

DRAFT MODULE (version May 2017)
– EVALUATION OF STAFF IN EDUCATIONAL INSTITUTIONS¹

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LEARNING OBJECTIVES

The student:

- understands the application of the general principles of administrative law in evaluation of staff and case law;
- illustrates how the general principles of administrative law are laid down in the regulations on the evaluation of staff in his/her country;
- understands the procedural aspects in litigation on evaluation of teachers, including the appeal procedures and organs;
- understands the criteria that can be used for an evaluation 'unsatisfactory';
- knows the difference between dismissal under a disciplinary procedure and dismissal after a 'unsatisfactory' evaluation;
- understands the differences in evaluation and the procedures applied in compulsory education and higher education
- can apply the general principles of administrative law when resolving a case-law example.

INTRODUCTION

Effective teachers contribute to the learning process of their students and are responsible for making their courses as effective as possible.² Therefore, in case of shortcomings in teaching, policymakers in many countries have issued regulations on evaluating of teachers procedures that address the challenges of dismissal of teachers who fail in delivering qualitative courses.

In the first part of this module, the general principles applicable on the evaluation of teaching staff will be discussed. Staff evaluations are now part of quality assurance system in education and where often introduced to find a balance between the right to quality education of students and tenured staff employment security. In most countries public education institutions had difficulties dismissing teachers who did not perform satisfactory when the school could not show cause to dismiss a teacher who has attained tenure status.

In the subsequent parts of this module, the application of the general principles of administrative law will be applied on the education system of the Flemish Community of Belgium³ by way of case study.

² This module focuses on the evaluation of teachers. Apart from effective teaching, schools need strong leadership, resources, and engagement of parents and other stakeholders in education to ensure quality education for all students.

³ Regulations in the Flemish Community of Belgium applicable on evaluation of staff are:

- Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium
- Decision of 22 May 1991 of the Flemish Community of Belgium on the evaluation, measures of order and discipline in educational institutions of the Flemish Community of Belgium
- Decree of 14 December 2007 on the appeal procedure after the final conclusion 'unsatisfactory' in educational institutions of the Flemish Community of Belgium

Staff of non-public state funded schools got a similar protection in separate decrees.

- Decree on the legal status of staff in non-public state funded schools in the Flemish Community of Belgium
- Decree of 14 December 2007 relating to the appeal procedure after the final conclusion 'unsatisfactory'

1. General principles of administrative law as applied in the evaluation of staff

1.1. The difference between non-tenured and tenured staff member

Most countries will make a difference between tenured and non-tenured staff members.

For tenured teachers, laws tend to provide a particular procedure that must be followed by the school in order to lawfully dismiss an ineffective tenured teacher, whereas the school can dismiss a teacher prior to attaining tenure at its discretion subject to contractual and constitutional restrictions.

Teachers fairly new at a school might be dismissed at the end of their trial period (not prolong his/her contract) or immediately after a first negative evaluation.

1.2. Burden of proof rests with the school

Tenured teachers in public and non-public state funded schools are well protected from dismissal through tenure statutes. To dismiss tenured teachers is a possibility if the school shows ineffective teacher's performance and follows all the procedural requirements including giving notice to the teacher, providing the teacher with a meaningful support track for improvement of his/her teaching, respects the rights of the defense, provides evidence and gives a hearing to the teacher.

Normally, an 'unsatisfactory' will require proof of substantial noncompliance with the task description meaning that the teacher is extremely ineffective at his/her teaching or fails to teach at all and his/her students barely learn anything at all.

This means that the school will have the duty to prove facts of 'unsatisfactory' performance and to show the circumstances of ineffective teaching.

In other words, a school has to make sure that the complaint about ineffective teaching is valid. This includes the obligation to show that the teacher's conduct does not fulfill the requirements of his task description. This includes the obligation of the school to inform the teacher about the tasks that he/she is expected to fulfill at that particular school.

After a tenured teacher has been reported to provide ineffective teaching, the school will probably start monitoring the teacher and/or and put him/her on a support track to improve his/her teaching.

