



OMBUDSMAN

SINT MAARTEN

FINAL REPORT

(Article 21 sub 1 National Ordinance Ombudsman)

Complainant: Complainant

Date complaint filed: 24 October 2014

Complaint no.: 2014/00183

Ministry of Education, Culture, Youth and Sports

Department: Division Public Education

Department Head: Glenderlin Davis-Holiday

Summary of Complaint:

Complainant sent a letter to the Minister of (OCJS) dated January 7, 2014 to request an extension in Government Service after the pensionable age. Complainant also filled out and signed a 'Letter of Intent' form from the Ministry (OCJS) dated January 31, 2014 indicating that she was available to work for the school year 2014-2015.

Complainant claims that she was not informed that an extension of service would not be granted before reaching the pensionable age on May 4, 2014.

Complainant opines that she should have been informed of the situation before she had reached the pensionable age, and believes that she is still entitled to remuneration for the days worked at home in May 2014, as well as her accumulated vacation-allowance.

Up to the date of filing the complaint with the Ombudsman, Complainant claims not to have received a response to her subsequent queries to various departments and request for compensation of days worked in May 2014, including a request that her accumulated vacation-allowance be paid out.

Findings:

By letter dated 7 January 2014 addressed to the Minister of Education, Complainant requested an extension in Government Service after the pensionable age. In addition, Complainant signed a 'Letter of Intent' form from the Ministry of Education, Culture, Youth and Sports (OCJS) **dated 31 January 2014** indicating that she was available to work for the 2014-2015 school year.



OMBUDSMAN

SINT MAARTEN

Complainant claims to have received a phone call from Ms. Helen van Putten from the Division of Public Education on **20 May 2014**. According to Complainant, Ms. van Putten inquired as to whether Complainant had received a letter informing her that her services were terminated as of her 60th birthday. Complainant further stated that Ms. van Putten informed her that she was no longer on the payroll and subsequently would not receive a salary for May 2014.

Despite this Complainant was remunerated at the end of May 2014.

In a letter dated 21 May 2014 Complainant requested an intervention by the Prime Minister regarding her request for an extension of services beyond her 60th birthday.

By National Resolution (LB 14/0297) dated 26 May 2014 Complainant was honorably discharged from Government Service. Complainant claims to have been informed of said discharge and the pertinent resolution in a letter from the Head of Division Public Education, **dated 20 June 2014**.

In the letter dated 20 June 2014 from the Mrs. Glenderline Davis-Holiday, Head of Division Public Education, Complainant was informed that the Division Public Education of OCJS was unable to grant her an extension of services as an administrative clerk. Complainant was also informed that in an effort to ensure that she had all the needed documentation to proceed with regulating her personal affairs, the Division Public Education had proceeded with the processing of her information to grant her honorable discharge.

In June 2014 Complainant received a salary slip with a deduction of 157.33 hours of work, totaling Naf. - 5 398.94. By invoice dated 11 August 2014 the Island Receiver's Office also requested that Complainant pay an amount of Naf. 1 113.67.

According to Complainant the abovementioned amount was recorded as a 'personeelslening' on the pay slip of June 2014. Complainant further claims that she has never requested such a loan, and is unaware of such an arrangement.

In a letter dated 22 August 2014 Complainant informed the Minister of Finance of the aforementioned situation, and the fact that on 20 June 2014 she had been formally informed of the decision not to extend her services as stated in a resolution dated 26 May 2014. In the above-mentioned letter, Complainant requested that the vacation-allowance, which she had



OMBUDSMAN

SINT MAARTEN

accumulated be paid out to her and not be withheld against the remuneration she had received in May 2014.

By letter dated 29 September 2014 Complainant informed Ms. S. Hazel, then Head of the Receivers Office, of the above described situation and requested that certain departments mentioned in the letter be contacted before measures were taken to collect the amount of Naf. 1113.17 in the invoice dated 11 August 2014.

