CHRAJ/38/2018/331

COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE (CHRAJ)

19-8-2020

IN THE MATTER OF THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRARIVE JUSTICE ACT 1993, (ACT 456)

AND

IN THE MATTER OF A COMPLAINT BEFORE THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE

CASE NUMBER.....38/2018

BETWEEN:

CITIZENS FORUM ... **COMPLAINANT**

AND`

GHANA IMMIGRATION SERVICE ... **RESPONDENT**

DECISION

INTRODUCTION

On 31st January, 2018, this Commission received a complaint from Citizens' Forum (Complainant) against the Ghana Immigration Service (Respondent) alleging, among others, abuse of power arising from unfair, unreasonable conduct, and illegal collection of recruitment application fees from applicants seeking employment with the Respondent. The Complainant is a civil society organization

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(CSO), which seeks to impact national governance through awareness creation and advocacy on matters of social justice.

BACKGROUND TO THE COMPLAINT

On Tuesday, 21st November 2017, the Respondent published in the *Daily Graphic* and *Ghanaian Times* newspapers (Newspapers) requesting for eligible applicants for recruitment/enlistment into the Ghana Immigration Service (GIS). According to the Newspapers, interested applicants were required to purchase an electronic voucher (E-voucher) at a cost of GH¢50.00 per applicant from various branches of GCB Bank Ltd. (GCB) across the country. In addition, the Newspapers stated that sale of the E-voucher would begin from 27th November 2017 to 8th December 2017. Furthermore, per the publication, applicants were required to complete the application online from 29th November 2017 to 11th December 2017. In view of the above publication, interested applicants purchased the E-voucher for purposes of recruitment into the GIS.

COMPLAINANT'S CASE

The Complainant sought to invoke the Commission's mandate under Article 218 (a) (b) and (c) of the 1992 Constitution (Constitution) in respect of the acts and omissions of the Respondent.

Article 218 (a) (b) of the Constitution 1992 provides:

> *"The functions of the Commission shall be defined and prescribed by an Act of Parliament and shall include the duty-*
>
> *(a) to investigate complaint of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;*
>
> *(b) to investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the Armed Forces, the Police Service and the Prisons Service in so far as*

complaints relate to the failure to achieve a balanced structuring of those services or fair administration in relation to those services;"

The Complainant alleged that, the Respondent commenced a recruitment process and requested interested persons or applicants to apply by purchasing application forms (E-voucher) at a cost of GH¢50.00. The Complainant further alleged that, at the close of the application window and at the screening stage, it turned out that 84,000 applicants had applied to be recruited into the GIS despite the Respondent knowing that it had capacity to employ only 500 applicants. According to the Complainant the sale of the E-vouchers as prerequisite for recruitment into the GIS denied other Ghanaian youth the opportunity to access recruitment into Respondent's institution.

Furthermore, the Complainant contended that the Respondent has no power as a public service (security institution) operating under the laws of Ghana to sell application forms or charge fees for recruitment into the GIS. Therefore, the Complainant argued that the sale of the application forms by the Respondent was contrary to law, particularly breaching specified provisions of the Public Financial Management Act, 2016 (Act 921) and the Financial Administration Regulations (FAR), 2004 (L.I. 1802).

In addition, the Complainant argued that the Respondent is bound by Articles 23 and 296 of the Constitution to be reasonable, fair and candid in the performance of its functions. According to the Complainant, by selling application forms (E-vouchers) to as many as 84,000 applicants when at all material times it knew that it had capacity to recruit only 500 applicants, the Respondent acted in breach of Articles 23 and 296 of the Constitution. In this connection, the Complainant contended that Respondent's conduct of collecting monies from unemployed and vulnerable youth seeking to serve their nation constitutes an unreasonable administrative practice being perpetrated by public institutions, including the Respondent, whose expenditures are borne by the Consolidated Fund.

Based on the above, the Complainant petitioned the Commission to cause investigation into the allegations to ascertain the lawfulness, reasonableness and fairness associated with the following:

a. the collection and disbursement of application fees by the Respondent in relation to section 47(1) and (2) of the Public Financial Management Act

(Act 654) as well as sections 20, 21 and 22 of the Financial Administration Regulations (FAR) (L.I. 1802);

b. Respondent's act of collecting moneys from 84,000 Ghanaian jobless youth, who were seeking employment or recruitment into any public or private institution in Ghana; and
c. the conduct of the Respondent in relation to the existing financial and legal framework regulating the operations of all public service institutions in Ghana.

RESPONDENT'S CASE

In accordance with section 14(1) of the Commission on Human Rights and Administrative Justice Act, 1993 (Act 456), the Commission, in a letter Ref. CHRAJ/38/2018/33 dated 21st February 2018, requested for Respondent's comment on the allegations.

