[DE] Court rejects party's request to participate in public broadcaster's election programme

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In a summary judgment of 13 September 2024 (case No. 3 S 103/24), the *Oberverwaltungsgericht Berlin-Brandenburg* (Berlin-Brandenburg Higher Administrative Court – OVG) upheld the lower-instance court's decision that the *Freie Demokratische Partei* (Free Democratic Party – FDP) was not entitled to take part in an election programme to be broadcast by *Rundfunk Berlin-Brandenburg* (rbb) in the run-up to the Brandenburg state parliament election under the principle of equal opportunities for political parties. It ruled that, in accordance with its editorial freedom, rbb could exclude the FDP's regional association from a programme designed to only feature the top candidates of parties already represented in the state parliament. The FDP was not currently represented in the state parliament and, according to polls, would not be represented after the election either.

The broadcaster rbb is one of the nine German state public broadcasting authorities. In the run-up to the Brandenburg state parliament election on 22 September 2024, it planned to broadcast a programme entitled "*rbb24 – Ihre Wahl: Der Kandidatencheck*" ("rbb24 – Your Choice: the Candidate Check") on 17 September. The programme's editorial concept was based on a Q&A session involving the top candidates of parties that were either already represented in the state parliament or, according to the polls, were expected to receive more than 5% of the votes in the election. The leading candidate of the FDP's Brandenburg regional association had not been invited because the FDP was not currently represented in the state parliament and, according to polls, would not be represented after the election either. The FDP, which is currently one of the ruling parties at federal level, and its regional association believed they were being discriminated against and lodged an urgent application for permission to take part in the programme. However, the application was dismissed by the *Verwaltungsgericht Potsdam* (Potsdam Administrative Court) on 4 September 2024 (case No. 11 L 733/24) on the grounds that rbb's editorial concept did not infringe constitutional principles. The OVG upheld this decision.

Under the constitutional principle of broadcasting freedom enshrined in Article 5(1)(2) of the *Grundgesetz* (Basic Law – GG), public and private broadcasters are granted editorial freedom when designing their programme concepts. In established case law, however, the *Bundesverfassungsgericht* (Federal

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Constitutional Court) assumes that, in the context of elections, particular attention should also be paid to the constitutional principle of equal opportunities for political parties (Article 21 in conjunction with Article 3(1) GG) and the election principles set out in Article 38 GG. In other words, broadcasters should give “appropriate” coverage to all parties standing for election in their programme concepts. Under their editorial freedom, however, broadcasters could determine what was “appropriate” on the basis of both objective criteria and a party’s chances of success in the election. The OVG did not believe that rbb’s plan to only invite the top candidates of parties that were already represented in the state parliament or that stood a chance of being elected unfairly discriminated against parties that were excluded. The editorial design of the programme was protected under rbb’s broadcasting freedom and did not infringe the FDP regional association’s right to (graduated) equal opportunities in pre-election reporting. Although the FDP’s leading candidate had not been invited to take part in the programme, rbb’s overall pre-election reporting concept made provision for the FDP to receive appropriate coverage in other programmes.

Pressemitteilung des OVG Berlin-Brandenburg

https://www.berlin.de/gerichte/oberverwaltungsgericht/presse/pressemitteilungen/2024/pressemitteilung.1485548.php

Berlin-Brandenburg Higher Administrative Court press release

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