to the free democratic basic order had in various respects not remained within the limits of the restrictions authorised by Article 1, paragraph 2, of Convention No. 111 on the basis of the inherent requirements of particular jobs. It concluded further that, as exemplified by the cases brought to its attention, those measures did not fall within the exception provided for in Article 4 of the Convention (concerning activities prejudicial to the security of the State). The Commission of Inquiry recommended that the existing measures in this matter be re-examined by the various authorities in the Federal Republic of Germany, with due regard to the conclusions stated by it, and that action be taken to ensure that only such restrictions on employment in the public service were maintained as corresponded to the inherent requirements of particular jobs within the meaning of Article 1, paragraph 2, of the Convention or could be justified under the terms of Article 4. The Commission of Inquiry recommended that, in such re-examination, account be taken of a number of more specific considerations mentioned by it, and that detailed information on all relevant developments be given in the annual reports on the Convention to be presented under article 22 of the ILO Constitution.

3. In a communication of 7 May 1987, in pursuance of article 29, paragraph 2, of the Constitution, the Government of the Federal Republic of Germany informed the Director-General of the ILO of its position with regard to the recommendations of the Commission of Inquiry (see document GB.236/4/6). While reaffirming its desire to support the ILO's procedures for the supervision of the application of standards and to promote dialogue with the supervisory bodies, the Government indicated its disagreement with the conclusions reached by the Commission of Inquiry. It expressed agreement with the minority opinion of one member of the Commission, and referred more particularly to the provisions of Article 5, paragraph 1, of the International Covenant on Civil and Political Rights and to the judgements of the European Court of Human Rights of August 1986 in the Glasenapp and Kosiek cases. The Government indicated that it saw no cause to depart from its previously stated legal position (namely, that legislation and practice in the matter were in conformity with the Convention), and that it did not intend to refer the questions at issue to the International Court of Justice.

4. The Committee of Experts has taken note of the above-mentioned documents, and of the further information and comments provided by the Government of the Federal Republic in its report for the period 1986-87. It has also noted the comments and documents communicated by the German Confederation of Trade Unions (DGB), the World Federation of Trade Unions, the World Federation of Teachers'

Unions, and the International Federation of Free Teachers' Unions, and the Government's observations on the comments of the DGB.

5. The principal developments in the matter may be summarised as follows:

(a) The Government of the Federal Republic has maintained the position stated in its communication of 7 May 1987, and has not taken any steps with a view to modification of existing legal provisions or practice. In a statement to the Committee on Petitions of the Federal Diet dated 14 July 1987, the Federal Minister of the Interior reiterated that the Federal Government did not accept the recommendations of the Commission of Inquiry; he stated the view that those recommendations had no binding force either in international law or in domestic law, but were merely non-mandatory recommendations. A similar position has been adopted by the Governments of various Länder, for example, by the Government of Bavaria in a statement to the Bavarian Diet of 15 June 1987 and by the Minister of the Interior of Lower Saxony in a statement to the Diet of Lower Saxony of 11 December 1987.

(b) A number of new judgements have been given by the courts in the Federal Republic. In a decision of 21 August 1987, the Oldenburg Labour Court, in considering the application of the provisions on the duty of faithfulness in a case concerning employment of a salaried employee in the public service, observed that, in so far as possible, national legislation and even the national constitution should be interpreted in a manner which would ensure respect of obligations under international law. After reviewing the provisions of Convention No. 111 and the conclusions of the Commission of Inquiry, the court proceeded to an examination of the facts in the light of the requirements of the particular job, and ruled in favour of the applicant. A contrary position has been adopted by administrative courts in a series of cases concerning the employment of officials. In particular, in judgements of 20 January 1987 and 15 September 1987, the Federal Administrative Court observed that, under article 29 of the ILO Constitution, a report of a Commission of Inquiry cannot establish obligations under international law for the Federal Republic of Germany, to be observed in the application and interpretation of domestic law. The Court considered that recommendations of a Commission of Inquiry could have no direct effect on domestic law, but would merely have the consequence that, if they were accepted by the government concerned, the latter would have to introduce the requisite legislative or other measures. While admitting that courts were bound to respect international law requirements, if domestic law left room for interpretation, the Federal Administrative Court ruled that there was no such possibility in regard to the duty of faithfulness of officials deriving from Article 33, paragraph 5, of the Basic Law. In application of this view of the legal position, the courts have ordered the dismissal of officials or upheld refusals of appointment in a series of cases, including cases which had been taken into consideration by the Commission of Inquiry. They have maintained a strict view of the requirements of the duty of

faithfulness. In particular they have declined to apply the test required by Article 1, paragraph 2, of the Convention (as indicated by the Commission of Inquiry in paragraph 585 of its report), namely, that suitability for admission to or continued employment in the public service should in each instance be judged by reference to the functions of the specific post concerned and the implications of the actual conduct of the individual for his ability to assume and exercise those functions.

(c) A substantial number of other cases are still pending before the courts.

(d) In its report, the Commission of Inquiry noted decisions by the Federal Labour Court in October 1986 that the authorities of Baden-Württemberg must provide an opportunity for preparatory training for teachers, even when there were doubts as to an applicant's faithfulness to the Constitution. While noting that, with respect to Bavaria, the same issue remained to be ruled upon by the Federal Labour Court, the Commission of Inquiry supposed that this particular problem would secure a solution. The Committee of Experts notes from the Government's report that the Federal Labour Court decided in May 1987 to suspend its consideration of the cases concerning Bavaria in order to obtain a ruling from the Federal Constitutional Court on the compatibility of the relevant Bavarian legislation with Article 12 of the Basic Law. As observed by the Commission of Inquiry, this issue of access to the public service for the purpose of training does not affect the broader question of employment in the public service once training has been completed.

6. The Government observes in its report that decisions by and proceedings before independent courts in the Federal Republic must abide by the legal provisions in force. It considers that there can exist no violation of Convention No. 111 or other international law so long as the relevant constitutional and legislative provisions do not violate the Convention, which even the majority of the Commission of Inquiry did not claim to be the case. The Government also observes that in a democratic State ruled by law, the Government has no means of annulling or overriding the decisions of independent courts. It refers in this connection to the arguments presented to the Commission of Inquiry concerning the need for exhaustion of domestic remedies, including recourse to the Federal Constitutional Court.

7. In the light of the preceding indications, the Committee of Experts feels it appropriate to make the following comments:

(a) The Committee notes that the Government did not accept the recommendations of the Commission of Inquiry. The ILO Constitution does not make the results of an inquiry subject to the consent of the State concerned. The Government's position therefore does not affect the validity of the conclusions of the Commission of Inquiry. The ILO Constitution provides an opportunity for an appeal to the International Court of Justice (which is then free to review any of the findings or recommendations), but the Government chose not to avail itself of that possibility.

(b) Article 28 of the ILO Constitution empowers a Commission of Inquiry to make recommendations to correct any shortcomings which

may have been found in the observance of a ratified Convention. The reference here to "recommendations" may be explained by the fact that (as also recognised by the Commission of Inquiry, in paragraph 588 of its report) there are generally various ways in which the situation can be brought into conformity with the Convention concerned. In the present case, for example, one Land has abrogated the guide-lines which governed the implementation of the relevant legislative provisions; other Länder amended their corresponding guide-lines and adapted their practice accordingly; and the Federal Government had at an earlier stage sought to change the situation by presenting a bill to the Federal Parliament. While, therefore, a Government retains considerable freedom in choosing the means of ensuring compliance with a ratified Convention, that fact cannot diminish its obligation, under article 19 of the ILO Constitution, to make the provisions of the Convention effective.

(c) The Government's observations concerning the relevance of Article 5, paragraph 1, of the International Covenant on Civil and Political Rights, the significance of the judgements of the European Court of Human Rights, and the exhaustion of local remedies were fully examined by the Commission of Inquiry (paragraphs 455 to 468, 506 to 509 and 524 to 526 of its report). The Committee of Experts agrees with the conclusions of the Commission of Inquiry on those matters. It would further point out that Article 5, paragraph 1, of the Covenant provides (inter alia) that nothing in that Covenant may be interpreted so as to permit the limitation of the rights and freedoms recognised in it "to a greater extent than is provided for in the present Covenant." It would therefore be in direct contradiction to the terms of this provision to seek to read the paragraph into ILO Convention No. 111 with a view to limiting the provisions of that Convention to a greater extent than is provided for in the Convention itself.

(d) The Committee recognises that the Government cannot annul or override the decisions rendered by the courts of the Federal Republic. Nor is it the function of ILO supervisory bodies to pronounce upon the merits of those decisions in ruling upon the interpretation or effect of domestic law or on the effect in domestic law of international standards. However, it remains necessary for the Committee to examine, in the light of the decisions of the courts, whether national legislation and practice are compatible with the Convention under consideration.

(e) Already in its observations of 1983, on the basis of information concerning practice and a number of judicial decisions then available, the Committee of Experts had considered that Convention No. 111 was not fully observed, because persons were excluded from public employment on grounds which did not relate to the inherent requirements of particular jobs, within the meaning of Article 1, paragraph 2, of the Convention. The Commission of Inquiry, on the basis of much more complete information, reached the same conclusion with respect to those federal and Länder authorities which follow a strict approach in applying the provisions on the duty of faithfulness. No measures

have been taken by the authorities concerned to modify their practice, and the courts have upheld the legality of that practice in terms of the existing legislation. The Committee of Experts would accordingly draw attention to the obligation incumbent upon the Government, under Article 2 of the Convention, to pursue a national policy to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination (as defined in Article 1), and, more particularly, to enact such legislation as may be calculated to secure the acceptance and observance of that policy (Article 3(b)) and to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the said policy (Article 3(c)). The Committee of Experts recalls that, in paragraph 588 of its report, the Commission of Inquiry recommended that, if the requisite changes could not be brought about by other means, appropriate legislative action be taken.

(f) The Committee would observe that, while the duty of faithfulness is considered to be one of the "traditional principles governing service as officials" referred to in Article 33, paragraph 5, of the Basic Law, the definition of that duty is laid down in ordinary legislation and the conditions for its implementation have been established by administrative guide-lines. As developments in various parts of the Federal Republic show, a variety of means may thus be available to resolve the existing difficulties.

(g) The Committee of Experts accordingly hopes that the Government will once more review the whole situation, in consultation with the organisations representing the workers concerned, with due regard to the provisions of the Convention and the considerations set out in the report of the Commission of Inquiry, and that it will adopt appropriate measures to overcome the existing difficulties in the implementation of the Convention.

Federal Republic of Germany (ratification: 1961)

1. The Committee has noted the information provided by the Government to the Conference Committee in 1988, in its report presented in November 1988, and in a supplementary report communicated in March 1989. It has also taken note of the discussion in the Conference Committee in 1988 and of that Committee's conclusions, in which the Committee associated itself with the hope expressed by the Committee of Experts that the Government would review the situation in consultation with workers' and employers' organisations and would adopt appropriate measures to overcome the existing difficulties, having due regard to the recommendations of the ILO Commission of Inquiry, the comments of the supervisory bodies and the dialogue in the Conference Committee. The Committee has also noted a communication from the World Federation of Trade Unions concerning certain proceedings before the Federal Administrative Court. During the Committee's session, comments were received from the German Confederation of Trade Unions, expressing concern at the position of the federal Government. Matters mentioned in this communication will be further considered by the Committee at its next session.

