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Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

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## REPORT WITH RECOMMENDATIONS

*Ex officio*

**Case no. 499/2016**

concerning

*The failure to respect legal procedures during the recruitment process of personnel according to competitions advertised by Municipal Education Departments in the Republic of Kosovo*

Addressed to:

Mr Shpend Ahmeti, Mayor of Prishtina,

Mr Lutfi Haziri, Mayor of Gjilan,

Mr Sokol Haliti, Mayor of Viti,

Mr Muharrem Svarqa, Mayor of Ferizaj,

Mr Imri Ahmeti, Mayor of Lipjan,

Mr Sokol Bashota, Mayor of Klina,

Mr Idriz Vehapi, Mayor of Rahovec,

Mr Svetislav Ivanoviq, Mayor of Novobërda, and

Mr Xhafer Gashi, Mayor of Obiliq.

Prishtina, 23 November 2016

## Purpose of report

The purpose of this report is the promotion of equality and drawing the attention of Municipal Education Departments (MED) in the Republic of Kosovo, regarding the need to undertake relevant actions for the implementation of the law and the respect of legal recruitment procedures.

## Legal basis

In conformity with article 135, par. 3 of Constitution, *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*

In addition, Law no. 05/L-019 on Ombudsperson, Article 18, and par. 1 determines that Ombudsperson, among others, has the following responsibilities:

- *“to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them” (par. 1),*
- *“to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases” (par. 2);*
- *“to inform about human rights and to make efforts to combat all forms of discrimination through increasing of awareness, especially through information and education and through the media” (par. 4);*
- *“to make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination” (par. 5);*
- *“to publish notifications, opinions, recommendations, proposals and his/her own reports” (par. 6);*
- *“to prepare annual, periodical and other reports on the situation of human rights and freedoms, equality and discrimination and conduct research on the issue of human rights and fundamental freedoms, equality and discrimination in the Republic of Kosovo” (par. 8);*

Upon the submission of this report to responsible institutions, Ombudsperson aims at carrying out the following legal responsibilities.

## Summary of facts of the case

According to information and documentation available with Ombudsperson Institution (OI), facts can be summarised as follows:

1. Competition advertised on 25 July 2016 by MED in the Municipality of Prishtina, the individual assessment of candidates, the decision on the establishment of commission for the development of procedures for establishing the employment relationship.
2. Competition for filling vacant positions for an indefinite time, advertised on 26 July 2016 by MED in the Municipality of Gjilan, forms for assessment of candidates,

Committee's recommendation for Education no.01, no. 134/2016, dated 20.06.2016 and decision of MED, no.061-59888, dated 22.06.2016.

3. Competitions for filling vacant positions advertised by MED in the Municipality of Gjakova, competition dated 03.08.2016, 23.08.2016 31.08.2016, as well as competitions dated 15.01.2016 and 02.03.2016.
4. Competition advertised on 11 July 2016 by MED in the Municipality of Ferizaj, form for assessment of candidates and decision for establishing the interview commission.
5. Competition for filling the vacant position advertised on 20 July 2016 by MED in the Municipality of Lipjan.
6. Competition for filling the vacant positions advertised by MED in the Municipality of Viti, the decision for establishment of the interview commission and the form for scoring the candidates.
7. Competition for teaching staff advertised on 21 July 2016 by MED in the Municipality of Klina.
8. Competitions advertised by MED in the Municipalities of: Prizren, Mitrovica, Skenderaj, Vushtrri, Dragash, Suhareka, Hani i Elezit, Rahovec, Podujeva, Obiliq, Malisheva, and Municipality of Novobërda.

#### **Legal instruments applicable in the Republic of Kosovo**

9. **Constitution of the Republic of Kosovo (hereinafter Constitution), Article 24, Equality before the law**, determines that: *“All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.”*(par.1).
10. *“No one shall be discriminated against on grounds of race, colour, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.”*(par.2). In addition, Article 31, paragraph 1, determines that: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”*
11. **Article 49 [Right to work and exercise profession]**, paragraph 1, *“the right to work is guaranteed”*, while paragraph 2, determines that: **“Every person is free to choose his/her profession and occupation.”**
12. **European Convention on Human Rights (hereinafter Convention)** is a legal document directly applicable according to Constitution of the Republic of Kosovo and has priority in case of conflict over the provisions of laws and other acts of public institutions.
13. Article 14, of Convention determines that: *“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or*