On 5 December 2014 a Notification of Complaint (NOC) was sent to the Minister of OCJS. The Minister was requested to respond to the NOC within 4 weeks.

In a letter dated 29 December 2014 Mrs. Glenderlin Davis-Holiday, the Head of Division Public Education, responded to the NOC.

Following are the questions posed in the NOC and the answers received:

1. Are you familiar with the above-mentioned complaint?
Yes, the complaint was forwarded via the outgoing Minister of ECYS.

2. What is your response to the complaint? (Notwithstanding your answer to question 1.)
Division Public Education cannot advise the Minister to honor Ms. ... request for extension due to the following:
 - a) *The complainant who held the position of administrative clerk at one of the DPE schools reached pensionable age on May 4th, 2014. Administrative personnel have never been granted extension of service within Public Education.*
 - b) *The complainant has a long record of chronic absenteeism due to illness throughout her years of service within the government.*
 - c) *On inquiry by complainant (via phone and in person at DPE office) prior to May 20th, 2014 she was informed by DPE Head and the Personnel Advisor, that unlike teaching staff in the Public Schools, her request cannot be honored. The visitor log sheet shows that Ms. ... came to the office regarding this issue on Monday, February 17th, 2014 at 2:15pm.*
Moreover, Ms. Y. ... is fully aware that when a person turns 60 the employer is not obligated to inform them of reaching this milestone nor grant them an extension.

3. Do you see a possibility to resolve this issue on a short term by intervention of the Ombudsman?



OMBUDSMAN

SINT MAARTEN

Yes, based on answers in point 2, however is the argument regarding compensation for work done at home after pensionable age, the permission to work from home was not authorized by DPE thus making her argument for compensation for those days null and void.

The attached pay slips shows clearly that Wages & Salary handled this issue in accordance to procedures and policies.

There were no answers provided to the following questions:

- Why was Complainant not informed that her request for an extension of services would not be granted before having reached the pensionable age?
- Explain why Complainant was allowed to work until May 20, 2014.
- Does the department plan to pay Complainant for the days worked in May? If yes, when will this take place? If not, please explain why this is.
- Explain how the actions taken by the Receiver's Office reflect department procedure/policy.
- Will the dispute concerning the repayment affect the payout of Complainant's 40 year Jubilee?

The Minister was also requested to provide all information and documents relevant to the complaint. No additional information or documents were provided.

By email of 11 February 2015 the Complaint Officer at the Ombudsman requested that Complainant provides documentation that supported her claim that she had worked after 4 May 2014.

By letter dated 12 February 2015 the Ombudsman requested that the department provide an answer to questions four (4) to eight (8) posed in the NOC. In addition the department was requested to provide additional information on the following:

- In the response to question 2 in the NOC "What is your response to the complaint? (Not withstanding your answer to question 1)", it was stated:
"... administrative personnel have never been granted extension of service within Public Education."
Please provide a copy of the legislation and/or policy in which this is regulated.
- Documentation wherein it was noted that Complainant was informed prior to 20 May 2014 that her request for extension could not be granted.

The department was given 2-weeks, until 26 February 2015, to provide the information.



OMBUDSMAN

SINT MAARTEN

By letter dated 19 February 2015 Ms. A.B. Samuel, Manager of the Charles Leopold Bell Primary School informed the Ombudsman of the tasks Complainant had carried out during May 2014. The tasks listed were:

- *“Compilation of all school statements for current and former students*
- *Letters to parents and other instances*
- *Compilation of the monthly statements for April 2014*
- *Convocation and minutes of meetings held during that month*
- *Kept daily accounts of contributions and PTF-funds*
- *Drafted the new groups for the 2014-2015 school year based on the registrations and the projections for the end of the school year 2013-2014*
- *Organized the new listing with the vaccination cards of the new pupils for the School Health Care.*
- *Typed up Teacher Performance evaluations*
- *Participated with the School manager on the Performance evaluation of the Adjunct Manager*
- *Transported a child, who came late to the Leonel Conner school to attend class*
- *Started out assisting with the School Development Plan*
- *Ran errands for the school*
- *Assisted with the school's year plan”*

