

## II. KOMENTARZE, OPINIE, POLEMIKI

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### **Potential invalidity of the decision of a public administrative body as a result of the conviction of a person performing a function**

#### **Introduction**

The objective of the article is to present conclusions and comments arising from an analysis conducted in connection with the possibility of the declaration of the invalidity of a decision in the light of the final and valid judgment of conviction for committing an offence by a person performing the function of the head of commune (*wójt*), or mayor (*burmistrz, prezydent miasta*). The aim of the article is to answer the question whether it is possible to refute or challenge an administrative decision issued by a convicted person. At the forefront of this question, one should consider the legal consequences of a conviction and how the conviction influences the legality of actions taken during the term of office by a convicted person. In view of the existing disputes, it seems necessary to obtain an answer to the above questions. In this paper, the main hypothesis which will be verified is that the administrative decision cannot be challenged as a result of the conviction of the person issuing the decision. The basic research method used in the paper is a formal-dogmatic approach.

## 1. Legal situation under the Election Code

The Election Code in its Article 492 § 1 Items 1–10 enumerates instances when the current mandate of the head of commune (*wójt*) or a mayor (*burmistrz, prezydent miasta*) expires. Such instances include: refusal to take an oath, failure to submit a statement on the person's financial standing within the deadline set out in separate regulations, a written waiver of the mandate, loss of the eligibility for election or the lack of such eligibility on the election day, breach of statutory prohibitions to combine the function of the head of commune and the performance of the function or conducting business activities specified in separate regulations, adjudication of incapacity to work or inability to exist independently under the procedure set out in the regulations on old-age and disability pensions, death, dismissal by way of a referendum, dismissal in accordance with the Act on Commune Self-Government of 8 March 1990, changes in the territorial division.

Eligibility for election (passive electoral right) includes the right to be elected, and to carry out the mandate obtained as a result of elections conducted with no defects. It has to be stated that in accordance with Article 492 § 1 Section 4 in connection with Article 11 § 2 Section 1 the loss of the eligibility for election (passive electoral right) takes place as a result of a sentence, based on the final and valid judgment, to the penalty of imprisonment for intentional offence prosecuted by public indictment or intentional fiscal offence. The sentencing of a person performing the function of the mayor to a fine does not result in the loss of the eligibility for election, therefore, the condition of the expiration of the mandate on the basis of the loss of eligibility for election is not met. A justification of the treatment of the sentencing to the penalty of imprisonment for the offence prosecuted by public indictment as a condition of the loss of passive electoral right was to ensure appropriate selection of candidates for public offices, related with the exercising of authority, involving public trust – by eliminating individuals convicted for the offence who, by committing a punishable act, become unworthy of such trust (the so-called electoral disqualification).

It should be noted on the margin that it is the election officer (*komisarz wyborczy*) who makes notification about the expiration of the mandate of the mayor due to the reason referred to in Article 492 § 1 (4) (loss of eligibility for election), by an announcement, within 14 days from the date when the extract of the final and valid court ruling

is delivered. The notification of the election officer is published in the voivodeship official journal and announced to the public in the Public Information Bulletin (*Biuletyn Informacji Publicznej*).

The action taken by the election officer only declares the occurrence of certain circumstances. As to the principle, the mandate expires as a result of the occurrence of one of the circumstances referred to above by force of law, on the date of the event existing in the legal norm. The announcement of the election officer is aimed at confirming a legal effect occurring by force of law. However, it has to be noted that only from the moment when such an individual action has been effected, its addressee is bound by the effectively shaped individual legal situation. The determination of the consequences of such finding is not covered by this ruling as it takes place as a result of the legislator's willingness.

In summary, the sentencing of a person performing the function of the mayor by the final and valid judgment to a fine does not constitute a condition of the expiry of the mandate of the mayor on the basis of the provisions of the Election Code.

## **2. Legal situation under the Act on Self-Government Employees**

Additionally, it has to be noted that there is a certain inconsistency under the Election Code and the Act on Self-Government Employees. Pursuant to Article 6 Section 2 of the Act, a person who has not been convicted by the final and valid court judgment for intentional offence prosecuted by public indictment or intentional fiscal offence may become a self-government employee hired on the basis of election or appointment. Pursuant to Article 4 Section 1 (1) (c) a mayor is a self-government employee hired on the basis of election.

The provisions of the Act are unambiguous and do not leave any freedom to the authority that hires a self-government employee in management capacity. This means that if any of the above mentioned statutory requirements is missing, it is inadmissible to appoint a given person to a management office in self-government administration, even if the person meets the remaining criteria. Such restrictive interpretation of the above regulations is justified by the unique nature of the functions performed by individuals holding management positions.

Also, the subsequent loss of any of the statutory requirements (related to the person) by the self-government employee during his/her employment should result in the termination of the employment relationship because of the failure to meet statutory requirements established for self-government employees. If any criminal liability within the meaning of Article 6 Section 2 arises, it will create an obstacle regarding the hiring of such self-government employee.