2. The Committee draws attention to the following developments:

(a) The Committee notes with interest from the Government's report that, following a change of government in the Land of

Schleswig-Holstein, the practice of systematic inquiry from the authority for the protection of the Constitution in regard to all applicants for employment in the public service (Regelanfrage) was abolished in July 1988.

(b) In its observations of 1988, the Committee had noted that two cases concerning admission to the public service for the purpose of preparatory service of teachers had been referred to the Federal Constitutional Court by the Federal Labour Court. The Committee notes that, following the withdrawal of the appeals to the Federal Labour Court, these references have lapsed.

(c) The Committee notes that in a number of other cases judgements have been rendered since its examination of the situation in 1988. In its previous observations, the Committee had noted a judgement of the Oldenburg Labour Court of August 1987, in which, following a review of the provisions of Convention No. 111 and the conclusions of the ILO Commission of Inquiry, the Court had ruled in favour of an applicant for employment in the public service. However, on appeal, that judgement was reversed by the Land Labour Court in June 1988. A number of other courts, including the Federal Administrative Court, have similarly ruled against the admission of applicants for employment in the public service or for dismissal of serving officials. In the various judgements available to the Committee, the courts have declined to apply the criteria stated in the report of the Commission of Inquiry as governing the application of Article 1, paragraph 2, of Convention No. 111 (in respect of the inherent requirements of particular jobs). They have consistently taken the view that neither the provisions of Convention No. 111 nor the conclusions and recommendations of the ILO Commission of Inquiry have direct binding force in the domestic law of the Federal Republic of Germany; this point has also been stressed by the Government in its report.

(d) The Committee notes that in October 1988 discussions concerning the implementation of Convention No. 111 took place between the federal authorities and representatives of the Confederation of German Employers' Associations, the German Officials' Federation, the German Salaried Employees' Union, the German Confederation of Trade Unions, the German Postal Workers' Union and the Educational and Scientific Workers' Union. The Government indicates in its supplementary report that these discussions revealed differences of opinion among the organisations concerned with respect to the compatibility with Convention No. 111 of the practice in the Federal Republic regarding the duty of faithfulness in the public service. In the light of those differences, the Government has once more set out in detail, in the supplementary report, its arguments for considering the existing law and practice in the matter to be in conformity with the Convention and for not accepting the conclusions of the Commission of Inquiry. The Government has stressed, in particular, its view that the differentiation in the application of the provisions relating to the duty of faithfulness according to the functions involved, which had been recommended by the Commission of Inquiry, is not possible and is not being seriously demanded by anyone in the Federal Republic. The Government has also communicated a decision by the Petitions

Committee of the Federal Diet, adopting a position corresponding to that of the federal Government.

3. Having regard to these developments, the Committee considers it appropriate to make the following comments:

(a) While the consultation of employers' and workers' organisations on measures to ensure the observance of the Convention is always desirable, and was indeed recommended by the ILO supervisory bodies, the fact that such consultations may have revealed differences of opinion does not absolve the Government from its obligation, under article 19 of the ILO Constitution and the provision of Convention No. 111, to make that Convention effective in law and practice.

(b) As the Committee already noted in 1988, ILO supervisory bodies are not called upon to pronounce upon the merits of the decisions of courts within the Federal Republic in ruling upon the interpretation or effect of domestic law or on the effect in domestic law of international standards. However, it remains necessary for the Committee to examine, in the light of decisions of the courts, whether national legislation and practice are compatible with the Convention. The fact that the courts consider Convention No. 111 and the conclusions of ILO supervisory bodies not to have any direct binding effect in domestic law does not absolve the Government from its obligation to make the provisions of the Convention effective. Under the Convention, it is incumbent upon the Government to pursue a national policy to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination (Articles 1 and 2) and, more particularly, to enact such legislation as may be calculated to secure the acceptance and observance of that policy (Article 3(b)) and to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the said policy (Article 3(c)).

(c) The ILO Commission of Inquiry, after an exhaustive examination of the situation with respect to exclusions from public service in application of the provisions on the duty of faithfulness, indicated in what respects that situation was not compatible with the requirements of Convention No. 111, and formulated recommendations on measures to be taken to eliminate the existing difficulties. The Commission of Inquiry recommended that, if the requisite changes could not be brought about by other means, appropriate legislative action should be taken (paragraph 588 of its report).

(d) The Committee notes that the Government maintains the position that the existing law and practice regarding the duty of faithfulness in the public service are consistent with Convention No. 111. It has taken note of the restatement of the Government's arguments and of its reasons for disagreeing with the conclusions of the Commission of Inquiry. The Committee of Experts recalls that article 29 of the ILO Constitution empowers a government which does not accept the recommendations of a commission of inquiry to refer the matter to the International Court of Justice, in which case the Court may affirm, vary or reverse any of the commission's findings or recommendation (Article 32). In the present case, the Government decided not to avail itself of this possibility.

4. The Committee accordingly once more expresses the hope that the Government will take the necessary measures to secure the

observance of Convention No. 111 in regard to the matters examined in the ILO inquiry. The Commission of Inquiry, in paragraph 586 of its report, drew attention to certain policies, practices and decisions already to be found in the Federal Republic of Germany which might provide guidance to the requisite action.

[The Government is asked to report in detail for the period ending 30 June 1989.]

CEACR: Individual Observation concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 Germany (ratification: 1961) Published: 1991

Description:(CEACR Individual Observation)
Convention:C111
Country:(Germany)
Subject: **Equality** the **of** document **Opportunity** in: **and** French **Treatment** Spanish
Display

Published:1991
Subject classification: Non-discrimination (Employment and Occupation)
Subject classification: Women

I. Equality of opportunity and treatment irrespective of political opinion

1. Further to its previous comments, the Committee notes with satisfaction the following developments:

(a) On 26 June 1990 the Land Government of Lower Saxony decided to revoke the decree against radicals and to discontinue systematic inquiry from the authority for the protection of the Constitution in regard to applicants for employment in the public service. It also decided to offer renewed opportunities of employment in the public service to persons who had previously been refused admission to such employment under the aforesaid provisions, to discontinue proceedings against officials or salaried employees in pursuance of those provisions that were still pending, and to offer reinstatement to persons against whom final court decisions of dismissal or demotion had already become effective. Following these measures, problems in the application of the Convention of the kind examined by the ILO Commission of Inquiry in its report of 1987 do not exist anymore or are in the course of being resolved in most of the Länder of the Federal Republic, namely: Berlin, Bremen, Hamburg, Hessen, Lower Saxony, North Rhine-Wesphalia, Saarland, Schleswig-Holstein.

(b) In July 1990, the President of the Federal Republic granted a pardon to Herbert Bastian (an official in the Federal Postal Service who had appeared as a witness before the Commission of Inquiry and whose dismissal had subsequently been ordered by the Federal Administrative Court, principally on account of his exercise of an elective mandate as a town councillor on behalf of the German Communist Party), enabling him to resume service as from 1 August 1990.

2. The Committee has also taken note with interest the judgements rendered by the Federal Labour Court on 28 September 1989 and 14 March 1990 in the cases of Heinrich-Udo Lammers and Thomas Weber. In the former case the Court held that the attempted termination of a contract of employment on account of the employee's political activities was not socially justified. In the latter, it held refusal of employment to be contrary to the constitutional guarantee of the right to equal access to the public service according to ability, qualifications and occupational performance. The Court distinguished between the duties incumbent upon officials and upon persons

employed in the public service under a contract of employment and observed that, in considering the justification for exclusion from the public service on account of political activities of contractual employees, regard must be had to the duties to be discharged, the nature of the functions performed by the employing authority and the field of work in which the employee would be engaged. These judgements applied, in the case of persons employed in the public service on the basis of a labour contract, criteria corresponding to those stated by the Commission of Inquiry in its recommendations with regard to persons in the public service generally.

3. The Committee notes that in cases concering officials, the administrative courts, in contrast to the labour courts, still do not differentiate in the application of provisions on the duty of faithfulness, according to the nature of the functions performed. The Committee notes that, in August 1990, the Federal Constitutional Court, following earlier decisions to like effect noted by the Commission of Inquiry in paragraph 456 of its report, declined to accept for hearing, on the ground of insufficient prospects of success, a complaint arising out of the dismissal of a lifetime official on account of political activities ordered by the administrative courts of Lower Saxony.

4. The Committee would accordingly appreciate information on any measures which may be contemplated by the federal authorities and by the Länder of Baden-Württemberg, Bavaria and Rhineland-Palatinate, in response to the recommendations of the Commission of Inqury, with a view to ensuring full compliance with the Convention.

II. Effective remedies in cases of sex discrimination

5. The Committee has noted the two judgements rendered by the Federal Labour Court on 14 May 1989 concerning compensation in cases of sex discrimination in respect of employment, the texts of which were communicated by the Government with its last report. Although in both cases there was found to have been unlawful discrimination, the Court held that, apart from recovery of any actual expenses incurred by the worker, compensation for immaterial damages might be awarded only where there was serious infringement of the worker's general rights as a human being. Accordingly, in one of the cases, no award of damages was made, whereas in the other the award was limited to one month's wages. It follows that in many cases of discrimination in employment on the ground of sex, the worker will not be able to obtain any compensation, and in others only nominal compensation may be obtainable. The Committee would, therefore, appreciate information on the further measures which it is proposed to take with a view to providing effective sanctions or remedies in cases of discrimination in employment on the ground of sex.

6. The Committee is raising other points in a request directed to the Government.

http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=1467&chapter=6&query=%28C111%29+%40ref+%2B+%28Germany%29+%40ref&highlight=&querytype=bool&context=0

CEACR: Individual Observation concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 Germany (ratification: 1961) Published: 1992

Description:(CEACR Individual Observation)
Convention:C111
Country:(Germany)
Subject: **Equality** **of** **Opportunity** **and** **Treatment**
Display the document in: French Spanish

Published:1992
Subject classification: Non-discrimination (Employment and Occupation)
Subject classification: Women

The Committee notes the communications received in February 1991 and December 1991 from the World Federation of Teachers' Union (FISE), concerning the application of the Convention. Copies of these communications were transmitted by the ILO to the Government in April 1991 and January 1992. The Committee notes that the Government has not yet replied.

FISE alleges that personnel in the public service education system in the former German Democratic Republic are victims of the policy of professional bans which had been applied in the former Federal Republic of Germany. According to the information supplied by FISE, teachers have been arbitrarily dismissed from their teaching posts in violation of Convention No. 111. Personnel in the public service education system in the former German Democratic Republic are being required to complete questionnaires concerning, among other things, their past positions, past national decorations received, whether they had been reproached or suspected of having violated fundamental principles of humanity or of States' rights and whether they were willing to commit themselves to the fundamental liberal-democratic system of the Federal Republic of Germany and to defend its laws. Dismissals of such personnel may result from the nature or content of answers to the questionnaire or from a refusal to answer it.

The Committee requests the Government to forward its observations on the questions raised by the FISE so that it can examine them at its next session. In this regard, it would be grateful if the Government would provide detailed information on the number of public service officials, including teachers, who have been dismissed from their posts following the reunification, the legal basis for their removal from service, the criteria applied in determining removal as well as the procedural protections applicable and followed, and the manner in which the information collected from the personnel questionnaires is reviewed and used to condition continuation of employment in the public service, including teaching. The Committee will examine the issues raised in the communications of FISE, along with the next report of the Government at its next session.