In response to the allegations, Baaba Asare, Deputy Comptroller-General (DCG/Legal), acting on behalf of the Respondent, in a letter Ref. GIS/LEG/096 dated 29th May 2018, commented as follows:

a. that between 27th November -11th December 2017 the Respondent, as part of its recruitment exercise, sold E-vouchers to prospective applicants at a cost of Gh¢50.00 per voucher. The Respondent indicated that the recruitment, which was done in line with government's policy on e-recruitment in all institutions under the Ministry of the Interior, was advertised in both electronic and print media; she added that, the advertisements stated the eligibility criteria for all applicants.

b. that in previous years the E-vouchers were sold for Gh¢100.00 per applicant. However, in 2017, the Ministry of the Interior directed that the E-vouchers be sold for Gh¢50.00, a directive which the Respondent complied with. According to the Respondent, about 81,700 E-vouchers were sold out; in addition, a total number of 68,379 used the E-vouchers by applying online while 15,621 bought the E-voucher, but for unknown reasons they did not use the E-vouchers at all. Moreover, the Respondent indicated that 20,902 out of the 68,379 applicants who used the E-vouchers were disqualified electronically and the remaining 47,477 were screened at various screening centres across the country.

c. that despite its capacity to recruit/enlist 500 applicants only out of the about 81,700 applicants, the Respondent posited that it intended to create a labour bank of potential candidates out of the E-vouchers sold from which subsequent recruitments would be done over a period of time without recourse to "the time-consuming and expensive recruitment process". In this regard, Respondent further posited that no ceiling was placed on the number of forms to be sold so as to give all eligible Ghanaians the opportunity to compete for the recruitment/enlistment into GIS.

d. that regarding the policy on recruitment for all the institutions under the Ministry of the Interior, the Ministry of the Interior issued a directive to all institutions under the Ministry to resort to electronic recruitment.

e. that the price for sale of the E-voucher was determined at the meeting of Heads of institutions under the Ministry of the Interior. And the pricing was based on a directive to the Respondent by the Ministry of the Interior.

f. that all the proceeds from the sale of the E-vouchers were deposited at the GIS Account number 1051130000894 domiciled at GCB, Ministries Branch, Accra. Again, the Respondent indicated that 47,477 applicants were screened at various screening centres across the country. However, some of the applicants fell short of the eligibility criteria as advertised in the Newspapers. The Respondent explained that at the end of the screening exercise 32,954 applicants were selected and were made to undergo written examination in all the then 10 regional capitals.

g. that section 19 of the Immigration Service Act, 2016 (Act 908), which provides for the funds of the Respondent does not limit it to only funds approved by Parliament but also provides for moneys that are internally generated (i.e. IGF) by the Respondent in the performance of its functions.

h. that in respect of the contract for the electronic recruitment, the Respondent indicated that it conformed to the procurement process; the contract was outsourced to a company known as TrybeNet Consult through sole sourcing having satisfied the necessary procurement regulations, and after obtaining clearance from the Public Procurement Authority (PPA).

The aforementioned response/comments by the Respondent were corroborated in interviews with Baaba Asare (DCG, Legal) and other officials of Respondent's

institution namely Judith M. Dzokoto Lomoh (Director, Finance) and Kojo Oppong Yeboah (Head, Human Resource Division).

The Commission enquired from the Respondent Representatives as to how the moneys realized were lodged and expended. The Respondent stated that it opened an account with GCB following instruction it received from the Controller and Accountant- General's Department (CAGB) that moneys from the sale of the E-vouchers were to be lodged into that account at GCB. According to the Respondent, when it needed funds for any expenditure, it sought approval from the Comptroller-General of GIS and upon the approval spending was effected.

The Director of Finance further explained that monies realized from the sale of the E-vouchers were used to facilitate the recruitment process. According to the Director of Finance, GIS had a budget estimate for undertaking the recruitment exercise. The budget was made up of expenditures including hiring of venues, national ambulance, setting of questions, marking of scripts, transportation of the materials, selection activities and training of cadets; moreover, GIS contracted the University of Ghana Business School (UGBS) to set the questions for the aptitude test and was paid out of the monies collected.

The Commission enquired whether the expenditures for the recruitment of UGBS to set the questions for the aptitude test was subjected to a procurement process. The head of legal of GIS said she needed to cross check and get back to the Commission. It was agreed that the Respondent would furnish the Commission with a copy of the expenditure on the recruitment process for the Commission to appreciate how the monies were expended. However, when the Respondent submitted the documents on the recruitment process, the Commission observed that it did not include the documentation on the procurement and the estimated budgets.

