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Author

NEUHÄUSER, Gert Armin

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Abstract

According to the principle of achievement anchored in Article 33 (2) of the Basic Law (Grundgesetz - GG), every German is equally eligible for any public office according to his aptitude, qualifications and professional achievements alone. The principle set down in Article 33 (2) of the Basic Law is constitutionally guaranteed without reservation and unrestrictedly. Based on the principle of the unity of the constitution it can therefore only be restricted by other rights and principles set down in the constitution in the course of practical concordance. As an "expression of constitutional democratic equality", Article 33 (2) of the Basic Law also guarantees a right that is equivalent to a fundamental right and therefore contains a general obligation to public notification of any vacancies. In order that one can speak of "equal" access, the enforcement of a constitutionally characterized legal position always requires procedural organization. Indeed, only the knowledge of a vacancy, only the general "transfer of knowledge" that there is a vacancy in public office enable the principle of performance to come into effect and actually make "equal access" achievable for the individual candidate. The

04.9.2024

advertisement of vacancies for professors can therefore regularly only be waived on the grounds of Section 45 (2) of the General Act of Higher Education (Hochschulrahmengesetz - HRG) and its concretizations in the laws of the Länder if the legal restrictions can be directly justified by the academic freedom guaranteed in Article 5 (3) of the Basic Law. Even if the appointment of professors directly affects the "self-renewal" of the higher education corporation and the appointment procedures determine the ones that are really responsible for free research and teaching within the universities and, based on Article 5 (3) of the Basic Law, the university basically has a constitutionally protected assessment competence regarding the applicant's qualification for a university post, regulations that lead to a situation in which junior professors are not offered a chair or, in the framework of the so called "Genius clause" make it possible to waive the advertisement of vacancies and thereby prevent a procedure of selecting the best candidates can not be justified by Article 5 (3) of the Basic Law. Article 5 (3) of the Basic Law in no way justifies an appointment without competition. By contrast, the removal of a time limit is no case of an appointment to public office that has to be measured against Article 33 (2) of the Basic Law. It is also possible to transfer the application procedures to an external funding institution if it is suitable to comply with the legal requirements of Article 5 (2) of the Basic Law. (HRK / Abstract übernommen)