*social origin, association with a national minority, property, birth or **other status.***”

14. Article 3 paragraph 2, of **Law on the Protection from Discrimination no. 05/L-021**, determines that: *“Discrimination is any distinction, exclusion, restriction or preference on any ground specified in Article 1 of this law, which has the purpose or impact of depreciation or violation of the recognition, enjoyment or exercise of human rights and fundamental freedoms guaranteed by the Constitution and other applicable legislations of the Republic of Kosovo.”*
15. **Law no. 03/L-212 on Labour**, Article 2, paragraph 2, determines that: *“Provisions of this Law shall be applicable for employees and employers, whose employment is regulated through a special Law, **if the special Law does not provide for a solution for certain issues deriving from employment relationship.**”*
16. Article 3, par. 1.17, determines that: *“**Discrimination** - any discrimination including exclusion or preference made on the basis of race, colour, sex, religion, age, family status, political opinion, national extraction or social origin, language or trade-union membership which has the effect of nullifying or **impairing equality of opportunity or treatment in employment** or occupation capacity building is prohibited;*
17. While Article 5, par.1, determines that: *“Discrimination is prohibited in employment and occupation in respect of recruitment of employment, [...] or other matters arising out of the employment relationship and regulated by Law and other Laws into force.”*
18. Article 7, par. 1 of Law, *“An employment relationship may be concluded by any person of eighteen (18) years of age or above.”*
19. Article 8, par.2, determines that: *“The competition must be equal for all aspirant candidates, without any kind of discrimination, as defined by this Law and other applicable acts.”*
20. **Administrative Instruction No.14/2011** for the Regulation of procedures for the establishment of labour relation in the public sector determines the establishment of the labour relationship in the public sector according to the Law on Labour.
21. **Law No. 04/L-032 on pre-University Education in the Republic of Kosovo**, Article 35, par.1, for the selection of teachers expressly determines that: *“Teachers [...] shall be selected through a public advertisement based on personal merit, with no direct or indirect discrimination of any kind for real or presumed reasons on grounds of gender, race, marital status, sexual orientation, national community background, disability, property, birthplace, political or philosophical views or other situations.”*  
*“Appointing authorities as defined in this Law shall establish fair, open and transparent recruitment procedures based on the qualifications and the needs of the post” (par.3).*  
*“Teachers shall be appointed by a committee established by the MED including the **director of the educational institution** and representatives of the governing board in accordance with the applicable law” (par.4).*

*“When choosing between two or more applicants for a management or teaching post,*

*emphasis shall be placed on each applicant's education, experience and qualifications for the post, as well as the needs which the appointment aims to fulfil. If no applicants satisfy the qualification requirements laid down in the present Law, a temporary appointment may be made. Such appointments shall terminate on the last day of the school year in which the appointment was made.” (par.5).*

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

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

In addition, par. c), of this Article determines that municipalities are competent for *“employment of teachers and other school personnel **in accordance with legal procedures for the recruitment, selection and employment of public employees;**”*

24. Based on Article 5, par. c), MEST issued an **Administrative Instruction no. 17/2009, Procedures for selection of teaching personnel in schools**, according to Article 3, par.1, the composition of commission for the selection of teaching personnel is defined, which expressly states that *“Two representatives of Municipal Education Department”(par.1.1) and “Director of the relevant school” (par.1.2).*

## **Legal analysis**

Legal analysis of Ombudsperson is based on documentation and competitions advertised by MED in 19 Municipalities of the Republic of Kosovo.

## **Municipality of Prishtina**

25. Based on the competition advertised on 25 July 2016 by MED in the Municipality of Prishtina, Ombudsperson observes that this competition was advertised according to Law on Labour, Law on Education in the Municipalities of the Republic of Kosovo and Administrative Instruction no.14/2011, for the Regulation of procedures for the establishment of labour relation in the public sector based on which **the five-member commission** was established for selection of candidates. Paragraph II, of competition determines that: *“Selection of candidates shall be done based on criteria determined according to Administrative Instruction No. 05/2015 for Normative Over professional Staff of the General Education, Administrative Instruction No. 06/2015 Normative for teachers of vocational education and other legal acts regulating the area of pre-University Education (Law no. 02/L-52, **Law No.03/L-068** and Law no. 04/L-138).”*

While paragraph III of competition determines that: “[...] *designation of the school for successful candidates shall be done by Municipality, namely by Education Department*”.