MANDATE OF THE COMMISSION

This complaint relates to alleged unfair, unreasonable and illegal acts, which portend abuse of power and the fair administration attributable to the Respondent in the performance of its statutory function. The alleged acts or infractions form

the basis of administrative injustice or maladministration (poor/bad governance) for which the Commission is constitutionally and statutorily empowered to investigate and render necessary remedy/redress.

In assuming the mandate to investigate the allegations, the Commission took into account the fact that the Respondent is part of the Public Service of Ghana as specified under Article 190 (1) (a) of the 1992 Constitution (Constitution).

It is noteworthy to indicate that, the Commission is the Ombudsman or Administrative Justice institution in Ghana imbued with the mandate to exercise administrative oversight and control with power to review the decisions, acts, omissions and recommendations of all Public Service institutions in Ghana, including the Respondent whenever such decisions, acts and omissions are the subject matter of a complaint from members of the public to the Commission. By virtue of its oversight mandate, the Commission controls power exercised by public officials that may result in administrative injustice or maladministration. In this regard, Article 23 of the 1992 Constitution enjoins the Respondent, as a public body, in the discharge of its administrative functions, to act in a fair, reasonable and just manner, and also comply with the laws that establish it.

Article 23 of the Constitution provides that:

> *"Administrative bodies and Administrative Officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before the Court or other tribunal".*

Furthermore, Article 296 of the Constitution outlines the parameters for exercising discretionary power by public institutions and public officials. It provides that:

> *"Where in this Constitution or in any other law discretionary power is vested in any person or authority –*
>
> *(a) that discretionary power shall be deemed to imply a duty to be fair and candid;*
>
> *(b) the exercise of the discretionary power shall not be arbitrary or biased whether by resentment, prejudice or personal dislike and shall be in accordance with due process of law" and*
>
> *(c) Where the person or authority is not a judge or other judicial officer, there shall be published by Constitutional Instrument or Statutory Instrument, regulations that are not inconsistent with the provision of this Constitution or that other law to govern the exercise of discretionary powers*

Specifically, section 7(1) (a) & (b) of the Commission on Human Rights and Administrative Justice Act of 1993 [Act 456] provides, among others, that:

The functions of the Commission are-

> (a) *to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties"*
>
> *(b) to investigate the functioning of the Public Services Commission, the administrative organs of the State, the office of the Regional Co-ordinating Council, and the District Assembly, the Armed Forces, the Police Service, the Prison Service in so far as the complaints relates to failure to achieve balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those services.*

The principles and standards underpinning good administrative practice as *sine qua non* for ensuring administrative justice impose on civil and public servants (public officials) the obligation to uphold basic standards of fairness, justice and reasonableness in the performance of their official functions/duties. Hence, public officials are required to ensure that their decisions and actions are appropriate, fair, objective and consistent. Moreover, the remit of an Ombudsman like the Commission, is to ensure democratic accountability between the citizenry (indeed all persons) and the State (represented by administrative or public officials) by dealing with allegations that hinge on administrative injustice in the nature of unfair treatment arising from maladministration or poor/bad governance (i.e. abuse of power, human rights violation, bias, arbitrariness, ineptitude, neglect, delay, etc.).

As Ghana's Ombudsman, the Commission's administrative justice mandate has been properly triggered by the instant complaint alleging administrative injustice arising from illegal, unfair, unjust and unreasonable exercise of discretionary power by the Respondent, an act or omission capable of resulting in abuse of power against the applicants, who applied for recruitment/enlistment into GIS.
Besides, the Respondent is a public institution established pursuant to Article 190(1) of the Constitution as well as its enabling legislation, the Immigration Service Act (Act 908). Therefore, the Respondent is amenable to the Commission's oversight mandate of ensuring administrative justice in the performance of Respondent's functions.

APPLICABLE LEGAL AND POLICY FRAMEWORK

The Commission's investigation was grounded on the following constitutional, legal and policy framework:

- Articles 23, 190, 218 and 296 of the 1992 Constitution.
- C.I. 67.
- Public Financial Management Act, 2016 (Act 921).
- Immigration Service Act 2016 (Act 908).
- Financial Administration Regulation (FAR), 2004 (L.I. 1802).
- Fees and Charges (Miscellaneous Provisions) Act, 2009 (Act 793).
- Fees and Charges Regulations, 2015 (L.I. 2228).

Decided cases (case law)

- Entick v Carrington [1765] 2 Wilson KB 275, 85 ER
- R (Baker) v Devon CC [1995]1 ALL ER 73, 88
- Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223

ISSUES

The following issues arise for determination:

1. Whether or not the Respondent has the legal authority to charge fees in respect of recruitment/enlistment of staff?
2. Whether or not the moneys realised from the sale of the E-vouchers were expended in accordance with the relevant laws that regulate public financial management
3. Whether or not the Respondent acted fairly and reasonably regarding the sale of E-vouchers to more than 84,000 unemployed youth/applicants knowing that it had capacity to recruit/enlist only 500 applicants?