In most countries, ineffective tenured staff should first be monitored and get detailed plans for improvement before he/she can be dismissed because of an 'unsatisfactory' evaluation.

1.3. Due process rights during the process of evaluation of teachers

Public and non-public state funded schools must provide the minimum procedural requirements when dismissing a teacher who has attained tenure in the context of an 'unsatisfactory' evaluation decision.

Due process rights do not prescribe the reasons why a teacher may be given an negative evaluation and be dismissed, but only the procedures that a school must follow to dismiss an ineffective teacher. It means the ineffective teacher must be treated in a fair way and all of his/her rights must be respected.

Regulations tend to provide that a teacher must be given oral or written notice of the 'unsatisfactory' evaluation decision and of the dismissal for ineffective teaching. The teacher should get the evidence obtained by the school that employs him/her. He/she should get the opportunity for a fair hearing.

Firing an ineffective tenured teacher requires the school to follow a very particular procedure to make sure the rights of the defense of the teacher are respected. Schools have to follow a defined set of guidelines for the evaluation of teachers and to adhere to the obligation that the teachers is heard. The teacher should be given the opportunity to present his/her side and must be heard.

The duty to give reasons for administrative decisions and the obligation to motivate the 'unsatisfactory' evaluation decision also requires the school to inform the teacher about the actions he/she can take against the decision of a negative evaluation. The teacher should be given all the information the school has gathered about his underperformance.

The school has to evaluate the tenured teacher again after a period of support to improve his teaching.

Specific evaluation requirements of the educational institution should be followed.

The educational institution should provide the evidence and the grounds for dismissal and give the teacher the chance to present his/her side of the evidence and facts.

1.4. Appeals and legal action against the school

If the dismissal for an 'unsatisfactory' evaluation decision is unlawful, the teacher can take legal action against the school.

In order to be lawful, the evaluation should be fair and the procedures be followed. The school has to collect the evaluation information in an objective manner and make sure that evaluators write down the evaluation truthfully.

Generally, a teacher who has been evaluated for ineffective teaching or incompetence should first be given a warning and put on a remedial track with the support of the school.

The tenured teacher should be given a chance to improve his/her ineffective teaching and the school should prove that it has provided resources to help the teacher improve his/her teaching.

2. Case study: evaluation of staff in educational institutions of the Flemish Community of Belgium

2.1. Compulsory education

2.1.1. Job Descriptions

The protection of the staff in education in the Flemish Community of Belgium is based on job descriptions. The job descriptions are best seen as a generic basic regulation that applies

to all employees and their evaluation, tools for a constructive staff policy, thereby respecting the autonomy of the school to elaborate its own staff policy aimed at providing quality education.

‘A job description is a constructive and positive policy instrument that allows for an autonomous staff policy with the aim to provide quality education’ (Article 73b Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium/ Article 47ter Decree on the legal status of staff in non-public state funded schools in the Flemish Community of Belgium).

Article 73quinquies of the Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium and Art. 47quinquies Decree on the legal status of staff in private state funded schools in the Flemish Community of Belgium distinguish between ‘integrated tasks’ on the one hand and ‘institutional tasks’ on the other hand.

Integrated tasks are focused on teaching in the broad sense of the word, and include all components of the teaching profession: teaching, preparation and planning, class-based student counseling, collaboration management with colleagues, meetings with parents.

Institutional tasks are described by the school authorities and include replacement of absentee teachers, additional supervision tasks and representation in school organs.

In the case of policy-supporting tasks for which the government provides additional resources, the proportion of this additional task in the staff member's assignment must be sufficiently taken care off by the school officials and the employee must be exempted from his/her lesson, otherwise the staff member can not be evaluate with a ‘unsatisfactory’ evaluation decision.

Administrative laws do not govern the tenure process at non-public state funded schools in the Flemish Community of Belgium. However, a special decree regulating the contract between a non-public state funded school and a teacher amounts to the same job security though enforcement of these rights is related to contractual rights rather than rights granted through the tenure statute of teachers in public schools.