26. Although paragraph II of competition, MED in Prishtinë is expressly responsible for the implementation of Law no. 03/L-068 on Education in the Municipalities of the Republic of Kosovo, Commission for the development of procedures for the establishment of labour relation of candidates is formed based on the Administrative Instruction No.14/2011 of Ministry of Labour and Social Welfare, and in contradiction with Administrative Instruction of MEST No.17/2009, according to which, the commission is composed of three members and one of them should be the school director.

### **Municipality of Gjilan**

27. Based on the competition advertised on 26 July 2016 by MED in the Municipality of Gjilan, Ombudsperson observes that this competition was advertised based on the Law on Pre-University Education in the Republic of Kosovo and Law on Labour according to the competition “*candidates applying in more than one school can apply only with one application form mentioning names of schools where he/she applies.*” According to criteria recommended by the Education Committee in the Municipality of Gjilan, dated 20 June 2016, it is observed that “*Candidate living in the locality where school is situated, 0.5 points (this criterion is valid only for primary schools and secondary lowers schools in villages)*. In this case, the candidate living in the village has advantage over all competitors, but he/she has also advantage over the candidates living in the town.

### **Municipality of Viti**

28. Based on the competition advertised on 2 August 2016 by MED in the Municipality of Viti, Ombudsperson observes that this competition was advertised based on Law on Pre-University Education in the Republic of Kosovo and Administrative Instruction No.13/2011 (it is worth mentioning that the competition advertised on 11 October 2016 is also based on this Administrative Instruction),<sup>1</sup> Law on Labour and Administrative Instruction No. 06/2015 on selection and acceptance of educational staff,<sup>2</sup> while the appointment of the interview commission was based on Administrative Instruction No. 17/2009, according to which a commission of three members is established, two members of MED and school director, however, there were **four members of the commission** appointed for interviews. In addition, based on the form for scoring the candidates, it is observed that as a criterion for scoring the candidates in this municipality is also: “*Local candidate (candidate living where school is situated, 1 point)*” (par. IV).

### **Municipality of Gjakova**

29. Based on the competition advertised by MED in the Municipality of Gjakova on 03.08.2016, 23.08.2016 31.08.2016, and competitions dated 15.01.2016 and

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<sup>1</sup> This Administrative Instruction was abrogated according to Article 13 of Administrative Instruction No.20/2013, normative on professional staff of the general education, dated 29.05.2013.

<sup>2</sup> The incorrect designation of the instruction, it should be the Administrative Instruction no. 06/2015 for the Normative over Professional Staff of the General Education.

02.03.2016, Ombudsperson observes that this competition was advertised based on the Law on Pre-University Education in the Republic of Kosovo and Law on Labour, Administrative Instruction 06/2015 for the Normative on Professional Staff of the General Education, Administrative Instruction 05/2015 Normative for Teachers of Vocational Education and Administrative Instruction 17/2009 Procedures for the Selection of Education Personnel in the School, according to competitions advertised on 15 January 2016 and 2 March 2016, was the criterion for application "***Candidate may apply at most in three (3) work positions***", while according to competitions advertised on 3, 23 and 31 August 2016, it is observed that candidates had the possibility to **apply in all work positions** advertised according to competitions.

### **Municipality of Ferizaj**

30. Based on the competition advertised by MED in the Municipality of Ferizaj, on **11 July 2016**, Ombudsperson observes that this competition was advertised based on the Law on Pre-University Education in the Republic of Kosovo and Law on Education in the Municipalities of the Republic of Kosovo and Administrative Instruction 06/2015 for the Normative over Professional Staff of the General Education. While, the commission for interviews was established according to Administrative Instruction No. 14/2011, of the Ministry of Labour and Social Welfare (MLSW) **composed of five members**.

Although according to the competition it cannot be ascertained that candidates were not eligible to apply in all work positions advertised, OI representative, during the visit made to the Office for citizens' service, confirmed the fact that candidates had the possibility to apply **only in two work positions**.