The Committee also hopes that the next report will contain replies to the points which were raised in its observation and direct request of 1991.

http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=1930&chapter=6&query=%28C111%29+%40ref+%2B+%28Germany%29+%40ref&highlight=&querytype=bool&context=0

CEACR: Individual Observation concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 Germany (ratification: 1961) Published: 1993

Description:(CEACR Individual Observation)
Convention:C111
Country:(Germany)
Subject: **Equality of Opportunity and Treatment**
Display the document in: French Spanish

Published:1993
Subject classification: Non-discrimination (Employment and Occupation)
Subject classification: Women

Communications of FISE concerning discrimination on the ground of political opinion

1. The Committee notes the information contained in the report of the Government for the period ending 30 June 1992. It has also given further consideration to the communications received in February 1991 and December 1991 from the World Federation of Teacher's Union (FISE) concerning the measures taken in regard to personnel in the public service education system in the former German Democratic Republic. The Committee notes that copies of the aforementioned communications had been sent to the Government to enable it to present comments thereon and that in its 1992 observation the Committee had requested the Government to provide detailed information on a number of points raised in the communications.

2. The Committee recalls that in its communications FISE alleged that personnel in the public service education system in the former GDR, through application of the policy which had already been applied in the Federal Republic of Germany, had been arbitrarily dismissed from their teaching posts in violation of the Convention. Personnel in the public service education system in the former GDR were required to complete questionnaires concerning, among other things, their past positions, past national decorations received, whether they had been reproached or suspected of having violated fundamental principles of humanity or of States' rights and whether they were willing to commit themselves to the fundamental liberal-democratic system of the Federal Republic of Germany and to defend its laws. Dismissals of such personnel might result from the nature or content of answers to the questionnaire or from a refusal to answer it.

3. The Committee notes from the documentation submitted by FISE supplying details on 11 individual cases that the officials in question were nine teachers who had been dismissed or had been given notices of dismissal from their positions pursuant to the German Reunification Treaty, Chapter XIX, Section III, Annex 1, paragraph 4 and paragraph 5 (in two cases) and two officials who had been refused appointment to teaching/administrative positions. The information further indicates that most, if not all, of the public officials had filled out questionnaires prior to their termination. There was no indication in the documentation that any of the individuals in question replied negatively to the inquiry on whether they would commit themselves to the

fundamental liberal-democratic system of Germany and defend its laws. The reasons given for the dismissals, notices of dismissals and refusal to appoint were based on former membership and/or position in certain political parties or organizations including positions held as President of the Union of Teachers of the GDR, member of municipal council, school inspector and other more general reasons such as unsuitability to teach in a democratic society. In the two dismissals made pursuant to paragraph 5, one case was based on former employment with the Ministry for State Security and the other gave no reason in the letter of dismissal.

4. Based on the aforementioned information, the Committee, in its 1992 observation, had requested the Government to provide detailed information on the number of public service officials, including teachers, who had been dismissed from their posts following reunification, the criteria applied in determining removal, as well as the procedural protections applicable and followed, and the manner in which the information collected from the personnel questionnaires was reviewed and used to condition continuation of employment in the public service, including teaching.

5. The Government has replied that no figures are available on the number of workers who have been discharged from the public service in the new Länder. It denies any question of arbitrary dismissal of public servants of the former GDR citing the provisions of the German Reunification Treaty, Chapter XIX, Annex I, Topic A, Section III, No. 1, paragraphs 4 and 5, which provide special legal bases for the termination of work relationships in the public administration in the Acceded Area (former GDR). The Government states that the provisions of paragraphs 4 and 5 take account of the special situation at the time of radical change in the State, and are indispensable for the creation in the Acceded Area of a constitutional and effective administration. The Government states that paragraph 4 of the Treaty provides that regular termination of a work relationship in the public service is permissible, if: (1) the worker does not meet the requirements, owing to inadequate specialist qualification or personal unsuitability; or (2) the worker can no longer be employed, owing to lack of necessity; or (3) the former appointment is abolished without replacement or, if the appointment is combined, incorporated or seriously altered, it is no longer possible to offer the previous employment or similar employment. The Government states that paragraph 5 of the Treaty provides that extraordinary termination of a work relationship is permissible based on serious reasons which exist when the worker: (1) has violated the principles of humanity or of the rule of law, especially the human rights guaranteed in the International Covenant on Civil and Political Rights of 19 December 1966 or has violated the principles contained in the Universal Declaration of Human Rights of 10 December 1948; or (2) has worked for the former Ministry for State Security or the Department of National Security, and a continuation of the work relationship thereby appears unacceptable. The Government states that termination under paragraph 5 always implies that an individual investigation has been carried out and that normal recourse to law, to appeal against termination, is available to the person concerned.

6. The Committee regrets that no figures are available on the number of workers who have been discharged from public service in the new Länder following reunification. The Committee has been informed that a number of individual communications alleging arbitrary dismissal on the basis of the Reunification Treaty have been received by the Office, but due to the individual nature of the complaints the Committee was not in a position to examine this information. The Committee also

notes that the Government failed to provide the requested information on the criteria used to determine applicability of the provisions authorizing dismissal, the procedural protections available and the manner in which the information collected from the personnel questionnaires is reviewed and used to condition continuation of employment in the public service. In fact, no mention is made of the questionnaires in the Government's report.

7. In order for the Committee to determine the precise effect of the provisions of paragraphs 4 and 5 in Annex I to the Reunification Treaty, it must draw attention to how these provisions are being applied in practice to condition employment in the public service and how this application relates to the requirements of the Convention. In Article 1, paragraph 1, of the Convention, the term discrimination includes any distinction, exclusion or preference made on the basis of specified grounds including political opinion, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. With respect to the protection of discrimination on the ground of political opinion, the Committee has stated in paragraph 57 of its 1988 General Survey that "the Convention implies (protection) in respect of activities expressing or demonstrating opposition to the established political principles - since the protection of opinions which are neither expressed nor demonstrated would be pointless ... The protection of freedom of expression is aimed ... at giving (an individual) an opportunity to seek to influence decisions in the political, economic and social life of his society". The Committee observes that to be meaningful the protection of political opinion must therefore extend to the collective participation in political parties and organizations.

8. In determining whether there is discrimination under the Convention, account must be taken of Article 1, paragraph 2, concerning the inherent requirements of a particular job, and of Article 4 concerning measures regarding activities prejudicial to the security of the State. It does not appear to the Committee that issues concerning the security of the State are raised in the communications of FISE as they deal with employment in teaching and lower-level administrative positions, therefore the Committee finds it unnecessary to examine the matter in light of the requirements set out under Article 4.

9. As regards the question of the inherent requirements of a particular job in relation to political opinion, the Committee in paragraph 126 of its 1988 General Survey stated that "although it may be admissible, in the case of certain higher posts which are directly concerned with implementing government policy, for the responsible authorities generally to bear in mind the political opinions of those concerned, the same is not true when conditions of a political nature are laid down for all kinds of public employment in general or for certain other professions: for example, when there is a provision that those concerned must make a formal declaration of loyalty and remain loyal to the political principles of the regime in power".

10. With respect to the inherent requirements of teaching positions, the Committee observes that consideration of political opinion is justified only where the opinions are in conflict with the obligations normally attached to teaching duties such as objectivity and respect for the truth, or are in conflict with or prejudice the aims and principles professed by the schools to which the officers belong, such as in an institution for religious studies. In this regard, the Committee would draw the Government's attention to the findings of the 1987 Commission of Inquiry which considered the

special situation of teachers in the Federal Republic of Germany and the requirement of loyalty oaths conditioning their employment, both because the majority of cases brought to the Commission's attention concerned that profession and because of the emphasis placed by the Government of Germany on the special responsibility of teachers to uphold the free democratic basic order and on the vulnerability of pupils to be influenced by teachers. The Commission noted that only exceptionally had teachers been excluded from employment on the ground that they had tried to indoctrinate pupils or had otherwise misconducted themselves in their service. The Commission found that there could be no justification to assume that, because a teacher was active in a particular party or organization, he would behave in a manner incompatible with his duties. The Commission concluded that, in most of the cases concerning teachers brought to its attention, the measures taken in application of the duty of faithfulness to the Constitution had not in various respects remained within the limits of the inherent job requirements exception provided in the Convention.

11. The Committee observes from the information provided by FISE that the dismissals were based on the individual's former membership or position in certain political parties or organizations and not on any conduct falling within the scope of what should reasonably be considered as an inherent requirement of the profession of teaching. Teaching or administrative skills, competence or qualifications were not questioned in any of the cases. The Committee further observes that the broad bases for dismissal provided in paragraphs 4, in particular 4(1), and 5 of the Annex to the Reunification Treaty upon which the Government relies, would not appear to lay down sufficiently precise criteria to ensure that there is no discrimination on the ground of political opinion.

12. The Committee hopes that the Government will re-examine its application of paragraphs 4 and 5 of Annex 1 to the Reunification Treaty and its use of the questionnaires, and that action will be taken to ensure that only such restrictions on employment in the public service in the new Länder are maintained as correspond to the inherent requirements of particular jobs within the meaning of Article 1, paragraph 2, of the Convention or as can be justified under the terms of Article 4 of the Convention. In this respect the Committee invites the Government to refer to the considerations set out in the Recommendations of the 1987 Commission of Inquiry, paragraphs 585 to 593, based on their relevance and applicability to the recent measures taken in the public service in the new Länder following reunification. The Committee requests the Government to report on the measures contemplated or taken to ensure that employment in the public service in the new Länder will be based on the inherent requirements of the job, such as by laying down of guidelines or sufficiently precise and objective criteria. The Committee hopes that the Government will provide statistics or other available information regarding the number of public officials, including teachers, who have been dismissed from their posts in the new Länder following reunification, the criteria applied in determining removal, the procedural protections available and the manner in which the information in the questionnaires is reviewed and used to determine conditionality for employment in the public service. It also requests the Government to indicate the rights of appeal available for the decisions taken under paragraphs 4 and 5 of the Reunification Treaty.

Follow-up to the recommendations of the 1987 Commission of Inquiry concerning

equality of opportunity and treatment irrespective of political opinion

13. The Committee notes that the operation of the above-mentioned paragraphs of the Reunification Treaty has been extended to the end of 1993. It understands that the relevant federal legislation establishing the duty of faithfulness to the Constitution has become applicable in the new Länder. Recalling its direct request of 1991, the Committee hopes that the Government will provide information on the measures taken with a view to ensuring equality of opportunity and treatment in accordance with the Convention in the new Länder, more particularly as regards: (a) employment in the public service in those regions; and (b) access of persons from those regions to the federal public service and to the public service of the previously existing Länder of the Federal Republic.

14. In previous comments, the Committee had requested the Government to continue to supply information on any measures taken by the federal authorities and by the Länder of Baden Württemberg, Bavaria and Rhineland-Palatinate, in response to the recommendations of the 1987 Commission of Inquiry concerning the requirement of loyalty oaths conditioning employment in the public service of the Federal Republic of Germany. The Committee notes with interest from the Government's report that the systematic inquiries concerning the loyalty of applicants for positions in the public service have been abolished in Baden-Württemberg by a directive of the Ministry of the Interior dated 27 October 1990, in Bavaria by an announcement by the Government of the State and Land of Bavaria of 3 December 1991 and in the Rhineland-Palatinate by an administrative provision of the Ministry of the Interior of 27 December 1990. As a result, the Government reports that no systematic inquiries concerning applicants have been made in Germany since 1 January 1992. The Committee requests the Government to provide copies of the above provisions and directives and to continue to supply information on the practical application of the recommendations of the Commission of Inquiry.

