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Staff Matters

Legal News from Union Syndicale

This newsletter is dedicated to the principle of impartiality, one of the central obligations of EU civil servants, and at the same time a right enjoyed by every civil servant. The institutions have to comply with both manifestations of the principle: subjective and objective impartiality.

You can continue to send us your suggestions for new subjects or your questions and comments :
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Impartiality – appeal against appraisal report – disciplinary proceedings – obligations of civil servants – invalidity committee

Impartiality in Civil Service Law

Case C-894/19 P, Parliament/UZ of 21 October 2021, Case T-47/18, UZ/Parliament of 20 September 2019, Case T-220/20, Kerstens of 20 October 2021, Case T-808/17, Pethke/EUIPO of 3 December 2019, Case C-139/18 P, CJ/ECDC, 3 April 2019, Case C-680/16 P, Wolff/Commission, 27 March 2019, Case C-831/18 P, Commission/RQ, 18 June 2020, Case T-567/16, McCoy/Committee of the Regions, 23 October 2018

Waiver

Although this newsletter is accurately prepared, it cannot replace individual legal advice. Legal situations are manifold and require both complex analysis and strategic action. You should therefore not rely on general presentations or former case-law alone to draw conclusions for your concrete situation. Please turn to us timely, should you require individual legal advice and/or representation.

Impartiality and Staff Regulations

Art. 11 SR stipulates: “An official shall carry out his duties and conduct himself solely with the interests of the Union in mind. He shall neither seek nor take instructions from any government, authority, organisation or person outside his institution. He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Union.”

Impartiality and Charter of Fundamental Rights

At the same time, every civil servant can rely on Art. 41 of the Charter of Fundamental Rights (Charter), because the institutions, bodies, offices and agencies of the Union are required to respect the right to good administration enshrined in Art. 41 of the Charter. According to Art. 41(1) of the Charter, each person has a right to have their affairs handled **impartially** (...) by the institutions, bodies, offices and agencies of the Union, including in matters relating to the management of civil service, such as the appointment, assessment, promotion and disciplining of staff.



What is Impartiality ?

Impartiality is a principle of general application in all administrative procedures. An infringement of the principle of impartiality is treated as an **infringement of the fundamental rights of the defence** and can lead to annulment of the administrative decision taken in breach of the right. Impartiality extends to all areas of activity of the EU administration, including management of the civil service. The Court describes the content of impartiality in two manifestations: on the one hand a **subjective impartiality**, according to which no member of the institution concerned may show bias or personal prejudice, and, on the other hand an **objective impartiality** in the sense that the institution must provide sufficient guarantees to rule out any legitimate doubt as to any prejudice. As the Court stated in Case *Wolff/Commission* the institutions have to comply with both components of the requirement of impartiality: subjective and objective. Whereas the Court of Justice applies a rather general concept of impartiality which is open to interpretation in its case-law, the Code of Good Administrative Behaviour of the European Ombudsman displays specific and particularly serious cases of lack of impartiality, such as conflicts of interest for personal, family, political or financial reasons.

The requirement of impartiality imposed on the institutions, bodies, offices and agencies in the exercise of their functions seeks to ensure the **equal treatment**. That requirement is intended, in particular, to avoid any conflict of interests of officials and other servants acting on behalf of the institutions, bodies, offices and agencies. Given the fundamental importance of ensuring independence and integrity, both for the internal functioning and the outward appearance of the institutions, the requirement of impartiality covers all circumstances in which the official or servant must reasonably see that, in the eyes of third parties, they may appear to be capable of impairing his/her independence in that area. Where a number of EU institutions, bodies, offices or agencies are given separate responsibilities of their own in the context of a procedure that is liable to result in a decision adversely affecting an individual, each of those entities is required, in respect of its own activities, to comply with the requirement of objective impartiality. Consequently, even where only one of them has breached that requirement, such a breach is liable to render the decision adopted by the other at the end of the procedure at issue unlawful.

The general lines of this concept shall be illustrated by examples of impartiality in disciplinary proceedings, in proceedings of the invalidity committee and in the appeal procedure against an appraisal report.

Impartiality in disciplinary proceedings

The applicant in Case *UZ/Parliament*, a head of unit, filed an application against the disciplinary decision to downgrade her and to reset the promotion points to zero, for reason of alleged harassment. Several of her colleagues had filed

complaints against her. She challenged the disciplinary decision on the basis of an infringement of her right of impartiality. A disciplinary procedure is divided in two distinct stages. The first stage consists in an impartial administrative investigation followed by the drafting of an investigation report, and closed, after the person concerned has been heard on the facts alleged against him or her, by conclusions drawn from that report. The second stage consists in the disciplinary proceedings proper, initiated by the Appointing Authority on the basis of that investigation report, and consists either in the initiation of disciplinary proceedings without consultation of the Disciplinary Board, or in the matter being referred to that board, on the basis of a report drawn up by the Appointing Authority in the light of the conclusions of the investigation and of the comments submitted by the person concerned in relation to that investigation.