### **Municipality of Lipjan**

31. Based on the competition advertised by MED in the Municipality of Lipjan, on 20 July 2016, Ombudsperson observes that this competition was advertised based on the Law on Local Self Government, Law on Education in the Municipalities of the Republic of Kosovo and Municipality Statute. According to the competition it is expressly emphasized that: "*If the candidate applies in more than one work position, the candidate is aware that he/she may be invited for an interview **only in that school, institution where he/she considers it with less priority. Therefore, you are recommended to apply in one work position.***"

### **Municipality of Klina**

32. The competition advertised by MED in the Municipality of Klina was based on the Law on Labour, Law on Education in the Municipalities of the Republic of Kosovo, Law on Pre-University Education, Administrative Instruction 06/2015 Normative for the Selection of Professional Staff of the General Education and Administrative Instruction No. 05/2015 for Teachers of Vocational Education, according to the competition par. 3, states that: "*Candidates are eligible to apply **only in one work position.***"

### **Municipality of Rahovec, Podujeva, Obiliq, Malisheva, Novobërda**

33. Ombudsperson observes that in the competitions advertised by MED in the Municipality of Rahovec, the commission for the interview of candidates was

composed of five members, while in the Municipality of Podujeva, according to the competition, it was foreseen that candidates applying in two positions will be interviewed only for one position, while the interview will be valid for both positions.

In the **Municipality** of Obiliq, the competition was advertised based on the Administrative Instruction no. 9/2014 for the Normative over professional staff of the general education,<sup>3</sup> in the Municipality of Malisheva, it is foreseen that candidates may apply in more schools, but with special documentation.

Also in the Municipality of Novobërda, the competition was advertised based on the Administrative Instruction no. 9/2014 for the Normative over professional staff of the general education).

### ***The criteria of competition in contradiction with law.***

34. Ombudsperson observed that during the drafting of competitions and criteria for employment of teachers, in some municipalities, also in the past there were competitions and criteria which contradicted the law, for this purpose Ombudsperson has even before recommended MEDs, that when drafting competitions and criteria for employment, they should draft criteria which do not contradict with the law, in order that all candidates are treated equally before the law.<sup>4</sup>

35. Law on Local Self- Government clearly determines the Municipality's legal obligations to ensure that citizens enjoy their rights and freedoms, Article 4, paragraph 2, expressly determines that: *“All municipal organs shall ensure that the citizens of the municipality enjoy all rights and freedoms [...], that they have fair and equal opportunities in municipality service at all levels.”* Ombudsperson observes that the above-mentioned MEDs have not undertaken any action in order that competitions advertised are in compliance with the applicable laws in Kosovo, and to ensure that all have equal opportunities.

36. Ombudsperson observes that according to the court decisions of European Court of Human Rights (ECtHR), “the right not to be discriminated is violated when States treat persons in similar situations unequally, without giving any objective and reasonable justification<sup>5</sup>. In order that such a justification is “objective and reasonable”, two more steps should be pursued: Firstly, there should be a “legitimate purpose” about the inequality in question, and secondly, there should exist “a reasonable tie of proportionality between the means used and the purpose intended”.

### **Findings of the Ombudsperson**

37. Based on the facts of cases and legal facts presented above, Ombudsperson observes that **limitation of the choice of the work position** by Municipality of Prishtina is in contradiction with paragraph 2 of Article 49, of Constitution, **establishment of the interview commission** is also in contradiction with Law on Education in the Municipalities of the Republic of Kosovo and Article 3, paragraph 1.1 and 1.2 of Administrative Instruction No. 17/2009, which determines procedures of selection of the education staff in schools. Regarding the implementation of the Law on Labour by the Municipality of Prishtina, Ombudsperson observes that according to Law on

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<sup>3</sup> This Administrative Instruction was abrogated according to Article 14, of Administrative Instruction no. 06/2015, for the normative over professional staff of the general education, dated 10.07.2015.

<sup>4</sup> See OI, Annual Report 2014, page 83

<sup>5</sup> ECtHR, case Thlimmenos vs. Greece, Application no. 34369/97, 6 April 2000, par.44.

Labour, Article 2 paragraph 2, it is determined that Provisions of this Law shall be applicable for employees and employers, whose employment is regulated through a special Law, if the special Law does not provide for a solution for certain issues deriving from employment relationship, therefore, in the concrete case, since the employment relationship for education staff is regulated through special laws of education, the obligation of the Municipality of Prishtina was to implement special laws of education.