Equality of opportunity and treatment on the ground of sex

15. The Committee notes that a draft law to bring about the equal status of men and women is currently being prepared by the Federal Ministry for Women and Young Persons and that, according to the Government, it will further improve sanctions against discrimination on the ground of sex in appointment and promotion in employment. The Committee hopes its previous comments will be taken into consideration in the drafting of the new legislation and that the Government will supply a copy of the text upon its adoption.

Equality of opportunity and treatment on grounds of race and national extraction

16. The Committee requests the Government to provide information on the policies, programmes or other measures taken or pursued with a view to eliminating discrimination and promoting equality of opportunity and treatment of all persons in employment and occupation on grounds of race and national extraction, in regard to access to training, access to and security of employment and terms and conditions of employment.

Requests

The Government is asked to report in detail for the period ending 30 June 1993.

Report date:30:06:1993

CEACR: Individual Observation concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 Germany (ratification: 1961) Published: 1994

Description:(CEACR Individual Observation)
Convention:C111
Country:(Germany)
Subject: **Equality of Opportunity and Treatment**
Display the document in: French Spanish

Published:1994
Subject classification: Non-discrimination (Employment and Occupation)
Subject classification: Women

The Committee notes the information supplied in the Government's report and appended documentation in reply to its previous observation and direct request.

Discrimination on the ground of political opinion

Public officials from the former German Democratic Republic (GDR)

1. The Committee recalls that the World Federation of Teachers' Unions (FISE) alleged that personnel in the public service education system in the former GDR had been arbitrarily dismissed from their teaching posts in violation of the Convention. From the documentation submitted by FISE detailing individual cases, it appeared that the officials in question had been dismissed or given notices of dismissal pursuant to the German Reunification Treaty, Chapter XIX, Section III, Annex I, paragraphs 4 or 5. The Committee further recalls that the Government had replied that these paragraphs established legal grounds for the dismissal of public servants of the former GDR. Paragraph 4 of the Treaty provides, inter alia, that ordinary termination of a work relationship in the public service is permissible if the worker does not meet the requirements, owing to inadequate specialist qualifications or personal unsuitability. Paragraph 5 provides that extraordinary termination of the work relationship is permissible based on serious reasons which exist when the worker: (1) has violated the principles of humanity or of the rule of law, especially the human rights guaranteed in the International Covenant on Civil and Political Rights or has violated the principles contained in the Universal Declaration of Human Rights; or (2) has been active for the former Ministry for State Security or the Department of National Security, and a continuation of the work relationship thereby appears unacceptable.

2. The Committee had observed that the broad bases for dismissals provided in paragraphs 4, in particular 4(1), and 5(1) and (2) did not appear to lay down sufficiently precise criteria to ensure that there was no discrimination on the ground of political opinion. It also observed that the dismissals of the public servants in question appeared to be based on their former membership or position in certain political parties or organizations, and not on any conduct falling within the scope of what should reasonably be considered as an inherent requirement of the profession of

teaching. The Committee accordingly had previously requested the Government to re-examine its application of paragraphs 4 and 5 of Annex 1 to the Reunification Treaty in order to ensure that only such restrictions on employment in the public service would be maintained as correspond to the inherent requirements of the job. It also requested the Government to provide statistics regarding the number of public officials, including teachers, who have been dismissed from their posts in the new Länder following reunification, the criteria applied, the procedural protections available and the rights of appeal.

3. In its latest report, the Government denies that political opinion has played a role in the dismissal of teachers following reunification. According to the Government, teachers who were dismissed had proved themselves to be unsuitable for continued teaching because they actively contributed, in the former GDR, to supporting the unjust regime to the disadvantage of the children entrusted to them, and to the disadvantage of their parents, in a way that exceeded their duties as public servants (for example: schools were intended to indoctrinate students; teachers had the task of assuring the future military generation; the school management had to give its opinion on applications made by parents for travel; the school management formed part of the reporting apparatus of the Ministry of State Security; teachers had to obtain information from the students about the political attitudes of their parents).

4. With respect to the application of paragraph 5 of Annex I to the Reunification Treaty, the Government emphasizes the extraordinary nature of the provision, and states that it may be implemented only for important reasons on the basis of proof in individual cases. As for the application of paragraph 4, the Government points out that the right of ordinary dismissal for, inter alia, deficient personal suitability, provided by this clause, ceased to have effect on 31 December 1993. According to the Government, prior "political incrimination" had been a reason for deeming a public official of the former GDR unsuitable under this section. In cases involving prior political incrimination, the Government considered that the more the person, by the assumption of certain functions, had identified himself with the unjust regime, the more incriminated he was, and the less reasonable it was for him to hold a position in the current administration.

5. The Government describes the practical implementation of paragraph 4 with reference to the new Land of Thuringia, including the guidelines issued on indicators of personal unsuitability for service as a teacher. According to the Government, in every case of ordinary or extraordinary dismissal, verification of the personal suitability for further employment, or that it is unreasonable to continue the employment, is determined by a hearing of the person concerned. The Government reports that, in the Land of Thuringia, it had to verify the suitability of a total of 36,000 teachers and educators from the former GDR after unification. Following several levels of hearings and personal interviews, 1,406 or 3.91 per cent were dismissed on account of personal unsuitability, under paragraph 4.

6. The Government reports that persons who have been dismissed have the right to bring their cases before the labour courts, the German Constitutional Court and the European Court of Human Rights. The Government also reported to the United Nations Committee on Economic, Social and Cultural Rights (UN document E/C.12/1993/SR.36, 7 December 1993) that, of the teachers who had been dismissed in Thuringia, 1,222 had appealed and 184 had accepted their dismissal. Of

the appeals, 583 had been settled amicably, 87 had been retained and the remaining 736 cases were still pending. One hundred and forty individual cases concerning teachers and public servants have been accepted for consideration by the Federal Constitutional Court.

7. The Committee notes the 31 December 1993 expiration date of the right to dismiss under paragraph 4 of Annex I to the Reunification Treaty. It also notes that the majority of dismissals of public servants from the former GDR, including teachers, had been based on that provision. The Committee must once again refer to its previous comments on the imprecise criteria of paragraphs 4 and 5. In addition, it observes that the indicators contained in the guidelines on how to apply the Treaty provisions in Thuringia also place an emphasis on the official's former position or organizational affiliations rather than on individual conduct. Thus, the Committee finds that use of the guidelines as criteria upon which to base dismissals would be insufficient to protect against discrimination based on political opinion. The Committee must stress the importance it places on objective judicial review available to the public officials. It hopes that such procedural protections will ensure that the dismissals which are affirmed in the public service are only those based on each individual's failure to meet the inherent requirements of the particular job, within the meaning of Article 1, paragraph 2, of the Convention. The Committee asks the Government to confirm that the right to dismiss under paragraph 4 has in fact lapsed, to confirm that the guidelines are no longer being used to determine suitability of teachers, to provide statistical information on the number of officials who have been dismissed in the new Länder other than Thuringia, and on the appeals filed against dismissals made under paragraph 4 of Annex I to the Reunification Treaty, and to supply copies of any court decisions or other rulings issued in such matters.

8. With respect to the continued application of paragraph 5 of Annex I to the Reunification Treaty, the Committee hopes that the Government will ensure that discrimination in dismissals and employment criteria based on political opinion does not occur in violation of Article 1, paragraph 1, of the Convention. It further hopes that only such restrictions on employment in the public service in the new Länder are maintained, as correspond to the inherent requirements of the job, within the meaning of Article 1, paragraph 2, or as can be justified under the terms of Article 4 of the Convention. The Committee requests the Government to keep it informed of any dismissals or refusals to hire based on the application of paragraph 5, in particular subsection 2, of any guidelines developed by the new Länder to implement the section, of the interpretation given to the provision concerning who has been active for the Minister of State Security, as well as of any court decisions in which the application of paragraph 5 has been challenged.

9. Concerning the old Länder in the western part of the country, the Committee notes that section I.2.1.3 of the Bavarian Government's Announcement of 3 December 1991 provides that no one is fit for public service who has violated the principles of humanity or rule of law, or who has been active for the Minister of State Security or the Office of National Security in the former GDR. The Committee notes the similarity of this provision to paragraph 5 of Annex I to the Reunification Treaty. It requests the Government to indicate the manner in which this provision is applied and the interpretation given to the phrase "who has been active for the Minister of State Security". It also requests the Government to indicate whether any other old Länder

have adopted similar policies towards former GDR public officials and, if so, to provide the information requested above.

10. The Committee also notes that section II.1 of the Bavarian Announcement of 3 December 1991 provides that an applicant for public service must fill out the questionnaire in Appendix 2 and sign the declaration in Appendix 3. The Committee requests the Government to supply copies of the questionnaire and the declaration and the list of the most important extremist organizations or extremist-influenced organizations, and of the most important mass or social organizations, of the former GDR up to 1989-90, to which the Announcement refers.

11. The Committee requests the Government to indicate any programmes of vocational training or retraining, or other measures to facilitate employment, which have been provided to those officials who have been dismissed from public service, as a result of the application of paragraphs 4 or 5 of the Annex to the Reunification Treaty, and the results of such programmes.

Duty of faithfulness

12. Recalling its previous comments concerning the follow-up to the recommendations of the 1987 Commission of Inquiry, the Committee notes that, while systematic inquiries concerning the loyalty of applicants for positions in the public service have been abolished in Baden-Württemberg and the Rhineland-Palatinate, public officials are still required to sign the declaration of loyalty. The Committee therefore continues to ask the Government to supply copies of any directives issued by the Länder or federal Government on this topic, and to supply information on any cases in which a public official has been dismissed or denied employment based on breach of the duty of faithfulness.

Equality irrespective of race and national extraction

13. Noting the information on the provision of vocational guidance and training for foreigners, the Committee again requests the Government to provide information on the policies, programmes or other measures taken or contemplated with a view to eliminating discrimination and promoting equality of opportunity and treatment of all persons in employment and occupation irrespective of race, colour or national extraction. It would also welcome information on any measures taken to foster understanding and tolerance among the various ethnic groups of the population.

Equality between men and women

14. The Committee notes with interest the adoption, on 13 July 1993, of the Act on Uniformization and Flexibilization of the Legislation on Working Time (the Working Time Act), which provides for the promulgation of new regulations to replace the prohibition of, and the restriction on, the employment of women in various jobs and sectors, such as in the building industry and on vehicles. It hopes that the new regulations will fully apply the principle of equality of opportunity and treatment, and that any special measures of protection will be adopted after consultation with the representative employers' and workers' groups in accordance with Article 5 of the Convention. The Committee asks the Government to provide information on the contents of such regulations, and to supply copies once they are issued.

15. The Committee notes with interest that commissioners for women's affairs have been appointed in all the highest federal administrations. It would be grateful if the Government would provide information on the duties and activities of these commissioners and an assessment of the impact of their work in relation to promoting the principle contained in the Convention.