THE INVESTIGATION

The investigation was conducted based on the following methodology:

i. **Review of media reports**
The investigation took into account print media reports as per 21st November 2017 editions of both the *Daily Graphic* and *Ghanaian Times*

newspapers which carried advertisements in respect of the recruitment by the Respondent.

ii. **Interviews**

Interviews were conducted with the following officials of Respondent institution:

a. Baaba Asaare - Deputy Comptroller-General, Legal (DCG, Legal)
b. Judith M Dzokoto Lomoh - Deputy-Comptroller General, Finance
c. Kojo Oppong- Yeboah - ACI, Human Resource Division

iii. **Review of documents**

The following documents were obtained from the Respondent:

a. A letter dated sometime in July 2017 from the Ministry of the Interior addressed to the Minister of Finance requesting for Financial Clearance for recruitment of 800 immigration personnel to beef up its personnel at the borders as well as critical Units and Departments.

b. Financial Clearance letter dated 9th March 2018 issued by the Ministry of Finance and addressed to the Minister of the Interior for recruitment of 1000 personnel by the Respondent. This letter indicated that the effective date of the recruitment should not be earlier than 1st July 2018.

c. Letter dated 17th January 2018 from GCB, Corporate Banking Department, addressed to the Comptroller-General of GIS in respect of sale of E-vouchers.

d. GIS Budget for 2017/18 recruitment exercise.

e. Letter dated 27th May 2016 signed by Sampson Asare Fianko, Deputy Controller & Accountant-General (F&A) addressed to the Director, Banking Department, Bank of Ghana, captioned "Opening of Bank Account" for GIS.

f. Letter dated 14th July 2016 signed by Eric Victor Appiah, Director, BM & E on behalf of the Chief Executive of PPA in respect of procurement of consultant to undertake electronic recruitment for Respondent using single sourcing.

g. Electronic recruitment contract between Respondent and TrybeNet consult.

h. Copy of a letter dated sometime in June 2016 signed by Adelaide Anno-Kumi (Mrs), Chief Director, Ministry of the Interior, addressed to the Office of the Attorney-General requesting for a review of the agreement between Respondent/GIS and Trybenet Consult.

i. Contract between the Respondent and GCB.

ANALYSIS OF EVIDENCE IN THE LIGHT OF THE ISSUES

Issue 1: whether or not the Respondent has the legal mandate to charge for fees in respect of recruitment/enlistment of staff?

On this issue, the Respondent argued that it was permitted by law to generate funds internally and thus derived its authority to sell the forms based on power granted it under the Immigration Service Act, 2016 (Act 908). However, as to whether the recruitment exercise forms part of the Respondent's core function for which reason it could raise IGF, the Respondent was not certain about the issue.

The Commission noted that on 21st November 2017, the Respondent advertised in the Newspapers of its intention to recruit applicants into the GIS. The advertisement further required interested applicants to purchase E-vouchers at a cost of GH¢50.00 per applicant from the various branches of GCB across the country. In view of the advertisement, interested applicants numbering about 81,700, according to the Respondent, purchased the E-vouchers.

The Complainant posited that the failure by the Respondent to seek Parliamentary approval regarding the sale of the E-vouchers rendered its act and omission inconsistent with the Public Financial Management Act, 2016 (Act 921) and the Financial Administration Regulations (FAR), 2004 (L.I. 1802)

The relevant provisions of Act 921 and L.I. 1802 are:

Section 2 (1) (a) (b) of Act 921 regarding the scope of application of the Act provides that:
Section 2(1) This Act applies to

(a) *a covered entity [includes the Respondent as per section 102 of the Act]and*
(b) *a public officer responsible for receiving, using, or managing public funds.*
(3) This Act shall be read together with any other enactment relevant to public financial management.
(4) Where there is a conflict or inconsistency between the provisions of this Act and any other relevant enactment, the provisions of this Act shall prevail.

In addition, section 47(1) (2) (3) of Act 921 provides that:

(1) A covered entity shall not collect or receive revenue except where the covered entity is authorised by an Act of Parliament to collect or receive the revenue"
(2) The revenue collected or received by a covered entity under subsection (1) shall (a) be paid into and form part of the Consolidated Fund; ...
(3) A covered entity may retain revenue collected or received, where the revenue is in the form of a levy, license fee or administrative penalty and the covered entity is authorised through appropriation by Parliament to retain the revenue.