By email of 7 April 2015 the following response was provided to the Ombudsman's request for additional information/documents of 12 February 2015:

“In response to the first question:

41 Landsverordening verhoging leeftijdsgrens 1996 regulates; *"The old-age pension age is 60 and this is also the age an employee has to leave service." Moreover honorable discharge is also given at the age of 60, which is the pensionable age for civil servants.*

In regards to your second question:

The complaint was verbally informed on several occasion prior May 20th, 2014 regarding her request for extension of her service as Administrative staff.”

By letter of 8 June 2015 Complainant disputed the claim of the Head of Division Public Education that Complainant had been informed that her request for an extension in service would not be granted: *“... when the complainant visited the office on February 17th, 2014 at 2:15 p.m., she neither had an audience with Mrs. Glenderlin Davis-Holiday nor Mrs. H. Van*



OMBUDSMAN

SINT MAARTEN

Putten and it was certainly not pertaining to her extension. As a matter of fact, she was called by Mrs. H. van Putten to resubmit her request for 'gratificatie' which was dated May 25, 2013 and was already submitted around that time in 2013, but could not be located. The complainant was attended to by one of the clerks at the window."

In the above mentioned letter Complainant also claimed that Head of Division Public Education was aware that Complainant was working from home as it was noted on the monthly statement '*maandstaat*' and that Complainant was never advised that she could not work from home.

On 24 June 2015 the Secretary General of the Ombudsman sent a reminder to the Secretary General of OCJS to respond to the findings and recommendations in the PFR.

By email of 29 June 2015 the Secretary General of OCJS requested an additional two weeks for the Ministry to provide a response to the PFR.

To date of this Final Report no reaction has been received to the PFR dated 8 June 2015.

Legal Basis:

Pursuant to article 19 section 1 of the National Ordinance Ombudsman (AB 2010, no. 20), the Ombudsman is authorized to request from government bodies, civil servants, the complainant, civil servants as experts or witnesses, all information and or documents pertaining to the investigation.

The persons mentioned in the aforementioned article are obliged to respond to the request within the time indicated by the Ombudsman, except in cases where the persons can appeal to legal grounds ("*verschoningsrecht*" - see article 19 section 4).

'Landsverordening Verhoging Leeftijdsgrens 1996' (PB 2000, no. 169)

Hoofdstuk 2 Bijzondere voorzieningen

Artikel IX: *In dit hoofdstuk wordt verstaan onder:*

- a. *Pensioenlandsverordening: de Pensioenlandsverordening overheidsdienaren (P.B. 1997, 312);*
- b. *Belanghebbende: degene die ingevolge artikel X recht heeft op de in artikel XI bedoelde uitkering;*
- c. *diensttijd: de diensttijd, vastgesteld overeenkomstig de artikelen 17 tot en met 20 en 104 van de Pensioenlandsverordening;*



- d. *middelsom: de middelsom van de laatste twee berekeningsgrondslagen als bedoeld in artikel 22 van de Pensioenlandsverordening, zonder toepassing van artikel 21 van die landsverordening;*
- e. *ontslag: een ontslag dat ingevolge de bepalingen van artikel 8, eerste lid, van de Pensioenlandsverordening Burgerlijke Landsdienaren 1938 (P.B. 1976, 45), zoals dat artikel op 1 januari 1996 luidde, een onmiddellijk recht op pensioen ten gevolge gehad zou hebben, maar dat geen recht op wachtgeld veroorzaakt.*