16. From the detailed information supplied by the Government, the Committee notes the efforts undertaken in the fields of education, training, occupation and employment to help broaden the spectrum of occupational choice for women workers in both the new and the old Länder. It also notes, however, that in spite of these efforts, the supply of training posts in undertakings lags behind demand, particularly for young women in the new Länder. The Committee requests the Government to continue to provide information, including statistical data comparable by Länder, if possible, on the various measures taken to promote equal opportunity for women in employment through vocational guidance, training and placement, and in particular on the various measures taken to assist young women in the new Länder to obtain training posts.

17. Noting that several drafts of a law to achieve equality between men and women have been prepared, the Committee requests the Government to indicate whether this law has been adopted and, if so, to supply a copy of the text with its next report.

International Labour Conference
81st Session 1994

Report III
(Part 4A)

Third item on the agenda:
Information and reports on the application
of Conventions and Recommendations

Report of the Committee of Experts on the Application of Conventions and Recommendations

(Articles 19, 22 and 35 of the Constitution)

General report
and observations concerning particular countries

International Labour Office Geneva

Discrimination on the ground of political opinion

Public officials from the former German Democratic Republic (GDR)

1. The Committee recalls that the World Federation of Teachers' Unions (FISE) alleged that personnel in the public service education system in the former GDR had been arbitrarily dismissed from their teaching posts in violation of the Convention. From the documentation submitted by FISE detailing individual cases, it appeared that the officials in question had been dismissed or given notices of dismissal pursuant to the German Reunification Treaty, Chapter XIX, Section III, Annex I, paragraphs 4 or 5. The Committee further recalls that the Government had replied that these paragraphs established legal grounds for the dismissal of public servants of the former GDR. Paragraph 4 of the Treaty provides, inter alia, that ordinary termination of a work relationship in the public service is permissible if the worker does not meet the requirements, owing to inadequate specialist qualifications or personal unsuitability. Paragraph 5 provides that extraordinary termination of the work relationship is permissible based on serious reasons which exist when the worker: (1) has violated the principles of humanity or of the rule of law, especially the human rights guaranteed in the International Covenant on Civil and Political Rights or has violated the principles contained in the Universal Declaration of Human Rights; or (2) has been active for the former Ministry for State Security or the Department of National Security, and a continuation of the work relationship thereby appears unacceptable.

2. The Committee had observed that the broad bases for dismissals provided in paragraphs 4, in particular 4(1), and 5(1) and (2) did not appear to lay down sufficiently precise criteria to ensure that there was no discrimination on the ground of political opinion. It also observed that the dismissals of the public servants in question appeared to be based on their former membership or position in certain political parties or organizations, and not on any conduct falling within the scope of what should reasonably be considered as an inherent requirement of the profession of teaching. The Committee accordingly had previously requested the Government to re-examine its application of paragraphs 4 and 5 of Annex 1 to the Reunification Treaty in order to ensure that only such restrictions on employment in the public service would be maintained as correspond to the inherent requirements of the job. It also requested the Government to provide statistics regarding the number of public officials, including teachers, who have been dismissed from their posts in the new Länder following reunification, the criteria applied, the procedural protections available and the rights of appeal.

3. In its latest report, the Government denies that political opinion has played a role in the dismissal of teachers following reunification. According to the Government, teachers who were dismissed had proved themselves to be unsuitable for continued teaching because they actively contributed, in the former GDR, to supporting the unjust regime to the disadvantage of the children

entrusted to them, and to the disadvantage of their parents, in a way that exceeded their duties as public servants (for example: schools were intended to indoctrinate students; teachers had the task of assuring the future military generation; the school management had to give its opinion on applications made by parents for travel; the school management formed part of the reporting apparatus of the Ministry of State Security; teachers had to obtain information from the students about the political attitudes of their parents).

4. With respect to the application of paragraph 5 of Annex I to the Reunification Treaty, the Government emphasizes the extraordinary nature of the provision, and states that it may be implemented only for important reasons on the basis of proof in individual cases. As for the application of paragraph 4, the Government points out that the right of ordinary dismissal for, inter alia, deficient personal suitability, provided by this clause, ceased to have effect on 31 December 1993. According to the Government, prior "political incrimination" had been a reason for deeming a public official of the former GDR unsuitable under this section. In cases involving prior political incrimination, the Government considered that the more the person, by the assumption of certain functions, had identified himself with the unjust regime, the more incriminated he was, and the less reasonable it was for him to hold a position in the current administration.

5. The Government describes the practical implementation of paragraph 4 with reference to the new Land of Thuringia, including the guidelines issued on indicators of personal unsuitability for service as a teacher. According to the Government, in every case of ordinary or extraordinary dismissal, verification of the personal suitability for further employment, or that it is unreasonable to continue the employment, is determined by a hearing of the person concerned. The Government reports that, in the Land of Thuringia, it had to verify the suitability of a total of 36,000 teachers and educators from the former GDR after unification. Following several levels of hearings and personal interviews, 1,406 or 3.91 per cent were dismissed on account of personal unsuitability, under paragraph 4.

6. The Government reports that persons who have been dismissed have the right to bring their cases before the labour courts, the German Constitutional Court and the European Court of Human Rights. The Government also reported to the United Nations Committee on Economic, Social and Cultural Rights (UN document E/C.12/1993/SR.36, 7 December 1993) that, of the teachers who had been dismissed in Thuringia, 1,222 had appealed and 184 had accepted their dismissal. Of the appeals, 583 had been settled amicably, 87 had been retained and the remaining 736 cases were still pending. One hundred and forty individual cases concerning teachers and public servants have been accepted for consideration by the Federal Constitutional Court.

7. The Committee notes the 31 December 1993 expiration date of the right to dismiss under paragraph 4 of Annex I to the Reunification Treaty. It also notes that the majority of dismissals of public servants from the former GDR, including teachers, had been based on that provision. The Committee must once again refer to its previous comments on the imprecise criteria of paragraphs 4 and 5. In addition, it observes that the indicators contained in the guidelines

on how to apply the Treaty provisions in Thuringia also place an emphasis on the official's former position or organizational affiliations rather than on individual conduct. Thus, the Committee finds that use of the guidelines as criteria upon which to base dismissals would be insufficient to protect against discrimination based on political opinion. The Committee must stress the importance it places on objective judicial review available to the public officials. It hopes that such procedural protections will ensure that the dismissals which are affirmed in the public service are only those based on each individual's failure to meet the inherent requirements of the particular job, within the meaning of Article 1, paragraph 2, of the Convention. The Committee asks the Government to confirm that the right to dismiss under paragraph 4 has in fact lapsed, to confirm that the guidelines are no longer being used to determine suitability of teachers, to provide statistical information on the number of officials who have been dismissed in the new Länder other than Thuringia, and on the appeals filed against dismissals made under paragraph 4 of Annex I to the Reunification Treaty, and to supply copies of any court decisions or other rulings issued in such matters.

8. With respect to the continued application of paragraph 5 of Annex I to the Reunification Treaty, the Committee hopes that the Government will ensure that discrimination in dismissals and employment criteria based on political opinion does not occur in violation of Article 1, paragraph 1, of the Convention. It further hopes that only such restrictions on employment in the public service in the new Länder are maintained, as correspond to the inherent requirements of the job, within the meaning of Article 1, paragraph 2, or as can be justified under the terms of Article 4 of the Convention. The Committee requests the Government to keep it informed of any dismissals or refusals to hire based on the application of paragraph 5, in particular subsection 2, of any guidelines developed by the new Länder to implement the section, of the interpretation given to the provision concerning who has been active for the Minister of State Security, as well as of any court decisions in which the application of paragraph 5 has been challenged.

9. Concerning the old Länder in the western part of the country, the Committee notes that section I.2.1.3 of the Bavarian Government's Announcement of 3 December 1991 provides that no one is fit for public service who has violated the principles of humanity or rule of law, or who has been active for the Minister of State Security or the Office of National Security in the former GDR. The Committee notes the similarity of this provision to paragraph 5 of Annex I to the Reunification Treaty. It requests the Government to indicate the manner in which this provision is applied and the interpretation given to the phrase "who has been active for the Minister of State Security". It also requests the Government to indicate whether any other old Länder have adopted similar policies towards former GDR public officials and, if so, to provide the information requested above.

10. The Committee also notes that section II.1 of the Bavarian Announcement of 3 December 1991 provides that an applicant for public service must fill out the questionnaire in Appendix 2 and sign the declaration in Appendix 3. The Committee requests the Government to

supply copies of the questionnaire and the declaration and the list of the most important extremist organizations or extremist-influenced organizations, and of the most important mass or social organizations, of the former GDR up to 1989-90, to which the Announcement refers.

11. The Committee requests the Government to indicate any programmes of vocational training or retraining, or other measures to facilitate employment, which have been provided to those officials who have been dismissed from public service, as a result of the application of paragraphs 4 or 5 of the Annex to the Reunification Treaty, and the results of such programmes.

Duty of faithfulness

12. Recalling its previous comments concerning the follow-up to the recommendations of the 1987 Commission of Inquiry, the Committee notes that, while systematic inquiries concerning the loyalty of applicants for positions in the public service have been abolished in Baden-Württemberg and the Rhineland-Palatinate, public officials are still required to sign the declaration of loyalty. The Committee therefore continues to ask the Government to supply copies of any directives issued by the Länder or federal Government on this topic, and to supply information on any cases in which a public official has been dismissed or denied employment based on breach of the duty of faithfulness.

Equality irrespective of race and national extraction

13. Noting the information on the provision of vocational guidance and training for foreigners, the Committee again requests the Government to provide information on the policies, programmes or other measures taken or contemplated with a view to eliminating discrimination and promoting equality of opportunity and treatment of all persons in employment and occupation irrespective of race, colour or national extraction. It would also welcome information on any measures taken to foster understanding and tolerance among the various ethnic groups of the population.

Equality between men and women

14. The Committee notes with interest the adoption, on 13 July 1993, of the Act on Uniformization and Flexibilization of the Legislation on Working Time (the Working Time Act), which provides for the promulgation of new regulations to replace the prohibition of, and the restriction on, the employment of women in various jobs and sectors, such as in the building industry and on vehicles. It hopes that the new regulations will fully apply the principle of equality of opportunity and treatment, and that any special measures of protection will be adopted after consultation with the representative employers' and workers' groups in accordance with Article 5 of the Convention. The Committee asks the Government to provide information on the contents of such regulations, and to supply copies once they are issued.

http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=3337&chapter=6&query=%28C111%29+%40ref+%2B+%28Germany%29+%40ref&highlight=&querytype=bool&context=0

CEACR: Individual Observation concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 Germany (ratification: 1961) Published: 1996

Description:(CEACR Individual Observation)
Convention:C111
Country:(Germany)
Subject: **Equality** **of** **Opportunity** **and** **Treatment**
Display the document in: French Spanish

Published:1996
Subject classification: Non-discrimination (Employment and Occupation)
Subject classification: Women

1. The Committee takes note of the Government's report and its annexed Länder higher court decisions and legal texts.

2. Discrimination on the ground of sex. The Committee notes with satisfaction the adoption, and entry into force on 1 September 1994, of the Act on the advancement of women and the compatibility of marriage and occupation in the federal administration and in the federal courts (known as the Second Equality Act). In particular, the Committee notes that federal administrative bodies and public undertakings must: issue a plan for the advancement of women every three years; compile annual statistics on the numbers of men and women in a number of areas for submission to the supreme federal authorities; draft vacancy advertisements in gender-neutral terms unless one or the other sex is an indispensable precondition for the job advertised; increase the proportion of women in under-represented areas subject to the precedence of suitability, capability and occupational performance; encourage women's further training to facilitate career advancement; where there is a regular staff of at least 200 persons, have women's representatives (or a "confidential adviser" if no such representative) to promote and supervise the application of the new Act, including the lodging of complaints with the directorate. The Act also amends certain legislation applicable to both the public and the private sectors: it clarifies the extent of monetary compensation in civil actions based on sex discrimination; and introduces protection against sexual harassment at the workplace including a complaints procedure and the need to include sexual harassment sensitization in vocational and further training courses offered to public servants.