Regulation 18 of L.I. 1802 provides that:

"A department that has legislative approval to retain all or a portion of Internally Generated Funds collected, must first lodge the retained Internally Generated Funds in gross into the Department's Operational Bank Account designated by the Controller and Account-General before disbursements are made"

Regulation 20 of L.I. 1802 provides that:

"A head of department responsible for collecting various types of fees and charges shall review annually the administrative efficiency of collection, the accuracy of past estimates and the relevance of rates, fees and charges to

current economic conditions and submit proposals through the appropriate Sector Minister to Parliament for approval".

In addition to the above legislative context, the Respondent's enabling legislation, Act 908, specifically section 4(1) provides for the Respondent's function as follows:

(a) subject to existing laws, to examine travel documents of persons entering or leaving the country through .....
(b) Ensure the application and enforcement of laws relating to the immigration and employment of non-Ghanaians in the country;
(c) Advise on and implement international cooperation agreements with other countries and international organisations on matters relating to migration;
(d) Manage and patrol the borders of the country;
(e) Through the Comptroller-General or the duly authorised representative of the Comptroller-General issue visas for entry into the country and permits for residence or work in the country;
(f) Perform any other functions as required by law.

Section 19 of Act 908 further provides that:

"The funds of the Service shall include:

(a) moneys approved by Parliament;

(b) donations and grants: and

(c) moneys generated by the Service in the performance of its functions

Also, section 20 of Act 908 provides that:

"The administrative expenses of the Service including salaries, allowances, gratuities, pension payable to or in respect of persons employed by the Service and the operational costs are a charged on the Consolidated Fund"

Moreover, the Fees and Charges (Miscellaneous Provisions), 2009 (Act 793) empowers public institutions (including the Respondent), in the pursuance of their functions, to make regulations empowering them to charge fees under various enactments.

With regard to section 2(1) of Act 921, the Commission noted from the evidence gathered that, the Respondent relied on its status as a public institution to sell the E-vouchers to the public. Meanwhile, as a covered entity and a public institution as per section 2 of Act 921, the Respondent failed to meet the requirements as per section 47(1), (2) and (3) of Act 921 by failing to seek the authorisation of Parliament before selling or charging fees in respect of the E-vouchers. The Commission found that the sale of the E-vouchers by the Respondent was based on an administrative directive from the Ministry of the Interior.

In view of the above, the Commission is of the considered view that by charging fees (i.e. selling) the E-vouchers thereby generating revenue internally without Parliamentary approval, the Respondent breached section 47 of Act 921, section 30 (2) (b) of Act 908, Regulation 18 of L.I. 1802 as well as the Fees and Charges (Amendment) Instrument, 2016 (L.I 2228) relating to fees and charges under Act 793. Granted that the Respondent relied on section 19 (c) of its enabling legislation, Act 908, the act of charging for the E-vouchers, does not form part of its core functions, and cannot be justified legally because the activity described as recruitment is neither specifically listed under the Fees and Charges Regulation (L.I 2228). The Fees and Charges (Miscellaneous Provisions), 2009 (Act 793) provides for the legal basis for charging of fees by public institutions under various enactments. Corollary to this, the Fees and Charges Regulations, L.I. 2228, 2016, which empowers institutions under the Ministry of the Interior to charge fees in pursuance of their functions did not provide for charges for the E-vouchers as per the Schedule.

The Commission noted that, the Respondent failed to demonstrate the legal basis justifying its act therefore rendering same unlawful, in that, finances of the Public Service are regulated by law. The Respondent, a public institution under Article 190(1) of the Constitution, is obligated to uphold the law relative to the sale of E-vouchers to the public, which culminated in generating IGF to the Respondent.

The Commission is of the considered view that the Respondent, as a public institution whose administrative and operational activities are funded by the State through the Consolidated Fund, expenses covering such an administrative activity like recruitment has to be the Consolidated Fund. The Commission concedes that there may be economic justification for the sale of the E-vouchers by the Respondent, but that can only be justified on the basis of law. Economic expediency does not justify an illegal act. Indeed, if Parliament wanted the

Respondent's recruitment activity to be captured in the law, it would have included it in the list (Schedule) of chargeable fees under L.I. 2228.

The Respondent's illegal act can be grounded on the seminal case of ***Entick v Carrington [1765] 2 Wilson KB 275; 85 ER*** which, in essence, holds that a public body is empowered to act within the law, and cannot, without legal authority, claim power merely because it considers it desirable to have the power to act. In this case, Lord Camden, enunciating the doctrine of rule of law/legality and the scope of executive/administrative power, said:

"No man can set his foot upon my ground without my licence, but he is liable to an action though the damage be nothing;...where the defendant is called upon to answer for bruising the grass and even treading the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment".

