

CASE NOTE: GERMANY

CASE CITATION:

22.09.2009, 1 K 365/09.TR

NAME AND LEVEL OF COURT:

Administrative Court of Trier
(Verwaltungsgericht Trier)

Right to appeal; electronic means; administrative proceedings

Available in electronic format at:

http://www3.justiz.rlp.de/rechtspr/DisplayUrteil.asp?ro_wguid={C7AFA90B-3828-4BD0-89AE-46D89091F3EB}

The electronic form is not a sub category of the written form. If a complaint can be filed in electronic form to the competent court pursuant to section 55a VwGO (Code of Administrative Courts Procedure, 'Verwaltungsgerichtsordnung'), an instruction on the right to appeal (Rechtsbehelfsbelehrung) that only mentions the possibility of filing a complaint either in writing or by reporting the complaint to a clerk, who writes it down, is incorrect. Such an instruction on the right to appeal does not start in the one month period for filing an action pursuant to section 74 Subsection 1 VwGO.

Summary

On 30 June 2009, the plaintiff filed a complaint against the allocation of a civil service remuneration that was fixed too low in the opinion of the plaintiff. In accordance with the provisions of section 74 subsection 1 VwGO, a complaint has to be filed within one month after the notification of the administrative act has been sent to the person concerned. The administrative act was notified to the plaintiff on 29 May 2009. The complaint against the administrative act was filed on 30 June 2009, and therefore did not comply with the one month period. But the Administrative Court of Trier decided that the one month period is not applicable pursuant to section 58 sub-section 2 VwGO. The one month period only starts if the instruction on the right to appeal provided with the administrative act is correct. Otherwise, the complaint can be filed within a period of one year after the notification of the administrative act

(cf. section 58 sub-section 2 VwGO). The court ruled that the information on the right to appeal provided by the authority that issued the disputed administrative act was incorrect. The information on the right to appeal provided, amongst other things, the correct legal remedy and the correct authority or court to lodge an appeal. Furthermore, it contained the information that the complaint could be filed in writing or by reporting the complaint to a clerk, who writes it down. The Administrative court stated that the term "in writing" does not include the possibility of filing a complaint electronically, as stipulated in the decree of the federal state of Rhineland-Palatinate regarding legal relations with public courts dated 9 January 2008. Pursuant to this decree, it has been possible to file a complaint to the Administrative court of Trier via e-mail since 1 February 2005, and since 1 January 2008 via web-upload. The plaintiff was not provided with this information. Therefore, the information provided on the right to appeal was misleading and incorrect in the view of the Administrative court. According to section 58 sub-section 2 VwGO, there is a one year period for filing a complaint, not a one month period.

Comment

The Code of Administrative Courts Procedure provides that the period to file an action begins with the notification of the administrative act and the information about the right to appeal. Where incorrect information is provided in respect of those rights, a longer period of one year applies (sections 74 and 58 VwGO). The mandatory content of the information on the right to appeal is regulated by section 58 sub-section 1 VwGO. It has to be pointed out that section 58 sub-section 1 VwGO does not require information about the form in which the complaint has to be filed. Therefore any information regarding the form is optional. But optional information has to be correct and not misleading. The

Federal Administrative Court (Bundesverwaltungsgericht - BVerwG) ruled that information on the right to appeal is incorrect if it provides the impression that a complaint can only be filed in writing (Decision 13.12.1978, 6 C 77/78, BVerwGE 57, 188). The Administrative Court of Trier expressly followed this decision. Usually, optional information on the form of the possible remedy is provided by the authorities.

Section 55a VwGO determines that before electronic documents can be exchanged with the court, the federal government and the governments of the federal states need to specify in decrees, amongst other things, the preferred way and form of submitting electronic documents to the court. The federal state Rhineland-Palatinate enacted such a decree regarding legal relations with its administrative courts on 9 January 2008 (Landesverordnung über den Rechtsverkehr mit den öffentlich-rechtlichen Fachgerichtsbarkeiten; Gesetz- und Verordnungsblatt Rheinland-Pfalz 2008, p. 33; http://rlp.juris.de/rlp/FachGElekRVerkV_RP_rahmen.htm). Both e-mail and web-upload as methods to file a complaint are regulated by the decree and therefore are admissible. As the information on the right to appeal did not contain any information about the electronic form, it was incorrect in the opinion of the Administrative court.

It is remarkable that the Administrative court distinguishes sharply between the written form and the electronic form. Usually the electronic form is regarded as one type of the written form. If the term "written form" includes the electronic form, the information on the right to appeal provided in this case could be considered as correct.

On 3 May 2010 the Higher Administrative Court of Berlin-Brandenburg (Oberverwaltungsgericht Berlin-Brandenburg) issued an order in a similar context (citation: OVG Berlin-Brandenburg, 03.05.2010, 2 S

106.09). In this case the information on the right to appeal provided by an administrative court did not mention the possibility of lodging a complaint in electronic form to the court of appeal, and was judged incorrect. According to the decree regarding relations with legal authorities in the federal state of Berlin (Verordnung über den elektronischen Rechtsverkehr mit der Justiz im Lande Berlin, Gesetz- und Verordnungsblatt Berlin Nr. 33, 30.12.2009, p. 881; http://www.berlin.de/imperia/md/content/senatsverwaltungen/justiz/gesetz-undverordnungsbllatt2009/heft_33_vom_30_12_2009_seite_845_896.pdf?download.html) it has been possible to lodge complaints electronically since 1 January 2010. The incomplete and therefore erroneous information triggered the longer period of one year to lodge a complaint pursuant to section 58 sub-section 2 VwGO.

As a consequence of the (Higher) Administrative court's decision, public authorities and courts will have to verify whether complaints against their administrative acts or decisions can be filed electronically to the competent court or not. If such is the case, and any information about the form of the possible complaint is provided the electronic form, it has to be mentioned expressly. But alternatively, the Administrative court's decision could also lead to the less preferable practice of providing no information at all about the form to file a complaint. As information about form is not a mandatory element of the information on the right to appeal pursuant to section 58 sub-section 1 VwGO, public authorities could simply leave this information out. This would lead to less transparency for the citizen.

Dr Martin Eßer is a member of the editorial board