3. Noting that section 14 of the Act provides that the Government shall submit to Parliament every three years a progress report on the situation of women in these administrations and the courts covering the implementation of the Act, the Committee requests the Government to supply a copy of the first report when due in 1997. In the meantime, the Committee requests the Government to inform it, in its next report, of the impact of this legislation on the promotion of equality between the sexes in access to vocational training, access to employment, and terms and conditions of employment in the federal public sector, and of any cases reported under the sexual harassment provisions.

4. The Committee also notes the decision, on 17 October 1995, of the European

Court of Justice in the case of Kalanke v. City of Bremen, in which the Court found that national rules which automatically give women priority for promotion where candidates of different sexes are equally qualified go beyond promoting equal opportunities and overstep the limits of the exception in article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion. The Committee notes that the relevant legislation contained an automatic and rigid quota of 50 per cent to be applied across all occupations including all educational and qualification levels. The Committee also notes that, in that case, the man and woman concerned had equal qualifications. Please indicate how this ruling has affected the Government's policies in this field and any action which may be proposed in respect of it.

5. Discrimination on the ground of political opinion. The Committee recalls the recommendations of the 1987 Commission of Inquiry that the measures relating to the civil service's duty of faithfulness to the free democratic basic order be re-examined, so that only such restrictions on employment in the public service are maintained as correspond to the inherent requirements of particular jobs within the meaning of Article 1, paragraph 2, of the Convention or can be justified under Article 4. In its most recent observation on this point, the Committee asked the Government to supply information on any cases in which a public official had been dismissed or an applicant denied employment based on breach of the duty of faithfulness; and given that certain Länder had abolished systematic inquiries into the loyalty of applicants for public service jobs but still required public officials to sign the declaration of loyalty, the Committee asked for copies of any directives showing the criteria used. The Government reports that the inquiries have now been abolished in all the old Länder and at the federal level, but that applicants are instructed on the principle concerning loyalty to the Constitution and must sign the declaration. In Bavaria, the Land Government's Announcement of 3 December 1991 contains guidelines on service loyalty requirements with the declaration as an annex and in that Land, between 1 July 1990 and 30 June 1994, nine applicants were rejected for insufficient loyalty, five legal trainees who were refused the status of civil servant were nevertheless allowed to complete their training, and there were no dismissal cases.

6. Moreover, it takes note of the decision of 26 September 1995 of the European Court of Human Rights in the case of Vogt v. Germany which held that the Land of Lower Saxony had breached the European Convention on Human Rights when it dismissed a permanent civil servant (who was mentioned in the ILO 1987 Commission of Inquiry report on this Convention) from a teaching post in the 1980s because she was a Communist Party member. In that case, following the 1990 repeal of the Land legislation in question (Decree on the employment of extremists in the Lower Saxony civil service) and the issuing of regulations to deal with earlier cases of political discrimination, Ms. Vogt was reinstated in her post as a teacher for that Land's education authority. The Committee requests the Government to inform it of the repercussions of this decision on the employment or re-employment opportunities of dismissed civil servants, provided that they satisfy the recruitment and qualification requirements.

7. The Committee has also been examining for a number of years the discriminatory nature of paragraphs 4 and 5 of Annex I of the German Reunification Treaty, Chapter XIX, section III, which had allegedly been used to dismiss public servants - in

particular teachers - of the former GDR on the ground of their political opinion and activities. Paragraph 4 of the Treaty provides, inter alia, that ordinary termination of a work relationship in the public service is permissible if the worker does not meet the requirements, owing to inadequate specialist qualifications or personal unsuitability. Paragraph 5 provides that extraordinary termination of the work relationship is permissible based on serious reasons which exist when the worker: (1) has violated the principles of humanity or of the rule of law, especially the human rights guaranteed in the International Covenant on Civil and Political Rights or has violated the principles contained in the Universal Declaration of Human Rights; or (2) has been active for the former Ministry for State Security or the Department of National Security, and a continuation of the work relationship thereby appears unacceptable. The Committee notes with interest the Government's confirmation that paragraph 4 ceased to have effect as of 31 December 1993 and that there have been no dismissals under that provision subsequently.

8. The statistics supplied by the Government for paragraph 4 dismissals in the new Länder when it was in force show that: in Mecklenburg-Western Pomerania there were 1,090 notices of dismissal; in Saxony, there were about 4,800 notices of dismissal; in Brandenburg, 456 notices. It also notes from the copies of appeal court decisions supplied that, in some cases, dismissal under paragraph 4 was confirmed on the basis that a liberal constitutional state could not tolerate former Communist Party and state functionaries as its representatives unless they placed their dissent on record or relinquished their position of the time, thereby indicating that they had severed their links at that time with the former regime. In other cases the dismissal was revoked given that the facts proved the personal suitability of the public servant for the current post. The Committee would appreciate being kept informed of the number of appeals which succeed or fail in these, and in other new Länder.

9. Regarding paragraph 5's provision of extraordinary termination of the work relationship for serious reasons when the worker: (1) has violated the principles of humanity or of the rule of law; or (2) has been active for the former Ministry for State Security or the Department of National Security, the Committee recalls its hope that use would be made of this provision only in accordance with Article 1, paragraph 2, or Article 4, of the Convention. The Committee notes the Government's repeated assertion that this provision does not contravene the Convention and that the Government relies on Article 1, paragraph 2, of the Convention, arguing that persons who had supported the former unjust system are not suitable for employment in a state under the rule of law and the Convention should not be used to protect them. The statistics provided show that: in Mecklenburg-Western Pomerania there have been 512 dismissals; in Saxony, 860; in Brandenburg, 439. From the appeal court ruling supplied it appears that the paragraph 5 dismissal was upheld given the inherent requirements of the post. The Committee would again appreciate being informed of the outcome of any pending appeals.

10. The Committee recalls in this connection the Commission of Inquiry's recommendation that it is important not to attribute excessive importance to activities undertaken at a time when applicants were not bound by any public service relationship and to provide an opportunity for them to demonstrate, once they are in such a relationship, that they will respect the obligations attaching thereto.

11. With regard to its request for information on any programmes for vocational

training or retraining of officials who had been dismissed from public service as a result of paragraphs 4 or 5 of Annex I of the Reunification Treaty, the Committee notes that the Government provides a copy of the Land of Brandenburg's directives for the granting of "interim assistance" for training and for establishing a means of livelihood for such persons; whereas it states that three Länder (Mecklenburg-Western Pomerania, Saxony and Thuringia) have announced that such measures have not been introduced. The Committee asks the Government to inform it of any developments in the approach of these Länder to this issue.

12. Concerning the old Länder in the western part of the country where similar criteria to paragraph 5 of Annex I of the Reunification Treaty have been adopted in the form of announcements and guidelines for civil service employment, the Committee had requested more information on the application of the Bavarian Announcement of 3 December 1991 and examples of other recent texts of other Länder, including the questionnaires which civil servants or applicants were required to sign. The Committee notes from the various texts provided (Baden-Wurtenburg, Bavaria, Hesse, Mecklenburg-West Pomerania, Rhineland-Palatinate, Saxony, Schleswig-Holstein and Thuringia) that civil service applicants are to be informed in writing of the obligation of allegiance to the Constitution, and the authority responsible for appointments must proceed to establish the allegiance, failing which, based on the facts available or the applicant's refusal to sign the declaration of loyalty annexed to the written notice, the applicant shall be refused employment. According to some of the texts, for applicants from the new Länder, the examination of constitutional allegiance requires additional verification of: (1) whether they were involved in violations of the principles of humanity or the rule of law; (2) whether they carried out official or unofficial functions for the Ministry of State Security or the Department of National Security; and (3) whether they had held senior posts in the former GDR system in particular in the Socialist Unity Party (SED) and in mass organizations linked to political objectives.

13. The Committee would appreciate receiving information on how these various state-level texts are being implemented in practice so that discrimination on the basis of political opinion is not possible both in entry to the Länder public services and in the terms and conditions of employment of civil servants.

14. The Committee is addressing a request directly to the Government on other points.

International Labour Conference
83rd Session 1996

Telefax
Fax-Nr.: 040 - 362124
An: RA Dr. Klaus Dammann
Von: Klaus Körcher DPG
Datum: 13.02.97 Seiten: 10

Post-it® Notes 7669

Report III
(Part 4A)

Third item on the agenda:
Information and reports on the application
of Conventions and Recommendations

Report of the Committee of Experts on the Application of Conventions and Recommendations

(articles 19, 22 and 35 of the Constitution)

General report
and observations concerning particular countries

governing boards of public companies or bodies, or to posts and functions related to influencing public opinion and education of future generations).

2. The Committee recalls that it had also made comments in previous observations in relation to discrimination based on political opinion arising from section 18 of Act No. 148 of 1980 respecting the power of the press, which restricted newspaper publication or ownership on the basis of political grounds. The Committee recalls the Government's indication — in a letter of 28 January 1992 — that this Act would be repealed on the occasion of the revision of the law of the press. The Committee also notes from the Government's most recent report that the repeal of Act No. 33, mentioned above, means that the categories of persons whose right to publish or own newspapers was restricted due to their political beliefs no longer exist. The Government states that the national legislation has thus been brought into conformity with the Convention on this point. The Committee concludes from this that section 18 of Act No. 148 is consequently devoid of content and asks the Government to confirm that section 18 has no effect, and to inform it of any measures taken to remove section 18 from the press law. The Committee also asks the Government to indicate whether Presidential Decree No. 214 of 1978 concerning the principles of the protection of the home front and social peace is still in force.

3. With regard to the employment situation of women, the Committee notes that the Government denies that the Ministry of Manpower and Training had any intention to encourage women to stay at home. On the contrary, the Government encourages women to enter the labour market, with due consideration to their circumstances and providing the necessary care they need through the establishment of nurseries and the granting of child-care leave without loss of jobs. The Government adds that it will provide, in its next report, statistics on the number of secondary schools where women receive training in "household" work, and on the number of women holding high-level posts, as well as details on the Five-year Plan for Development (1992-97). The Committee looks forward to receiving this data. It repeats its request to the Government for information on measures taken in the area of vocational training irrespective of sex, particularly on vocational guidance criteria used to assess women's skills and interests in an effort to avoid stereotyping of training into "typically male" or "typically female" trades or occupations.

4. The Committee again asks for information on the adoption of the revised Labour Code, an initial version of which was completed with the technical assistance of the Office in 1994.