Artikel X

1. *Degene die op 31 december 1995 ambtenaar in de zin van de Pensioenverordening Burgerlijk Landsdienaren 1938 was, heeft na bekomen ontslag recht op een uitkering indien hij:*
 - a. *de leeftijd van ten minste 55 jaren heeft bereikt;*
 - b. *geboren is vóór 1 januari 1949; en*
 - c. *een diensttijd van ten minste 20 jaren, waarvan ten minste 5 in Nederlands-Antilliaanse dienst, heeft vervuld.*
2. *Aan een betrokkene kan bij landsbesluit ontheffing van het eerste lid, onderdeel b, worden verleend indien hij een functie vervult waarvoor op de arbeidsmarkt niet voldoende gekwalificeerde werknemers beschikbaar zijn, met dien verstande dat deze ontheffing slechts verleend kan worden aan personen die vóór 1 januari 1951 geboren zijn.*
3. *Het eerste lid is van overeenkomstige toepassing op personen als bedoeld in dat lid, die tevens ambtenaren zijn in de zin van artikel 8, derde lid, van de Pensioenverordening Burgerlijke Landsdienaren 1938, zoals dat artikellid op 1 januari 1996 luidde, met dien verstande dat alsdan voor het vervuld zijn van de voorwaarde, gesteld in onderdeel c van het eerste lid, vereist is dat een diensttijd van ten minste 20 jaren vervuld zou zijn, indien de betrokkenen niet ontslagen zouden zijn en regelmatig zouden zijn blijven doordienen.*
4. *Het recht op de uitkering gaat in:*
 - a. *indien het eerste lid van toepassing is, met ingang van de dag waarop het ontslag ingaat. En*
 - b. *indien het derde lid van toepassing is, met ingang van de dag waarop 20 dienstjaren zouden zijn vervuld, indien de belanghebbende niet ontslagen zou zijn en regelmatig zou zijn blijven doordienen.*

Indien evenwel op het onder a of b bedoelde tijdstip door de betrokkene een wachtgeld ingevolge de Wachtgeldregeling overheidsdienaren (P.B. 1986, no. 83)



OMBUDSMAN

SINT MAARTEN

wordt genoten, gaat het recht op de uitkering eerst in, zodra de wachtgeldperiode ingevolge artikel 5 van de genoemde landsverordening is verstreken.

3. *Het recht op de uitkering eindigt met ingang van:*
 - a. *de dag, volgende op die waarop de belanghebbende de leeftijd van 60 jaar bereikt, of*
 - b. *de maand, volgende op die waarop de belanghebbende is overleden.*

Artikel XI:

1. *De uitkering bedraagt bij een diensttijd van:*
 - a. *20 jaar: 50% van de middelsom;*
 - b. *meer dan 20 jaren, maar minder dan 30 jaren: 50% van de middelsom, vermeerderd met 2% van de middelsom voor elk jaar daarboven vervulde diensttijd;*
 - c. *30 of meer jaren: 70% van de middelsom.*
2. *De uitkering wordt voor zover nodig naar boven afgerond tot het naasthogere bedrag in guldens dat een veelvoud is van 3.*

Artikel XII

Degene die een uitkering geniet als bedoeld in het voorgaande artikel, is, indien hij pensioengerechtigde betrekkingen in de zin van hoofdstuk IV, afdeling 1, paragraaf 1, van de Pensioenlandsverordening heeft, verplicht ten behoeve van het nabestaanden- en wezenpensioen drie procent (3%) van die uitkering bij te dragen. Deze bijdrage wordt door de uitbetalende instantie ten behoeve van het Algemeen Pensioenfonds van de Nederlandse Antillen op de uitkering ingehouden.