The Court found in that case that at the time of his appointment, an investigator had already met one of the complainants and could already have held a negative opinion of the applicant. This called into question the objective impartiality of the investigator. Lack of impartiality is a procedural irregularity that can justify the annulment of a measure only if, had it not been for such an irregularity, the outcome of the procedure might have been different. Yet, no strict evidence is required here: the Court applies this criterion in the sense that **it cannot be ruled out** that, if the administrative investigation had been conducted with care and impartiality, that investigation might have resulted in a different initial assessment of the facts and, thus, led to different consequences.

Particularly, an infringement of objective impartiality cannot be easily remedied, as it is likely to undermine the legality of the administrative procedure as a whole. Case *Wolff/Commission* was about the role of a rapporteur in an assessment committee. In its judgment, the Court refrained from examining whether or not the participation of a certain expert had influenced the decision adopted and instead confined itself to finding that there was a legitimate doubt as to objective impartiality, which could not be dispelled.

Similarly, in Case *Kerstens/Commission* an investigation leading to the disciplinary sanction of a reprimand was organised by a person who had already knowledge about the facts underlying the investigation before the procedure commenced. This raised legitimate doubts as to the objective impartiality of the investigation.

Impartiality in proceedings of an invalidity committee

Case *McCoy* related to the decision-making of an invalidity committee. The applicant had doubts about the impartiality of the doctor appointed by the institution. These doubts were based on the fact that this doctor had already expressed an opinion unfavourable to him at a meeting of the invalidity committee at a time when no medical examination, much

less the 'in-depth' medical examination could have been carried out. In addition, in this Case, the institution did not consult the summary medical report and the opinions of the three doctors on the invalidity committee in order to have a fuller picture of the file. The institution's decision (based on the conclusions of the invalidity committee), which refused to recognise the occupational origin of the applicant's disease, had to be annulled by the Court.





Impartiality in the appeal procedure against an appraisal report

In Case *Pethke/EUIPO* the Court treated the question whether a superior was an impartial appeal body for review of the appraisal report of a staff member, where the same superior had played an important role in setting up the respective appraisal report before, as of reporting officer. Prior knowledge of facts alone does not make a person partial. For example, reporting officers cannot be regarded as being biased and non-objective solely because as superiors they are involved in the professional activities of their staff. Quite the opposite, it is rather that involvement that enables them to give the most appropriate assessment of the activities of the staff member. Here, however, the applicant's former superior, in charge during three quarters of the period in question, was instrumental for drawing up the respective assessment. The fact that he decided again in the internal appeal procedure raised doubts as to his impartiality as appeal assessor. The Court decided on this that the obligation of impartiality constitutes a fundamental guarantee which must be respected, since otherwise the staff member would be deprived of his effective right to a genuine review. This is also important with a view to the functionality of an institution: an internal appraisal review procedure can contribute to the objectivity of the assessment and thus prevent litigation.

In more general terms, the Court held in Case *CJ/ECDC* that an appeal assessment must not be entrusted to a hierarchical subordinate of the reporting officer. The staff member who challenges his appraisal report must be sure that a genuine review will be carried out. That presupposes that the appeal assessor is able to assess freely the merits of the staff member's complaint and, where appropriate, uphold it by calling into question the reporting officer's appraisal. It is doubtful whether that would be the case where an appeal assessor who is hierarchically subordinate to the reporting officer and who is, therefore, himself assessed by the reporting officer conducts the appeal.

Impartiality as a Charter right that also obliges staff

The Court regularly bases the right to an impartial procedure on both the obligation of officials to act impartially (Art. 11(1) SR) and on the fundamental right to Good Administration stipulated in Art. 41 of the EU Charter of Fundamental Rights. That deduction is of special importance because it implies the obligation of the superior of the staff member towards his colleague as bearer of the right. The superior is bound by and the staff member can rely on the Charter right despite the internal administrative nature of the dispute.

Procedural guarantees and the margin of discretion

As mentioned in the beginning of this newsletter, the impartiality in a procedure belongs to the fundamental rights of the defence. The wide margin of discretion enjoyed by the employing institutions in many areas of civil service law must be counterbalanced by a particular attention given to the course of the procedure for that purpose (cf. judgments in Case T-92/01, *Girardot / Commission*, para. 24; T-336/02, *Christensen / Commission*, para. 38). Case-law stipulates that where an EU institution has wide discretionary powers, compliance with the procedural safeguards provided for in the EU legal order is even more fundamental (Case C-269/90, *Technische Universität München*, para. 14). Those guarantees include, in particular, the duty of the institution to examine carefully and impartially all the relevant aspects of the case. In other words, an infringement of procedural rules (including impartiality) in administrative areas granting wide discretion to decision-makers is scrutinized by the Union judge with particular attention.