2.1.2. Evaluation of staff in public schools in the Flemish Community of Belgium

The evaluation of the staff is described by the legislator in a positive manner: ‘[...] must be seen as a constructive and positive policy instrument that allows for an independent staff policy aimed at providing quality education’ (Article 73 § 2 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

The evaluation is mandatory every 4 years for each staff member with a job description (Article 73 §2 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium). For the staff member for whom no job description was made, no evaluation can not be made (Article 73 §2 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

The evaluation is required at least every 4 years for each staff member (Article 73g §1 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

The board of public schools negotiates the general rules for evaluation of the staff

(Article 73b §3 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium). The evaluation report carefully describes the full functioning of the staff member in relation to the agreed job description, including the specific objectives and developmental objectives set for the relevant evaluation period (Article 73 dec. §2 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

The evaluation of the teacher of religious instruction or non-confessional learning is done by the competent authority of the particular religion or non-confessional learning (article 73 dec. §3 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

- The first evaluator

The evaluation process always starts with the designation of evaluators. With the exception of the director and administrator of the boarding school, two evaluators are appointed. The first evaluator is ultimately responsible for the full evaluation process. He, together with the staff member, is in charge of the job description, performs performance interviews, supervises the staff member, carries out the evaluation conversations and eventually compiles the evaluation report with the final conclusion. The first evaluator is always hierarchically higher than the staff member to be evaluated. The role of the second evaluator is decided at the local school level. His/her task is to monitor the evaluation process and support both the staff member and the first evaluator. He must be consulted during the evaluation procedure by both the first evaluator and the staff member who is evaluated. The second evaluator can never replace the first evaluator and can not change the final decision of the first evaluator. The second evaluator is at least of the same hierarchical grade as the staff member to be evaluated. (Article 73ter §4 3 ° Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

The evaluation takes place in particular on the basis of an evaluation conversation. The main aim is to improve the 'functioning of the staff member where necessary and to support him/her. Evaluation is not solely aimed at the past. The strengths and weaknesses to be improved, should be clarified. The evaluation conversation can therefore lead to a change for the future' (Article 73, §1 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

The evaluation discussion will in any case lead to an evaluation report (Article 73d § 2 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium). This evaluation report carefully describes the evaluation discussion (Article 73 §3 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium): the functioning of the staff member in relation to the job description, including the specific objectives and development goals agreed for the relevant evaluation period (Article 73d, §2 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

The first evaluator signs the evaluation report and submits it to the relevant staff member. The staff member signs for notification and returns it to the first evaluator immediately. The first evaluator then immediately sends a copy of this signed evaluation report to the evaluated staff member. The first evaluator will also provide a copy of this evaluation report for notification to the second evaluator and to the board of directors. If the evaluation report contains the 'unsatisfactory' final conclusion, it must always include the information about the appeal procedure (Article 73, §2 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

- The final 'unsatisfactory' evaluation decision

An evaluation may result in a final 'unsatisfactory' evaluation decision (Article 73undecies

§1 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium). Only in case of a final 'unsatisfactory' evaluation conclusion does the staff member has a right to appeal before the Appeals Commission within a period of 20 calendar days from the day that the copy of the evaluation report with the final conclusion 'unsatisfactory' is given to the staff member by the first evaluator (Article 73septies §5 1 ° Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium). This Appeals Commission guarantees the rights of defense (Article 73septies § 5 4° Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium). As long as the appeal is being dealt with, the negative evaluation is suspended (Article 73septies §5 2 ° Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

If the tenured staff member or staff member appointed for indefinite duration has received an 'unsatisfactory' final evaluation, the staff member has the right to a new evaluation (Article 73undecies §3 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium). This new evaluation must include effective performance of at least 12 months from the date of submission of the evaluation report (Article 73undecies §3 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

- Permanent staff member or staff member appointed for indefinite duration

The appointed staff member or staff member appointed for indefinite duration is dismissed after 2 consecutive final evaluations with the final 'unsatisfactory' evaluation decision or 3 final 'unsatisfactory' evaluation decisions in his/her career in the school where the 'unsatisfactory' evaluation decisions were given (Article 73ter Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

- Staff member appointed for a fixed duration

The staff member appointed for a fixed period is fired after 1 evaluation with the final 'unsatisfactory' evaluation decision (Article 73quaterdecies, Decree legal status of staff of educational institutions of the Flemish Community of Belgium).