Artikel XIII

1. *Met de uitkering worden verrekend de inkomsten uit of in verband met arbeid, die direct of indirect ten laste komen van 's Lands kas, ten laste van de kas van een eilandgebied of van de kas van een ander publiekrechtelijk lichaam in de Nederlandse Antillen. De verrekening geschiedt aldus dat de uitkering wordt verminderd met het bedrag waarmede de uitkering, vermeerderd met genoemde inkomsten, de middelsom overschrijdt.*
2. *Aan een belanghebbende kan ontheffing van het eerste lid worden verleend voor zover de in dat lid bedoelde arbeid betreft de vervulling van een functie waarvoor op de arbeidsmarkt niet voldoende gekwalificeerde werknemers beschikbaar zijn. De ontheffing geschiedt bij landsbesluit.*
3. *Hoofdstuk XI van de Landsverordening Materieel Ambtenarenrecht (P.B. 1964, 159) is op de uitkering van overeenkomstige toepassing.*



OMBUDSMAN

SINT MAARTEN

4. *Bij de toepassing van bepalingen inzake de samenloop van een pensioen op grond van de Pensioenlandsverordening met een pensioen op grond van een andere regeling of met een uitkering bij wijze van pensioen, wordt de uitkering gelijkgesteld met een pensioen op grond van de Pensioenlandsverordening.*

Artikel XIV

1. *De uitkering wordt in gelijke maandelijkse termijnen uitbetaald.*
2. *De uitkering wordt in de Nederlandse Antillen betaalbaar gesteld in Nederlands Antilliaans courant op een door de belanghebbende aan te geven bank- of girorekening.*

Artikel XV

1. *De uitkering wordt slechts verleend op een daartoe strekkend, door of vanwege de belanghebbende bij de Gouverneur ingediend schriftelijk verzoek.*
2. *Een aanvraag als bedoeld in artikel 52 van de Pensioenlandsverordening ter verkrijging van ouderdomspensioen wordt aangemerkt als een verzoek als bedoeld in het eerste lid, indien de aanvrager ingevolge deze landsverordening slechts recht kan hebben op een uitkering krachtens deze landsverordening.*
3. *Artikel 45, tweede en vijfde lid, van de Pensioenverordening Burgerlijke Landsdienaren 1938, zoals die artikelleden op 1 januari 1996 luiden, is op het verzoek van overeenkomstige toepassing.*
4. *Over het verzoek wordt bij landsbesluit beslist.*

Artikel XX

Over besluiten, handelingen en weigeringen om te besluiten of te handelen, verband houdende met een aanspraak of vermeende aanspraak op grond van dit hoofdstuk, oordeelt bij uitsluiting in eerste aanleg het gerecht in ambtenarenzaken en in hoger beroep de raad van beroep in ambtenarenzaken, óók wanneer de bezwaarde geen ambtenaar in de zin van de Regeling Ambtenarenrechtspraak 1951 (P.B. 1951, 134) is. De bepalingen van die landsverordening zijn van overeenkomstige toepassing.

HOOFDSTUK 3 Overgangsregeling

Artikel XXII

Voor zover het betreft de toepassing van artikel 5 van de Landsverordening leeftijdsgrens ambtenaren, is deze landsverordening niet van toepassing ten aanzien van degenen die tot het tijdstip van inwerkingtreding van deze landsverordening, ambtenaar in vaste niet-pensioengerechtigde dienst als bedoeld in genoemd artikel waren.



OMBUDSMAN

SINT MAARTEN

‘Landsverordening leeftijdsgrens ambtenaren’ (AB 213, GT no. 631)

‘Artikel 4 lid 1 Aan de ambtenaar wordt door het bevoegde gezag eervol ontslag verleend met ingang van de dag waarop hij de leeftijd van 60 jaar bereikt.’

Government of St. Maarten Employee Handbook

The first sentence of **Section E-7, paragraph 2 of the Employee Handbook 2011 and 2015** states that the old- age pension age is 60 and this is also the age an employee has to leave service.

Both documents incorrectly refer to the *‘Landsverordening verhoging leeftijdsgrens 1996’* as the basis for the regulation.