Furthermore, the Commission is of the opinion that, if the practice of charging fees without Parliamentary approval is allowed to go unchecked, it would open the floodgate for public institutions, which are plagued with perennial financial constraints to resort to the 'economic' *laissez faire* cost-recovery approach to justify their conduct in respect of recruitments generally. This can adversely impact the unemployed and vulnerable youth.

<u>Issue 2:</u> whether or not the moneys realised from the sale of the E-vouchers were expended in accordance with the relevant laws that regulate public financial management and administration?

With regard to this issue, the Commission noted that, the Respondent was required under Section 51(1), (2), (3), (4) and (5) of Act 921 to open a bank account with authorisation from the Controller and Accountant General's Department (CAGD).

Section 47 (2) of Act 921 provides that:

> *"The revenue received or collected by the covered entity under subsection (1) shall:*
> *(a) be paid into and form part of the Consolidated Fund;*

(b) be receivable into a public Fund; fund and
(c) be receivable into a public fund established for a specific purpose where authorised by the Constitution or an Act of Parliament

Section 51 (1) – (5) of Act 921 provides that:

(1) a bank account shall not be opened for any covered entity without the written approval of the Controller and Accountant-General.
(2) subject to the written approval of the Controller and Accountant-General, a bank account shall not be opened to receive or spend public funds.
(3) a bank account shall be managed by a covered entity in accordance with the terms and conditions determined by the Controller and Accountant-General.
(4) subject to subsection (5), the Bank of Ghana is the depository of cash for the recurrent and capital operations of all covered entities.
(5) the Controller and Accountant-General may authorise a covered entity to open an account in an approved financial institution.

Furthermore, section 30 (1) and (2) (b) of Act 908 provides, among others, that:

"(1) The Minister may, on the advice of the Council, by legislative instrument, make Regulations for carrying out or giving effect to this Act

(2)(b) Without limiting subsection (1), the Regulations may provide for –

fees to be charged under this Act" [Act 908]

The Commission noted that, prior to the publication of the recruitment exercise in the Newspapers on 21st November 2017, CAGD had requested the Director of Banking Department, Bank of Ghana, to arrange and open an account with GCB, Head Office Branch, for the Respondent to lodge the proceeds from the sale of the E-vouchers. This directive was contained in a letter dated 27th May 2016 signed by Mr. Sampson Asare Fianko, Deputy Controller & Accountant General (F&A). As a result, proceeds from the sale of the E-vouchers went directly into the GCB Head Office Branch account. Therefore, the Commission noted that the Respondent's decision to seek written approval or authorization from CAGD for opening of the account complied with sections 47(2) of Act 921 and 51(1) - (5) of Act 921.

With respect to how the IGF arising from the sale of the E-vouchers was expended, the Commission, in a letter dated 17th September 2018, requested the Respondent to furnish it with authorisation by CAGD for documents on the expenditure for the recruitment exercise. In response, the Respondent contended that it was not under any legal obligation to seek authorisation from CAGD regarding disbursement of its IGF. The Respondent further contended that, it has an internal procedure which requires that whenever Sectional Heads need funds for a project or activity, they submit a memo to the Comptroller-General through the Deputy Comptroller-General (DCG/FIN & ADMIN), thereafter the approved memo is referred to the DCG/FIN & ADMIN who prepares a Payment Voucher for authorisation of payment by the Director of Finance.

As to whether the sale of the E-vouchers constitutes an IGF requiring the procedure in L.I. 1802 to be followed regarding spending or disbursement of IGF, the Commission considered what constitutes Non-Tax Revenue, its collection and lodgement, as well as retention of IGF in the context of Regulations 16, 17 and 18 of L.I. 1802, which provide as follows:

Regulation 16:

(a) "Non-Tax Revenue includes fines, penalties, forfeitures, fees and charges, rent on government lands and buildings, interest on government investments, dividends and all other revenue generated from the activities of departments;

(b) Internally Generated Funds are Non-Tax Revenue that are generated through the activities of the departments".

Regulation 17:

A head of department shall -

(a) ensure that all Non-Tax Revenue are efficiently collected;

(b) ensure that all Non-Tax Revenue is immediately lodged in the designated Consolidated Fund Transit bank accounts except in the case of Internally Generated Funds retained under an enactment; and

(c) monitor and ensure that all Non-Tax Revenue lodged into the transit bank accounts is promptly transferred into the main Consolidated Fund bank account.

Regulation 18:

"A department that has legislative approval to retain all or a portion of Internally Generated Funds collected, must first lodge the retained Internally Generated Funds in gross into the Department's Operational Bank Account designated by the Controller and Accountant-General before disbursements are made".

The above provisions of L.I. 1802 explicitly require all Non-Tax Revenue to be lodged in a transit bank account and subsequently deposited in the Consolidated Fund account unless the institution has legislative/Parliamentary approval to retain such funds. The Commission noted from the available evidence that the IGF that accrued from the sale of the E-vouchers were deposited in GCB Head Office Branch account for which CAGD approval was sought by the Respondent.