- Mandate as Director

The appointed staff member with the mandate of director is set back in his/her function prior to the term of director after 1 final 'unsatisfactory' evaluation decision 'unsatisfactory' immediately (Article 73quinqües Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium).

2.1.3. Evaluation of staff in non-public state funded schools in the Flemish Community of Belgium

The provisions applicable for non-public state funded schools are similar to those described above for public schools in the Flemish Community of Belgium and laid down in Article 47a and following of the Decree on the legal status of staff in non-public state funded schools in the Flemish Community of Belgium.

The main differences are in the field of appeals against an 'unsatisfactory' evaluation decision confirmed by the Appeals Chamber for non-public state funded schools in the Flemish Community of Belgium before the court.

This is due to the fact that non-public state funded schools are considered private law institutions, which means that staff can challenge the decisions of dismissal in the labor court only, within 3 months after notification of the dismissal (and not in the Council of State).

2.1.4. Appeals Chambers

A final ‘unsatisfactory’ evaluation decision has serious consequences for a staff member. Therefore appeal procedures are in place. A final ‘unsatisfactory’ evaluation decision may first be appealed to the special Appeals Chambers and later before the courts (Council of State for public schools, the labor courts for non-public state funded schools).

- Appeals Chambers

The Appeals Chambers are constituted by representatives of employers and employees (Article 3, §3 Evaluation Decision of the Flemish Government). There are three appeals chambers: a chamber for public schools of the Flemish Community of Belgium (Article 73septies §1 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium), a chamber for non-public state funded schools (Article 47septies §1 Decree on the legal status of staff in non-public state funded schools in the Flemish Community of Belgium) and a chamber for the small sector of public state-funded schools (established by the villages, cities, provinces).

An Appeals Chamber is composed of one working and two deputy chairmen and of twelve working and twelve back-up members. A back-up member can only sit if the working member is absent. All these members are appointed by the Flemish Government for a renewable 4 year mandate (Art. 3, §1 and §2 and Art.4, §1 Evaluation Decision of the Flemish Government).

The time limit for lodging an appeal is laid down in the Decrees on the legal status of the staff in education (Article 73septies §5 1° Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium; Art. 47septies Decisions §5 1° Decree on the legal status of staff in non-public state funded schools in the Flemish Community of Belgium). In both cases, the staff member should lodge his/her appeal within 20 calendar days after the handover of the copy of the evaluation report with the final ‘unsatisfactory’ evaluation decision by the first evaluator. If the end of this term falls within a school holiday, the term is suspended for the duration of the holiday (Article 7 Evaluation Decision of the Flemish Government).

Within 30 calendar days, the members of the relevant Appeals Chamber schedule their agenda and invite by registered mail the parties involved (Article 10 §1 Evaluation Decision of the Flemish Government). The Chambers work in public hearings unless the public order is threatened or the staff member asks for a closed session (Article 10 §3 Evaluation Decision of the Flemish Government).

The decision of the Appeals Chamber is communicated to the parties by registered mail within ten calendar days of the date of the decision. The decision is motivated and binds both parties (Article 11, BVR evaluation).

The Appeals Chamber checks whether the procedures have been properly followed by the educational institution and whether there is a reasonable relationship between the facts and the final ‘unsatisfactory’ evaluation decision. The Appeals Chamber may confirm or annul the decision (Art. 73septies Decisions §2 Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium & Art. 47septies Decisions §2 Decree on the legal status of staff in non-public state funded schools in the Flemish Community of Belgium).