5. The Committee is addressing a direct request to the Government on other points.

Germany (ratification: 1961)

1. The Committee takes note of the Government's report and its annexed Länder higher court decisions and legal texts.

2. *Discrimination on the ground of sex.* The Committee notes with satisfaction the adoption, and entry into force on 1 September 1994, of the Act on the advancement of women and the compatibility of marriage and occupation in the federal administration and in the federal courts (known as the Second Equality Act). In particular, the Committee notes that federal administrative bodies and public undertakings must: issue a plan for the advancement of women every three years; compile annual statistics on the numbers of men and women in a number of areas for submission to the supreme federal authorities; draft vacancy advertisements in gender-neutral terms unless one or the other sex is an indispensable precondition for the job advertised; increase the proportion of

women in under-represented areas subject to the precedence of suitability, capability and occupational performance; encourage women's further training to facilitate career advancement; where there is a regular staff of at least 200 persons, have women's representatives (or a "confidential adviser" if no such representative) to promote and supervise the application of the new Act, including the lodging of complaints with the directorate. The Act also amends certain legislation applicable to both the public and the private sectors: it clarifies the extent of monetary compensation in civil actions based on sex discrimination; and introduces protection against sexual harassment at the workplace including a complaints procedure and the need to include sexual harassment sensitization in vocational and further training courses offered to public servants.

3. Noting that section 14 of the Act provides that the Government shall submit to Parliament every three years a progress report on the situation of women in these administrations and the courts covering the implementation of the Act, the Committee requests the Government to supply a copy of the first report when due in 1997. In the meantime, the Committee requests the Government to inform it, in its next report, of the impact of this legislation on the promotion of equality between the sexes in access to vocational training, access to employment, and terms and conditions of employment in the federal public sector, and of any cases reported under the sexual harassment provisions.

4. The Committee also notes the decision, on 17 October 1995, of the European Court of Justice in the case of *Kalanke v. City of Bremen*, in which the Court found that national rules which automatically give women priority for promotion where candidates of different sexes are equally qualified go beyond promoting equal opportunities and overstep the limits of the exception in article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion. The Committee notes that the relevant legislation contained an automatic and rigid quota of 50 per cent to be applied across all occupations including all educational and qualification levels. The Committee also notes that, in that case, the man and woman concerned had equal qualifications. Please indicate how this ruling has affected the Government's policies in this field and any action which may be proposed in respect of it.

5. *Discrimination on the ground of political opinion.* The Committee recalls the recommendations of the 1987 Commission of Inquiry that the measures relating to the civil service's duty of faithfulness to the free democratic basic order be re-examined, so that only such restrictions on employment in the public service are maintained as correspond to the inherent requirements of particular jobs within the meaning of *Article 1, paragraph 2, of the Convention* or can be justified under *Article 4*. In its most recent observation on this point, the Committee asked the Government to supply information on any cases in which a public official had been dismissed or an applicant denied employment based on breach of the duty of faithfulness; and given that certain Länder had abolished systematic inquiries into the loyalty of applicants for public service jobs but still required public officials to sign the declaration of loyalty, the Committee asked for copies of any directives showing the criteria used. The Government reports that the inquiries have now been abolished in all the old Länder and at the federal level, but that applicants are instructed on the principle concerning loyalty to the Constitution and must sign the declaration. In Bavaria, the Land Government's Announcement of 3 December 1991 contains guidelines on service loyalty requirements with the declaration as an annex and in that Land, between 1 July 1990 and 30 June 1994, nine applicants were rejected for insufficient loyalty, five legal trainees who were refused the status of civil servant were nevertheless allowed to complete their training, and there were no dismissal cases.

6. Moreover, it takes note of the decision of 26 September 1995 of the European Court of Human Rights in the case of *Vogt v. Germany* which held that the Land of Lower Saxony had breached the European Convention on Human Rights when it dismissed a permanent civil servant (who was mentioned in the ILO 1987 Commission of Inquiry report on this Convention) from a teaching post in the 1980s because she was a Communist Party member. In that case, following the 1990 repeal of the Land legislation in question (Decree on the employment of extremists in the Lower Saxony civil service) and the issuing of regulations to deal with earlier cases of political discrimination, Ms. Vogt was reinstated in her post as a teacher for that Land's education authority. The Committee requests the Government to inform it of the repercussions of this decision on the employment or re-employment opportunities of dismissed civil servants, provided that they satisfy the recruitment and qualification requirements.

7. The Committee has also been examining for a number of years the discriminatory nature of paragraphs 4 and 5 of Annex I of the German Reunification Treaty, Chapter XIX, section III, which had allegedly been used to dismiss public servants — in particular teachers — of the former GDR on the ground of their political opinion and activities. Paragraph 4 of the Treaty provides, inter alia, that ordinary termination of a work relationship in the public service is permissible if the worker does not meet the requirements, owing to inadequate specialist qualifications or personal unsuitability. Paragraph 5 provides that extraordinary termination of the work relationship is permissible based on serious reasons which exist when the worker: (1) has violated the principles of humanity or of the rule of law, especially the human rights guaranteed in the International Covenant on Civil and Political Rights or has violated the principles contained in the Universal Declaration of Human Rights; or (2) has been active for the former Ministry for State Security or the Department of National Security, and a continuation of the work relationship thereby appears unacceptable. The Committee notes with interest the Government's confirmation that paragraph 4 ceased to have effect as of 31 December 1993 and that there have been no dismissals under that provision subsequently.

8. The statistics supplied by the Government for paragraph 4 dismissals in the new Länder when it was in force show that: in Mecklenburg-Western Pomerania there were 1,090 notices of dismissal; in Saxony, there were about 4,800 notices of dismissal; in Brandenburg, 456 notices. It also notes from the copies of appeal court decisions supplied that, in some cases, dismissal under paragraph 4 was confirmed on the basis that a liberal constitutional state could not tolerate former Communist Party and state functionaries as its representatives unless they placed their dissent on record or relinquished their position of the time, thereby indicating that they had severed their links at that time with the former regime. In other cases the dismissal was revoked given that the facts proved the personal suitability of the public servant for the current post. The Committee would appreciate being kept informed of the number of appeals which succeed or fail in these, and in other new Länder.

9. Regarding paragraph 5's provision of extraordinary termination of the work relationship for serious reasons when the worker: (1) has violated the principles of humanity or of the rule of law; or (2) has been active for the former Ministry for State Security or the Department of National Security, the Committee recalls its hope that use would be made of this provision only in accordance with *Article 1, paragraph 2, or Article 4, of the Convention*. The Committee notes the Government's repeated assertion that this provision does not contravene the Convention and that the Government relies on Article 1, paragraph 2, of the Convention, arguing that persons who had supported

the former unjust system are not suitable for employment in a state under the rule of law and the Convention should not be used to protect them. The statistics provided show that: in Mecklenburg-Western Pomerania there have been 512 dismissals; in Saxony, 860; in Brandenburg, 439. From the appeal court ruling supplied it appears that the paragraph 5 dismissal was upheld given the inherent requirements of the post. The Committee would again appreciate being informed of the outcome of any pending appeals.

10. The Committee recalls in this connection the Commission of Inquiry's recommendation that it is important not to attribute excessive importance to activities undertaken at a time when applicants were not bound by any public service relationship and to provide an opportunity for them to demonstrate, once they are in such a relationship, that they will respect the obligations attaching thereto.

11. With regard to its request for information on any programmes for vocational training or retraining of officials who had been dismissed from public service as a result of paragraphs 4 or 5 of Annex I of the Reunification Treaty, the Committee notes that the Government provides a copy of the Land of Brandenburg's directives for the granting of "interim assistance" for training and for establishing a means of livelihood for such persons; whereas it states that three Länder (Mecklenburg-Western Pomerania, Saxony and Thuringia) have announced that such measures have not been introduced. The Committee asks the Government to inform it of any developments in the approach of these Länder to this issue.

12. Concerning the old Länder in the western part of the country where similar criteria to paragraph 5 of Annex I of the Reunification Treaty have been adopted in the form of announcements and guidelines for civil service employment, the Committee had requested more information on the application of the Bavarian Announcement of 3 December 1991 and examples of other recent texts of other Länder, including the questionnaires which civil servants or applicants were required to sign. The Committee notes from the various texts provided (Baden-Wurtenburg, Bavaria, Hesse, Mecklenburg-West Pomerania, Rhineland-Palatinate, Saxony, Schleswig-Holstein and Thuringia) that civil service applicants are to be informed in writing of the obligation of allegiance to the Constitution, and the authority responsible for appointments must proceed to establish the allegiance, failing which, based on the facts available or the applicant's refusal to sign the declaration of loyalty annexed to the written notice, the applicant shall be refused employment. According to some of the texts, for applicants from the new Länder, the examination of constitutional allegiance requires additional verification of: (1) whether they were involved in violations of the principles of humanity or the rule of law; (2) whether they carried out official or unofficial functions for the Ministry of State Security or the Department of National Security; and (3) whether they had held senior posts in the former GDR system in particular in the Socialist Unity Party (SED) and in mass organizations linked to political objectives.

13. The Committee would appreciate receiving information on how these various state-level texts are being implemented in practice so that discrimination on the basis of political opinion is not possible both in entry to the Länder public services and in the terms and conditions of employment of civil servants.

14. The Committee is addressing a request directly to the Government on other points.

http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=4160&chapter=6&query=%28C111%29+%40ref+%2B+%28Germany%29+%40ref&highlight=&querytype=bool&context=0

CEACR: Individual Observation concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 Germany (ratification: 1961) Published: 1998

Description:(CEACR Individual Observation)
Convention:C111
Country:(Germany)
Subject classification: Non-discrimination (Employment and Occupation)
Subject classification: Women
Subject: **Equality of Opportunity and Treatment**
Display the document in: French Spanish

1. The Committee takes note of the Government's reports and of the numerous documents annexed to them.

2. Discrimination on the ground of sex. Further to its previous observation requesting information on the implementation (in access to vocational training, access to employment and terms and conditions of employment in the federal administration) of the Second Equality Act, in particular on section 14 (three-yearly report to be tabled in Parliament documenting progress on the situation of women in the federal administration and public undertakings), the Committee notes that the first report under section 14, for the period 1996-98, will be transmitted as soon as it is available. It notes with interest from the Government's third report (1992-94) on the situation of women in the federal administration (presented to Parliament under the former legislation in November 1996) that, while the actual total number of civil servants has diminished, the trend to increased percentages of women in higher grades and posts of responsibility continues. At the same time, it notes with concern that, while the actual number of public officials has slightly increased, the percentage of women in the highest band (Höherer Dienst) has dropped from 51.4 per cent in 1990-91 to 39.1 per cent in 1993-94, implying that men are filling the new higher level public employee (Angestellte) posts. The third report shows that family-friendly policies continue to expand with a view to enabling women's career progression, and states that the next report will be tabled in accordance with the Second Equality Act. The Committee looks forward to receiving, with the Government's next report, the document tabled in Parliament on the impact of the Second Equality Act and any other information on its application in practice.

3. Following the European Court of Justice decision in Kalanke v. City of Bremen, the Committee had requested information on how the ruling affected government policies in the area of affirmative action for the elimination of discrimination against women. It notes the Government's statement that there has been no impact on its policies since the Second Equality Act contains no provisions on automatic quotas for women, which was the subject-matter of that case. Moreover, the Government confirms that other affirmative action measures are not affected and remain both necessary and possible.