The Commission noted that L.I. 1802 requires public officers who collect or receive public moneys to pay same into a public fund account within 24 hours. Also, the Commission noted that the revenue generated from the sale of the E-vouchers by the Respondent falls within the category of Non-Tax Revenue and therefore constitutes an IGF for which the Respondent was required to pay the proceeds from the sale of the E-vouchers into a Consolidated Fund Transit bank account in accordance with Regulation 17(b) of L.I. 1802. The Respondent, however, failed to comply with the law, but rather expended the IGF directly from GCB Head Office Branch account. It is also evident from the Respondent's comments that it did not have Parliamentary approval or authorization to retain the funds in the Departmental Operational Bank Account with GCB Head Office Branch.

The Commission is of the considered view that even though the proceeds from the sale of the E-vouchers were deposited directly into GCB Head Office Branch account, the Respondent failed to transfer the moneys into the Consolidated Fund Bank account before disbursement; the Respondent relied on its internal mechanism of spending and disbursement of the IGF as alluded to above instead of following the law (i.e. L.I. 1802). Furthermore, Respondent failed to obtain legislative approval as required under Regulation 18 of L.I.1802, which would have enabled it to retain the IGF accruing from sale of the E-vouchers.

Based on the aforementioned, the Commission has come to the conclusion that the Respondent's decision to disburse the IGF directly from the GCB Head Office Branch account instead of transferring the moneys into the Consolidated Fund contravened Regulations 16, 17 and 18 of L.I 1802.

Issue 3: whether or not the Respondent acted fairly and reasonably regarding the sale of E-vouchers to about 81,700 unemployed youth/applicants knowing that it had capacity to recruit/enlist only 500 applicants?

On this issue, the Complainant alleged that the Respondent sold 84,000 application forms to unemployed youth knowing it had capacity to recruit only 500 personnel. However, the Respondent claimed it sold about 81,700 E-vouchers. The Complainant further alleged that the sale of the E-vouchers was unfair and unreasonable as the Respondent is bound by Articles 23 and 296 of the Constitution to be fair and reasonable in the performance of its functions/duties.

Regarding the number of vacancies the Respondent sought to fill at the time of the exercise, the Respondent argued that it received financial clearance from time to time to recruit approved number of personnel. For example, it received financial clearance to recruit 370 personnel in 2016, and in July 2018 it received another financial clearance to recruit 800 personnel. Again, the investigation revealed that, in March 2018, the Respondent received financial clearance to recruit 1000 personnel. The Respondent further argued that after issuing the financial clearances, the Ministry of Finance (MoF) gave deadline for completion of its recruitment exercise. As a result, the Respondent contended that, considering the rigorous and time consuming process associated with the recruitment process, it was impossible to meet the deadlines given by MoF, hence the recourse to creating a labour bank from which subsequent recruitments could be done. In this connection, after the first recruitment, Respondent indicated that it maintained a list of qualified applicants, who were employed based on the limited vacancy and took into account that whenever it received financial clearance for recruitment, persons in the labour bank would be considered first for employment in order to save it from undergoing the expensive recruitment process as canvassed above.

The Respondent concluded that it did not have any particular ceiling in respect of vacancy to be filled because the process of recruitment was continuous. According

to the Director of Finance, the Respondent sought to recruit 5000 people within 3 years to beef up its border patrols.

In determining whether the Respondent's act of selling the E-vouchers to more than 84,000 applicants as alleged by the Complainant constitutes unfair and unreasonable administrative practice, the Commission considered what constitutes unfair and unreasonable exercise of power by an administrative body and/or a public official in the context of Articles 23 and 296 of the Constitution.

Articles 23 and 296 of the 1992 Constitution as discussed above, elucidate the principles and standards that administrative officials must conform to in the discharge of their duties. Importantly, an administrative act or practice can be deemed unfair if it does not accord with the principles of equality and justice as espoused by Robin Cooke in the case of ***R (Baker) v Devon CC [1995]1 ALL ER 73, 88***, which stated that:

"The general principle is that a public officer or an administrator must act fairly and reasonably and according to law".

The Respondent advertised the sale of the E-vouchers, which was announced to the general public from 27th November 2017 to 8th December 2017. The act of the Respondent would have been deemed unfair if it had stopped the applicants from purchasing the E-vouchers before the expiration of the time as advertised. It is the opinion of the Commission that, the Respondent gave equal opportunity to all who wished to be considered for the recruitment/enlistment. In arriving at this opinion, the Commission considered the standard as per *'Wednesbury unreasonableness'* threshold in the case of ***Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 (the Wednesbury case)*** which, in essence, describes boundaries of irrationality in the context of unfair and unreasonable conduct/act as:

"a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it"

In the *Wednesbury case* the court held that, for an action to constitute unreasonableness, the decision should fall within the following parameters:

- in making the decision, the defendant took into account factors that ought not to have been taken into account;

- the defendant failed to take into account factors that ought to have been taken into account; or
- the decision was so unreasonable that no reasonable authority would ever consider taking it.