‘The competences of the Appeals Chamber are:

1° to check whether the procedural rules are complied with by the educational institution. It verifies whether:

- both the evaluation procedures and the procedures for the job description were respected;
 - the rights of defense were not violated;
 - 2° to check whether the evaluation has been done according to the rules and in the spirit of the job description and evaluation;
 - 3° to judge whether the ‘unsatisfactory’ evaluation decision is based on motives that sustain the ‘unsatisfactory’ evaluation in law and in fact;
 - 4 ° to judge whether there is a reasonable relationship between the facts and the final ‘unsatisfactory’ evaluation decision;
 - 5° annul the ‘unsatisfactory’ evaluation decision.’
- (Art. 47septies Decree on the legal status of staff in non-public state funded schools in the Flemish Community of Belgium)

The Appeals Chamber rules on the final ‘unsatisfactory’ evaluation decision by assessing on the one hand whether the evaluation has been done in a careful and qualitative manner, and on the other hand, whether it is reasonable.

Unlike the Appeals Chamber for disciplinary matters, the Appeals Chamber that annuls the final ‘unsatisfactory’ evaluation decision, can not evaluate the staff member itself but has to return the file to the educational institution for a new evaluation.

In case the Appeals Chamber decides not to annul – in other words to reject the appeal – the final ‘unsatisfactory’ evaluation decision enters into force in accordance with article 73undecies, § 2 third paragraph of Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium.⁴

The decisions of the Appeals Chamber for public schools may still be challenged in the Council of State (administrative court) within 60 days of publication of the decision (Article 14 Council of State Statute).

2.2. Case study: the evaluation of staff in university colleges and universities in the Flemish Community of Belgium

For the teaching staff in university colleges and universities, the Codex on Higher Education is far less detailed. Moreover, universities do not have an automatic dismissal procedure after consecutive ‘unsatisfactory’ evaluations.

2.2.1. University colleges

The Codex Higher Education (Article V.111 §2 2 °) contains an automatic dismissal after a second consecutive ‘unsatisfactory’ evaluation or after a fifth ‘unsatisfactory’ evaluation in the whole career path at that university college.

In university colleges the evaluator is often one person only. This obviously raises more controversies, although internal appeals procedures at the university colleges have to comply with procedural requirements laid down in the Codex Higher Education.

The board of the university college establishes an evaluation scheme, including the evaluation procedures and the functioning of the internal appeals commission for evaluations. The Negotiation Committee for University Colleges is involved as well in the drafting of the

⁴ Council of State of Belgium, Case no. 225.662 of 2 December 2013.

evaluation procedures (Article V.83 §1, Codex Higher Education).

An evaluation is mandatory for each staff member and takes place at least every five years, unless the staff member got an ‘unsatisfactory’ evaluation. In this case, a new evaluation must be organized within one year of effective performance. Another exception is the first evaluation of the staff member after his/her first appointment in the institution, or after a promotion that should take place at least within 3 years (Article V.83 §2, Codex Higher Education).

In any evaluation other than ‘unsatisfactory’, the staff member may respond in writing to the arguments. This written response is added to the evaluation file (Article V.93 §5, Codex Higher Education). In case of an ‘unsatisfactory’ evaluation, the staff member can appeal against this decision to the appeals commission (Article V.93 §3, Codex Higher Education) within a period of 15 calendar days. The ‘unsatisfactory’ evaluation is final if the time limit for setting up the appeal has expired or after a final decision has been taken (Article V.93 §4, Codex Higher Education).

- Internal Appeals Commission

The board of the university college establishes an internal appeals commission for evaluations (Article V.93 §3 Codex Higher Education). This internal appeals commission consists of 5 permanent and 5 rotating members, whether or not employed by the university college. They are appointed by the board of the university college for a term of 4 years. Staff members involved in the evaluation that gave rise to the appeal can not sit in the internal appeals commission.

As long as no internal appeals commission is established in the university college, ‘unsatisfactory’ evaluations can not be given (Article V.93 §3, Codex Higher Education).