4. Discrimination on the ground of political opinion. Following up on the

recommendations of the 1987 Commission of Inquiry report and the provisions in Annex I of the German Reunification Treaty, the Committee has been requesting the Government to ensure that, in relation both to applicants for government jobs and stability of employment in the public service, particularly for teachers, legislative requirements of questioning as to faithfulness to the free and democratic order be applied restrictively having regard to the nature of the job. The aim of this request was to ensure that restrictions on employment in the public service correspond to the inherent requirements of particular jobs within the meaning of Article 1, paragraph 2, of the Convention, or can be justified under Article 4. The Committee notes that the Government supplies data on the number of terminations made under the provisions of Annex I and appeals lodged against them in the various Länder, which appear to have mixed results (roughly two-thirds of the appeals upheld the terminations and one-third of the appeals were dismissed, with a number of agreed settlements or withdrawals).

5. The Committee notes with interest from the Government's most recent report that, on 8 July 1997, the Constitutional Court delivered four fundamental decisions regarding special cases of dismissal pursuant to the provisions of the Reunification Treaty, upholding their constitutionality. It is in principle admissible to ask questions regarding the individual's previous activity in the state security apparatus, but situations should be examined on a case-by-case basis. Activities "in the distant past" (in the cases in question, activities which ended before 1970) could have no or very little relevance to the current employment relationship or candidature. In this connection, the Committee had also asked for information on the impact of the European Court of Human Rights decision in Vogt v. Germany on the re-employment opportunities of civil servants dismissed under these provisions, provided that they satisfy the recruitment and qualification requirements. It notes that, according to the Government, this case gave important guidance on the principle of proportionality (whether removal from service of a permanent civil servant is proportional or not depends on the circumstances of the individual case) and that all other cases of dismissed teachers are closed. Its impact can be seen in the jurisprudence of the Land-level Labour Court of Chemniz to the effect that "a dismissal from the public service can no longer be based on the holding of specific functions, for instance in the former German Democratic Republic. Account must also be taken rather of the service record of the dismissed person as well as any possible orientation following the collapse of the Socialist Unity Party, towards the free political order".

6. The Committee welcomes these jurisprudential developments, which reflect the recommendation of the Commission of Inquiry and its own previous comments, to the effect that it is important not to attribute excessive importance to activities undertaken at a time when applicants for civil service jobs were not bound by any public service relationship and to provide an opportunity for them to demonstrate, once they are in such a relationship, that they will respect the obligations attached thereto. The Committee would appreciate receiving information from the Government in future reports on any new court challenges to refusal to hire or to termination of employment in the public service on the basis of past political activities.

7. Observing that criteria similar to that for "extraordinary termination" of the work relationship set out in Annex I to the Reunification Treaty had been adopted in various Länder in the form of announcements and guidelines for civil service employment, the Committee had also requested the Government to supply

information on how the specific Land-level texts are being implemented in practice. It notes the Government's indications that each case is examined on an individual basis, and that the Länder themselves supply general information on the procedure for interviews. The Committee asks the Government to inform it, in future reports, of any changes to the Länder announcements and guidelines that might affect the application of the prohibition on discrimination in employment on the basis of political opinion contained in the Convention.

8. The Committee is addressing a request directly to the Government on other matters.

Extract from the Observation made by the Committee of Experts on the Application of Conventions and Recommendations in 1999 concerning the observance by Germany of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

3. Discrimination on the ground of political opinion. Further to its comments on the conclusions of the Commission of Inquiry, the Committee notes the Government's statement that, with regard to applicants for positions in the public service, loyalty to the Constitution must be checked in each individual case, and that activities for the Ministry of State Security or the Office for National Security of the former German Democratic Republic (GDR) can be grounds for considerable doubts about a candidate's loyalty to the Constitution or other suitability. The Government further indicates that checking must always be carried out on a case-by-case basis. The Committee notes the recent decisions from the Länder courts, which held that civil servants could not be dismissed merely because of past activities for the Ministry of State Security for the former GDR. The courts held that, for a dismissal to be upheld, the individual's past involvement with the Ministry of State Security must have been of a serious nature. The Committee also notes from the decisions that the courts may be disinclined to uphold the dismissal where the individual worked merely as an informal agent, or where there was a long time interval between the past activities and the termination. The Committee notes that these decisions continue to be in accordance with the proportionality rationale proposed by the ILO Commission of Inquiry on the application of this Convention and this Committee on the application of Annex I of the Reunification Treaty. The Committee would be grateful if the Government would continue to provide information on any new court decisions involving terminations or failure to hire a candidate for the public service on the basis of his or her past political activities.

4. The Committee notes the Government's statement that the decision issued by the State Government of Mecklenburg-Vorpommern on 23 February 1999, concerning screening of candidates for civil service positions, could affect the implementation of the Convention's prohibition of discrimination on the ground of political opinion. The Committee notes that the scope of the posts to which the decision applies is quite broad. The decision provides that the possibility that an applicant may have worked officially or unofficially for the Ministry of State Security or the Office for National Security of the former GDR will be considered during the recruitment process, although due consideration must be given to the wider circumstances of a given case. The decision limits the inquiry to activities for the named institutions, which began on or after 31 December 1980, or which began before 31 December 1980, but continued after that date. The Committee notes from the decision that vetting of first-time candidates through the federal commissioner responsible for such matters, entailing an inquiry into past activities, will be carried out where there is concrete evidence of collaboration with the former GDR institutions mentioned, in the case of appointments to higher grades in the civil service, or appointments to sensitive areas, where the position in question imposes particular requirements of trust, or if the position in question is an especially important one. In the latter case, the inquiry need not be time restricted. The Committee asks the Government to provide information on the number of applicants refused employment on the basis of these screening guidelines, and the right of appeal available to the persons affected.

CEACR: Individual Observation concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 Germany (ratification: 1961) Published: 2000

Description:(CEACR Individual Observation)
Convention:C111
Country:(Germany)
Subject classification: Non-discrimination (Employment and Occupation)
Subject classification: Women
Subject: **Equality of Opportunity and Treatment**
Display the document in: French Spanish

1. The Committee notes the Government's detailed report and annexed documentation, including data from the Federal Statistics Office and relevant jurisprudence.

2. Discrimination on the ground of sex. The Committee notes that women represent 63 per cent of the total workforce in establishments to which the Federal Public Service Act applies, other than the federal public service. It notes with interest the slow but consistent increase in the percentages of women occupying posts at the highest grades as civil servants and public employees directly employed in the federal public service, with 18 per cent of higher posts being occupied by women in 1996 (up from 16 per cent in 1993), although women are still under-represented in higher posts overall. It notes, for example, that despite the high proportion of women in establishments to which the Federal Public Service Act applies, other than the federal public service, only 24.5 per cent of posts in the highest grades, including senior management positions, were occupied by women in 1996. The Committee notes the Government's statement that the Second Equality Act, which entered into force on 1 September 1994, is making an appreciable contribution to increasing women's participation in senior public administration posts and in facilitating workers' conciliation of professional and family life. The Committee notes that section 2 of the Advancement of Women Act, enacted under the Second Equality Act, provides that, as long as women are employed in individual areas in smaller numbers than men, government departments are required to increase the proportion of women in supervisory and managerial positions as civil servants, judges, employees and workers, and in the promotion or transfer of women to higher level positions. Section 8 of the Second Equality Act also requires departments to promote further job training for women, and provides for special accommodations to be made to facilitate the participation of workers with family responsibilities in additional training. The Government indicates, however, that the Act for the Advancement of Women and the Reconciliation of Family and Work in the Federal Administration and in the Federal Courts, which came into effect under the Second Equality Act, needs to be applied more consistently. The Committee requests the Government to provide information on the impact of these legislative measures on the employment of women in higher-level positions in the federal public sector, as well as information on the measures taken and results achieved in this area at the Länder level.

3. Discrimination on the ground of political opinion. Further to its comments on the conclusions of the Commission of Inquiry, the Committee notes the Government's statement that, with regard to applicants for positions in the public service, loyalty to the Constitution must be checked in each individual case, and that activities for the Ministry of State Security or the Office for National Security of the former German Democratic Republic (GDR) can be grounds for considerable doubts about a candidate's loyalty to the Constitution or other suitability. The Government further indicates that checking must always be carried out on a case-by-case basis. The Committee notes the recent decisions from the Länder courts, which held that civil servants could not be dismissed merely because of past activities for the Ministry of State Security for the former GDR. The courts held that, for a dismissal to be upheld, the individual's past involvement with the Ministry of State Security must have been of a serious nature. The Committee also notes from the decisions that the courts may be disinclined to uphold the dismissal where the individual worked merely as an informal agent, or where there was a long time interval between the past activities and the termination. The Committee notes that these decisions continue to be in accordance with the proportionality rationale proposed by the ILO Commission of Inquiry on the application of this Convention and this Committee on the application of Annex I of the Reunification Treaty. The Committee would be grateful if the Government would continue to provide information on any new court decisions involving terminations or failure to hire a candidate for the public service on the basis of his or her past political activities.

4. The Committee notes the Government's statement that the decision issued by the State Government of Mecklenburg-Vorpommern on 23 February 1999, concerning screening of candidates for civil service positions, could affect the implementation of the Convention's prohibition of discrimination on the ground of political opinion. The Committee notes that the scope of the posts to which the decision applies is quite broad. The decision provides that the possibility that an applicant may have worked officially or unofficially for the Ministry of State Security or the Office for National Security of the former GDR will be considered during the recruitment process, although due consideration must be given to the wider circumstances of a given case. The decision limits the inquiry to activities for the named institutions, which began on or after 31 December 1980, or which began before 31 December 1980, but continued after that date. The Committee notes from the decision that vetting of first-time candidates through the federal commissioner responsible for such matters, entailing an inquiry into past activities, will be carried out where there is concrete evidence of collaboration with the former GDR institutions mentioned, in the case of appointments to higher grades in the civil service, or appointments to sensitive areas, where the position in question imposes particular requirements of trust, or if the position in question is an especially important one. In the latter case, the inquiry need not be time restricted. The Committee asks the Government to provide information on the number of applicants refused employment on the basis of these screening guidelines, and the right of appeal available to the persons affected.

5. Enforcement of equal opportunity provisions. With respect to its previous comments, the Committee notes with interest the Act Amending the Civil Law Code and the Act on the Labour Court, which entered into force on 3 July 1998. The report reflects the fact that the Parliament took into account the verdict of the European Court of Justice of 22 April 1997 (Az. C-180-95) and modified the national legislation (in respect of section 611(a) of the Civil Code) to bring the provisions on

compensation for damages into conformity with the European law. Noting the Committee's earlier concern over the limitations previously placed on damages, it asks the Government to provide information on the application in practice of the new legislation and its impact on eliminating discrimination in employment and promoting equality in employment and opportunity.

The Committee is addressing a request directly to the Government on other points.

Tel. 0041-22-990 17 16
Fax 0041-22-990 17 17
e-mail : ksam@bluewin.ch

6 rue de la Porcelaine,
CH-1260 Nyon,
den 23. Februar 2004.

Sehr geehrter Herr Dr. Dammann,

Ich komme auf meinen Brief vom 11. Februar zurück.

1999 was das letzte Jahr, in dem der Sachverständigenausschuss der IAO in seinem öffentlichen Bericht Bemerkungen über die Ihnen interessierenden Fragen gemacht hat. Ich lege den Text dieser Bemerkungen bei. Seitdem hat der Ausschuss nur in direkten Anfragen die Regierung um weitere Auskunft über Praxis und Rechtsprechung in der im §4 erwähnten Problematik gebeten.

Mit freundlichen Grüssen

Klaus Samson