According to the ‘Dismissal’ section of Personnel & Organization’s website,

(<http://pnobeleid.sharepoint.com/Pages/Dismissal.aspx>, last accessed 31 August 2015)

Honorable discharge is also given at the age of 60, which is the pensionable age for civil servants. For more details on pension, see section E, benefits. If Government wants to retain an employee who has reached the age of 60, this can only be done by means of an employment contract.

Standard(s) of Proper Conduct:

The Ombudsman investigates whether the behavior of public bodies towards citizens is correct. The applicable standards of proper conduct in this case are:

- *Active and adequate information provision;*
- *Promptness;*

Active and adequate information provision

In the interest of managing the affairs of the citizens, administrative bodies are required to provide adequate information to the public actively and upon request. This implies among others the obligation to answer letters from citizens, sending an acknowledgement of receipt, and an interim notice in case the handling of a request takes longer than anticipated.

That administrative bodies are required to provide adequate information to the public actively and upon request, entails the duty to provide citizens with information upon request; as well as have the duty to inform the citizen on its own initiative about proceedings that have a direct effect on them. Proper information provision creates legal certainty for all.

Promptness



OMBUDSMAN

SINT MAARTEN

A public body is expected to be dynamic and as such be decisive and swift in its decision-making. Hence, providing a response or decision within the legal timeframe or at least within a reasonable time is required.

Promptness requires a decision to be taken in less than the legal timeframe in matters of urgency.

Conclusion:

Considering that no reaction to the PFR was received from the Division of Public Education, the Ombudsman considers the findings to be accurate.

Complainant requested an extension in Government Service after the pensionable age by **letter dated 7 January 2014** addressed to the Minister of Education and again via a 'Letter of Intent' form from OCJS **dated 31 January 2014**.

On 4 May 2014 Complainant reached the pensionable age of 60.

By National Resolution (LB 14/0297) dated 26 May 2014 Complainant was honorably discharged from Government Service. Complainant claims to have been accordingly informed in a letter from the Head of Division Public Education, **dated 20 June 2014**. **In the letter dated 20 June 2014** from the Head of Division Public Education, Complainant was informed that the Division Public Education of OCJS was unable to grant her an extension of services as an administrative clerk.

No clarity was provided regarding the action of the Receiver's Office pertaining to the invoice of 11 August 2014, nor was the request for compensation of vacation days addressed.

The Ombudsman concludes that propriety provides that complainant should have been formally answered and informed that the Division Public Education was unable to grant her request for an extension of service before she reached the pensionable age on 4 May 2014. If applicable, Complainant should have been informed of any delays in the decision-making process. Five months cannot be considered a reasonable timeframe to respond to Complainant's request, especially considering the time-sensitive nature of said request. As such the standards of proper conduct *Active and adequate information provision* and *Promptness* are applicable.



OMBUDSMAN

SINT MAARTEN

Judgment:

The complaint filed by Complainant regarding the fact that her request and inquiries for an extension of Government Service after the pensionable age, and related questions, remained unanswered before reaching the pensionable age of 60 is deemed founded.

Considering that Complainant was allowed to continue to work, albeit from home after reaching the pensionable age and was paid for the month of May 2014, the standards of proper conduct *Active and adequate information provision* and *Promptness* were not duly observed by Division of Public Education. The (in)actions of the Division of Public Education towards Complainant are improper.

Recommendation(s):

Considering the above-mentioned the Ombudsman recommends as follows:

- Properly respond to Complainants' requests not addressed by the National Resolution (LB 14/0297) dated 26 May 2014.
 - Respond to all written requests and or agreements made with third parties in writing.
- o I agree with the recommendation(s)
 - o I do not agree with the recommendations (please explain by submitting a written reaction no later than 16 September 2015).

The OBM requests a status report on the recommendation(s) within three (3) months from the date of this letter.

Philipsburg, 2 September 2015

Dr. R. (Nilda) J.A. Arduin
Ombudsman