2.2.2. Universities

The university board approves the regulations for evaluating the performance of academic staff members. In any case, every member of the academic staff must be evaluated at least every 5 years (Article V.46, Codex Higher Education). By way of derogation, however, an evaluation must take place 3 years after the first appointment and after promotion.

In case of a final ‘unsatisfactory’ evaluation decision, the university board may cancel the seniority plan for the next salary step for 1 year.

After 2 final consecutive ‘unsatisfactory’ evaluation decisions or 3 ‘unsatisfactory’ evaluation decisions in the career of a staff member at a particular university, the university board may dismiss the staff member. However, no automatic dismissal is included for universities under Art. V.46 Codex Higher Education.

Universities should guarantee objective evaluation procedures. The quality of the procedure is subject to judicial review by the courts. The Council of State has underlined that the various procedural safeguards should be respected in the evaluation of a staff member. The procedure must be objective, evaluators may be challenged for i.a. bias, performance interviews should be recent, accurate formulation of the facts should be contained in the evaluation file, ...

Unlike compulsory education schools and university colleges, no automatic dismissal occurs after two ‘unsatisfactory’ evaluations. This means that even after 2 final consecutive ‘unsatisfactory’ evaluation decisions or three ‘unsatisfactory’ evaluation decisions in a career, the university board has still discretion to dismiss the staff member or not (Article V.46, Codex Higher Education).

Another difference with university colleges and compulsory education schools is that universities are autonomous in organizing the internal appeal procedure: ‘The evaluation procedure must provide for a career opportunity with independent appeals. The procedure must protect the rights of the staff member’. (Article V.46, Codex Higher Education)

With regard to the legal protection after internal appeal procedures, the external appeal procedures are not specified and the scope of judicial review is left to the courts to decide. The courts will engage in judicial review of the motivation and the evaluation procedures.

2.3. Case study: procedures on evaluation of staff before the courts in the Flemish Community of Belgium

2.3.1. Public educational institutions

The staff working in a public educational institution can appeal to the Council of State (Administrative Court) after a ‘unsatisfactory’ evaluation decision and ask for suspension and annulment of the ‘unsatisfactory’ evaluation decision. The Council of State can order the suspension or annulment of the ‘unsatisfactory’ evaluation decision.

An annulment by the Council of State of an ‘unsatisfactory’ evaluation decision by a public-law institution has profound consequences. The evaluation decision of the educational institution disappears from the legal order and the ‘unsatisfactory’ evaluation is considered to have never been given, and the staff member has to be integrated again.

2.3.2. Non-public state funded educational institutions

On the other hand, for the staff working at non-public state funded institutions, the employers have according to labor law autonomy in decisions of dismissal of staff.

When evaluating the performance of the staff employed under contract, the labor court can not put its decision in the place of the decision made by the employer, in particular can the labor courts not reverse the evaluation decision of the employer. The labor court can not declare an unlawful dismissal void. In case of a wrongful evaluation and dismissal in breach of contract, the staff member may claim compensation for all financial and other benefits that he/she would have received had he/she not been dismissed for wrongful evaluation.

An exception to this is the possibility of declaring an employer's decision void in so far as the decision is challenged under the anti-discrimination law. In the case of labor law (non-public state funded private law educational institutions), the claim for annulment of an employer's decision with reinstatement of employment is completely unknown under Belgian law. The question then arises whether this could be considered a discrimination between teaching staff working in public educational institutions and teaching staff working in non-public state funded educational institutions. According to the Constitutional Court, the difference in treatment does not constitute a discrimination. In a landmark decision, the Constitutional Court of Belgium ruled that the protection against unlawful dismissal is different but equal.⁵

Not only procedures but also compensation for unlawful dismissal are different in the Council of State and the Labor Court.

The competences of labor courts are limited to rulings on damages (non-public state funded

⁵ Constitutional Court of Belgium (Grondwettelijk Hof/Arbitragehof) Case nr.87/2002

schools). This requires (under the 1384 Belgian Civil Code) the staff member to prove that the employer has made a fault in his/her evaluation.