38. By analysing the criteria for scoring the candidates in the Municipality of Gjilan and Municipality of Viti, Ombudsperson observes that the criterion based on which the candidates living in the locality where school is situated, according to which criterion competitors gain points **is a discriminatory criterion**, this criterion on one hand violates the right **for equal treatment** and creates inequality among competitors, while on the other hand creates favouring for candidates based on locality where they live, since according to Constitution, all are equal before the law and since no one can be discriminated, municipal institutions should ensure that all citizens enjoy equal rights and opportunities, therefore, such actions of public authorities in these municipalities **violate equality before the law**, and are in contradiction with legal provisions.
39. Ombudsperson observes that in some municipalities candidates could apply **in all work positions**, while in some other municipalities they could apply only **in one** or **in two** work positions, therefore, the limitation of the right to apply only in one work position (Municipality of Lipjan and Municipality of Klina), or in two work positions (Municipality of Ferizaj) are limitations which **deny** the right guaranteed to the candidates to apply in all work positions.
40. In addition, competitions advertised by MEDs are based on different legal provisions, in some cases also on Administrative Instructions abrogated, in some Municipalities Law on Labour and Administrative Instruction No. 14/2011 of MLSW was implemented, while in some other municipalities special legal provisions of MEST were implemented, therefore, in such situations when there is a general law and special laws, Ombudsperson considers that special laws should be implemented which regulate the issue of employment of teachers.<sup>6</sup>
41. In addition, it is observed that according to decisions for the establishment of interview commissions issued by MEDs regarding the number of members of interview commissions, some municipalities have established the commission composing of three members, some with four and some municipalities with five members, in some municipalities there were also observers, while in some others school directors were not included in the commission, these differences occurred because of the implementation of different legal acts by MEDs. Therefore, Ombudsperson draws the attention that interview commissions should be formed based on Article 35, paragraph 4, of Law on Pre-University Education in the Republic of Kosovo and Administrative Instruction No.17/2009 Procedures for selection of the education staff in schools, as special legal acts which regulate the procedures of employment of teachers<sup>7</sup>.

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<sup>6</sup> Law on Labour, Article 2, paragraph 2.

<sup>7</sup> Law on Labour, Article 2, paragraph 2.

42. Based on all evidences presented and facts gathered, Ombudsperson, in compliance with the relevant legislation, **found that there was violation of Human Rights and Fundamental Freedoms**, since responsible officers of MEDs in the Municipality of Prishtina, Gjilan, Viti, Ferizaj, Lipjan, Klina, Rahovec, Novobërda and Obiliq have acted in contradiction with the applicable legislation.
43. As a conclusion, Ombudsperson considers it indispensable that these practices should not be repeated in the future, in order that all actions of municipal bodies are in compliance with legal provisions and at the function of the protection of human rights and freedoms.

Based on what was said above, and taking into account the principle of implementation of legality and in order to improve and increase efficiency of authorities, Ombudsperson, in conformity with Article 135, paragraph 3 of Constitution of the Republic of Kosovo and Article 18, paragraph 1.2 of Law on Ombudsperson no. 05/L-019.:

**Ombudsperson recommends:**

***Municipality of Prishtina***

1. *Should undertake all measures necessary to ensure the right guaranteed by Constitution to candidates that every person is free to choose his/her occupation.*

***Municipality of Gjilan and Municipality of Viti***

2. *Should undertake all measures to stop such cases of unequal treatment and ensure that all candidates enjoy equal rights and opportunities for employment in the education institutions, irrespective of the place where they live or where they were born.*

***Municipality of Prishtina, Municipality of Viti, Municipality of Ferizaj and Municipality of Rahovec***

3. *Should ensure that the commission for the selection of teachers should be established in accordance with law.<sup>8</sup>*

***Municipality of Ferizaj, Municipality of Lipjan and Municipality of Klina***

4. *Should guarantee the right of every candidate to apply in all work positions without further limitations.*

***Municipality of Viti, Municipality of Novobërda and Municipality of Obiliq***

5. *Should undertake all measures that drafting of competitions in the future is done based on legal acts which are in force.*

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo (*“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”*) and Article 28 of Law no. 05/L-019 on Ombudsperson (*“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, ... must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”*), will you kindly inform us on actions to be undertaken about this issue.

Sincerely,

Hilmi Jashari  
Ombudsperson

**Copy to:** Mr Habit Hajredini, Head of Office for Good Governance, Office of the Prime minister

Parliamentary Commission on Human Rights, Gender Equality, Missing Persons and Petitions of the Republic of Kosovo.

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<sup>8</sup> Article 35, par.4, of Law on pre-University Education and Article 3 of Administrative Instruction No. 17/2009 Procedures for selection of the education staff in schools, foresee the establishment of interview commissions.