The Commission noted that the reasons given by the Respondent for selling about 81,700 E-vouchers whilst it had approval to recruit 500 personnel led to the creation of a labour bank of potential candidates from which subsequent recruitment would be considered. According to the Respondent, it received a first letter in July 2017 signed by Hon. Ambrose Dery, the Minister of the Interior, requesting MoF for financial clearance to recruit 800 personnel. The second letter dated 9th March, 2018, from the MoF granted the Respondent financial clearance to recruit 1000 personnel.

Considering the *Wednesbury case* in relation to the decision to sell about 81,700 E-vouchers (above the 500 approved applicants) and the reasonableness or otherwise of the Respondent's act or omission, the Commission notes that from the available evidence, the Respondent advertised the recruitment exercise in the Newspapers. The purpose of the advertisement was to inform the general public about the recruitment/enlistment. The Commission is of the considered view that the Respondent had no control over the number of people who could have purchased the E-vouchers. Besides, it would not have been fair and proper to halt the sale before the stipulated time as advertised just because many applicants were purchasing the E-voucher. Consequently, the Commission is of the considered view that the Respondent gave equal opportunity to all to apply for the enlistment/recruitment into the GIS.

In view of the above, the Commission is persuaded that the sale of about 81,700 E-vouchers by the Respondent instead of 84,000 as alleged by the Complainant knowing that it would be recruiting 500 personnel does not constitute unfair and unreasonable action taking into account the '*Wednesbury unreasonableness*' threshold. Therefore, this allegation against the Respondent is not justified and accordingly dismissed.

FINDINGS

The Commission, after its investigation, makes the following findings:

I. That the Respondent's decision to charge fees or sell the E-vouchers to the public/applicants without prior Parliamentary approval contravenes the

above stated provisions of the Public Financial Management Act, 2016 (Act 921), FAR (L.I. 1802) and the Fees and Charges (Amendment) Instrument, 2016 (L.I. 2228).

II. That the Respondent's decision to disburse the IGF accruing from the sale of the E-vouchers directly from the GCB Head Office Branch account instead of transferring same into the Consolidated Fund contravened Regulations 16, 17, and 18 of L.I. 1802.

III. That the Respondent's act of charging fees or selling about 81,700 E-vouchers knowing that it could recruit/enlist only 500 personnel does not constitute unfair and unreasonable act under the circumstances of this particular complaint.

DECISION

In view of the above, the Commission decides as follows:

I. Considering the fact that the Respondent acted in breach of the above stated provisions of Act 921, L.I. 1802 and L.I. 2228, the Commission decides that the Respondent should henceforth desist from charging applicants for recruitment/enlistment into GIS. For the avoidance of doubt, until the Respondent is able to justify and receive Parliamentary approval for fees and charges relating to recruitment/enlistment should be catered for by the Respondent from its budgetary allocation for routine administrative expenses.

II. Even though the Respondent gave all the applicants equal opportunity to apply for the recruitment/enlistment and had no control over the number of applicants who could apply, the Commission decides that the Respondent should devise a system that will have a cut-off point so that in its future recruitment/enlistment exercise, it would automatically cease taking in more than reasonably necessary applicants and this should be made known to potential applicants in advance in such advertisements.

III. Notwithstanding paragraph II above, should the Respondent decide to resort to its labour bank for recruitment/enlistment, the selection process should be transparent and fair to ensure equal access to all shortlisted

applicants. In other words, all applicants placed in the labour bank should be given the opportunity to compete for available recruitment places.

RECOMMENDATION

Further to the Decision, the Commission recommends the following for future guidance relative to recruitment:

As the supervisory agency, the Ministry of the Interior, should take necessary steps to advise the Respondent and other institutions falling under its purview namely, the Ghana Police Service and the Ghana Fire Service, the Ghana Immigration Service, Ghana Prisons Service etc to desist from charging fees for recruitment/enlistment into their respective institutions so as to safeguard abuse of their statutory powers or acting ultra vires.

In the circumstances where it becomes expedient to charge for fees in respect of recruitment, the Ministry of the Interior should ensure that the necessary Parliamentary approval is obtained in this regard.

DATED AT THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE, OLD PARLIAMENT HOUSE, ACCRA. THIS 10TH DAY OF AUGUST, 2020.

JOSEPH WHITTAL
COMMISSIONER