The claim for damages often ends up in a lump sum deemed to compensate the staff member for all damages suffered, except in case of abuse of law. Additional damages are difficult to prove.

A first negative evaluation in higher non-public state funded university colleges, does not immediately have adverse legal consequences for the staff member as it concerns only a possibility of hypothetical damages if a second unlawful 'unsatisfactory' evaluation would be given. The staff member does not suffer any material damage at this stage of evaluation. Moreover, an 'unsatisfactory' evaluation does not cause moral damage – however unpleasant. And even if there is moral damage, a fault still has to be proven by the staff member. Implementing the regulations on teacher performance does not constitute a wrong doing as long as the procedure was exercised carefully and the decision does not appear to be unreasonable or discriminatory.

Only after a second 'unsatisfactory' evaluation, the tenured staff member can be dismissed, which he/she can challenge in court. The court will rule on the legality and the motivation of that second negative evaluation.

In the case of non-public state funded institutions, labor law defines the principles applicable on dismissal in education, as applied to employers and staff working in the private sector. As long as the Court of Cassation in Belgium adheres to the principle of autonomy of employers in dismissal decisions and unlawful dismissal is compensated through a lump sum, in practice, damages for unlawful dismissal for a wrongful 'unsatisfactory' evaluation remain restrictive. Nevertheless, there is recently a tendency by the courts to effectively allocating damages on the basis of actual and proven damages suffered for unlawful dismissal.

CONCLUSION

Staff evaluations challenge tenured staff positions. But in reality it seems that educational institutions (so far) apply evaluation procedures carefully.

Evaluation procedures are characterized by a high degree of autonomy of the schools. Moreover, different procedures exist for the different levels and kinds of education and educational institutions: compulsory education, university colleges and universities, public and non-public state funded.

In the Flemish Community of Belgium, Decree 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium and the Decree on the legal status of staff in non-state state funded schools in the Flemish Community of Belgium appear to be based on a certain automatism of dismissal or resignation after a number of 'unsatisfactory' evaluation decisions. According to the Council of State, schools for compulsory education and university colleges do not have a margin of discretion after a particular number of 'unsatisfactory' evaluation decisions. The legislator has however not included such an automatism for universities.

Personnel evaluations remain delicate, not just in case of an 'unsatisfactory' evaluation decision, but also the reasons and motivation given for a positive evaluations with critical comments. Often, alternative solutions are considered in problematic situations such as early retirement. However, in an increasingly competitive environment for grants, a systematically underperforming staff member will come under peer pressure to resign.

Annex

1. The Flemish Community of Belgium

1.1. Legislation of the Flemish Community of Belgium

Dutch only website Edulex <http://data-onderwijs.vlaanderen.be/edulex/>

- Decree on Basic Education, 25 February 1997 (hereinafter: Decree of Primary Education)
- Decision of the Flemish Government on the organization of full-time secondary education, 19 July 2002 (hereinafter: Organization for Secondary Education)
- Decree of the Flemish Government on the codification of secondary education, 17 December 2010 (hereafter: Codex Secondary Education)
- Law of 29 July 1991 on the duty to give reasons for administrative decisions (hereinafter: Law on Motivation)
- Decree of 27 March 1991 on the legal status of staff in public schools in the Flemish Community of Belgium
- Decision of 22 May 1991 of the Flemish Community of Belgium on the evaluation, and disciplinary procedures in public schools in the Flemish Community of Belgium
- Decree of 27 March 1991 on the legal status of staff in education institutions and centers for student counseling of non-state funded schools in the Flemish Community of Belgium
- Decree of 14 December 2007 relating to the appeal procedure after the final 'unsatisfactory' evaluation decision
- Codex Higher Education (Besluit van de Vlaamse Regering tot codificatie van de decretale bepalingen betreffende het hoger onderwijs 11 oktober 2013)

1.2. Example of case law of the Flemish Community of Belgium

- Case law of the Appeals Chambers in the Flemish Community of Belgium⁶ can be found at:
<http://www.agodi.be/college-van-beroep-beslissingen>
- Case law by the Council of State (Belgium) can be found at:
<http://www.raadvanstate.be/?lang=nl&page=caselaw>
Examples:
Case nr. 225.662 of 2 December 2013 in Case A. 198.524/IX-8099
Case nr. 234.920 of 2 June 2016 in Case A. 215.745/IX-8632
Case nr. 235.143 of 21 June 2016 in Case A. 209.134/IX-8028
Case nr. 203.063 of 19 April 2010 in Case A. 172.994/IX-5314 A. 174.784/IX-5367
Case nr. 165.125 of 27 November 2006 in Case A. 174.784/IX-5367
- Case law of the Constitutional Court of Belgium (Grondwettelijk Hof/previously Arbitragehof) can be found at: <http://www.const-court.be>
Case nr.87/2002

1.3. Summaries of some cases of the Flemish Community of Belgium

Decision of the Appeals Chamber for non-public state funded schools

2016_06: pdf bestandCollege_van_beroep_GVO_2016_06_dd_20161018.pdf (173 kB)

http://www.agodi.be/sites/default/files/atoms/files/College_van_beroep_GVO_2016_06_dd_20161018.pdf

⁶ The Flemish Community of Belgium has 3 Appeals Chambers: one for the public schools, one for the non-public state funded schools, and one for the small sector of public state funded schools

October 18, 2017 - The Appeals Chamber annuls the final 'unsatisfactory' evaluation decision

Summary of the case

The Appeals Chamber recalls that it can not substitute its appreciation for the evaluator(s) and that it can only annul the final 'unsatisfactory' evaluation decision based on the motivation mentioned in the final evaluation report and that its decision can not replace the decision of the initial decision.

The Appeals Chamber does not have the competences to evaluate a staff member; it must only ascertain whether the contested evaluation decision was made after a careful and qualitative evaluation procedure and whether the evaluation was made reasonably.

The Appeals Chamber reiterates that an evaluation can only take into account the performance of the current school year and the three preceding years and confirms that there is no provision for any extension of this evaluation period.

The Appeals Chamber found that the evaluation report contains just two sentences relating to a negative attitude towards the school board and to an insufficient scope of performance of tasks described in the job description.

The motivation for an evaluation must give clearly reasons and motivate why the evaluator came to the given conclusion in the evaluation.

The Appeals Chamber could not establish during the hearing with certainty as to whether the staff member had received adequate support and whether he got cooperation.

The Appeals Chamber states that the arguments regarding working conditions and complaints about welfare at work should be dealt with under appropriate procedures. These objections can not be dealt with by the Appeals Chamber for evaluations.

2. Lithuania

(...)

3. Poland

(...)

4. The Russian Federation

(...)

5. Belarus

(...)

6. Albania

(...)

Glossary of legal terms

- the duty to give reasons for an administrative decision
- reinstatement of employment
- by way of derogation
- unsatisfactory work performance
- standards and expectations that must be attained
- the level of improvement to be sustained
- termination of employment
- termination for unsatisfactory performance
- inability to complete work assignments
- inability to learn skills
- comply with the regulations
- repeal the regulations
- regulations for evaluating the performance of staff

- the evaluation 'unsatisfactory'
- relationship between facts and normative principles
- reasonable judgment about the evidence
- adversary proceeding
- appeal = a request made by a party that has lost and review of that decision to determine if it was correct
- the decision may be appealed to the court
- appellant = party who appeals a decision usually seeking reversal of that decision.
- burden of proof = the duty to prove disputed facts
- to have the burden of proving his or her case
- to challenge an evaluator for an appearance of partiality or impropriety
- fixed term contract = a contract in which an educational institution hires an employee for a specific period of time or a specific job
- contracts of an indefinite duration = employment with no specified end to the relationship and including a right to reasonable notice upon termination