### 3. Legal situation under the Labour Code

Pursuant to Article 8 Section 1 of the Act on Self-Government Employees, the commune office (*urząd gminy*) is the employer of a (commune) mayor. Any action in the area of labour law related to the mayor, connected with the establishment and termination of employment, is carried out by the chair of the commune council (the chair does not take any action in order to establish this relationship, e.g. by signing the election document). Pursuant to Article 4 Section 1 (1c) of the Act on Self-Government Employees the mayor is employed by the commune office based on election. The wording of Article 73 § 1 of the Labour Code provides that the election entrusts a given person with a position and leads to the establishment of an employment relationship if the duty of performing work is a result of the election. The employment based on election arises in order to carry out the mandate and lasts during its term. Therefore, it is subordinated to this "basic" relationship to such an extent that it cannot exist without it. On the other hand, Article 73 § 2 of the Labour Code directly indicates that the employment relationship based on election will be terminated upon the expiry of the mandate. The peculiarity of an employment relationship established based on election manifests itself by the lack of the possibility to terminate it prior to the expiry of the mandate of the employee. In the literature it is emphasised that there is a close relationship between an employment based on election and the elective function as well as that the provisions of Article 73 § 2 of the Labour Code involve the elimination of the possibility to terminate an employment relationship based on election without breaching the mandate.

Therefore, if the employment based on election is terminated only when the mandate expires, then as long as the mandate is not challenged, the employment based on election continues. The function

of the holder of the mandate ends together with the expiration of the mandate and at that time also employment based on election expires. It also follows from the regulations of the Labour Code that the election itself constitutes an act that triggers employment. This should be understood in such a manner that it is a direct source of the relationship and not that it only constitutes grounds of entering into an employment contract and in this sense it performs the role of indirect grounds of the employment.

A person sentenced by the final and valid judgment for intentional offence prosecuted by public indictment to a fine or to penalty of imprisonment retains a passive electoral right in the elections for the mayor. Some representatives of the legal theory believe that if such a person gets elected as a mayor it will not be possible to establish employment with this person in the capacity of a self-government employee based on election. The provisions of the Act on Self-Government Employees contain a prohibition regarding the employment of a person convicted by the final and valid judgment for intentional offence prosecuted by public indictment in the capacity of a self-government employee based on appointment and election, regardless of the penalty to which the person was sentenced. The Election Code regulates issues related with a passive electoral right of a number of entities, including the mayor. A person with respect to whom a negative condition such as being subject to criminal liability was met cannot be a candidate for a public office or cannot keep such office. On the other hand, the Act on Self-Government Employees sets out the conditions of employment of all self-government employees, including the mayor. Therefore, we are dealing with two separate legal regulations where the legislator has regulated completely different legal situations. With respect to the mayor the Election Code regulates the conditions of a passive electoral right, and the Act on Self-Government Employees regulates a mayor's legal situation as a self-government employee based on election. Therefore, in such legal circumstances the conflict-of-law rules (e.g. *lex specialis derogat legi generali*) cannot be applied because there is no conflict of norms when the norms regulate completely different legal situations.

On the other hand, a position is well established in the doctrine and the case law indicating that the regulations governing the principles of the election of the mayor should be treated *as lex specialis* with respect to the Act on Self-Government Employees, therefore, the conflict of the two acts – with respect to the election and a subsequent employment

of a convicted person at the office of the commune – is out of question. Additionally, the provisions of the Labour Code and the case law to that extent indicate that the employment based on election is terminated only in the case of the expiration of the mandate. As a result, it seems that as long as the mandate of the person performing the function of the mayor remains in effect, the employment will continue.

#### **4. Potential invalidity**

With respect to the potential invalidity of the decision of the public administrative body as a result of the conviction of a person performing the function of the mayor for an offence by the final and valid judgment it is necessary to carefully analyse the potential basis for invalidity.

Under Polish law positive and negative conditions of declaring the invalidity of an administrative decision are defined in Article 156 of the Administrative Procedure Code. As to the principle, the rule of the presumption that the decision is correct applies, which means that the administrative decision, until its invalidity is declared pursuant to Article 156 of the Administrative Procedure Code by a final decision of competent authority, exists in legal transactions and triggers legal consequences. The above arrangement is aimed at releasing administered entities from the risk of a subjective assessment of legal consequences of errors related to the actions taken by public administration, and it also provides grounds for asserting claims limiting adverse consequences triggered by a defective decision or by the fact of removing it from legal transactions. Therefore, the declaration of invalidity of a decision constitutes an exception to a general rule of the stability of final decisions expressed in Article 16 § 1 of the Administrative Procedure Code.

The following belong to a closed list of positive conditions of declaring the invalidity of an administrative decision: issuance of a decision in breach of regulations on jurisdiction, issuance of a decision without legal grounds or in gross breach of law, the decision concerns a matter that has previously been resolved by another final decision or a matter that was dealt with silently, addressing a decision to a person who is not a party to the matter, a decision was unenforceable on the date when it was issued and its unenforceability is permanent, in case of its performance, the decision would have resulted in a punishable act, a decision contains a defect resulting in its invalidity by force of law.

In view of the objective of this article, below are analysed two conditions that could be taken into account as grounds for declaring the invalidity of an administrative decision.

#### **4.1. Lack of jurisdiction of the authority as a condition of declaring the invalidity of a decision**

Pursuant to Article 156 § 1 Section 1 of the Administrative Procedure Code, a public administration authority declares the invalidity of a decision issued in breach of the regulations on jurisdiction. This regulation does not directly indicate the type of jurisdiction, therefore, it is understood that it concerns any jurisdiction of a given authority (with respect to venue, subject-matter or functional jurisdiction).

Therefore, the regulation on jurisdiction may be breached if one of the above mentioned types of jurisdiction is violated that is not the case in circumstances under discussion. It has to be emphasised that pursuant to Article 104 § 1 of the Administrative Procedure Code, a public administrative body resolves a given matter by issuing a decision and, as a result, in legal sense the decision is issued by a public administrative body and not a person representing this body. The authorisation of an employee to exercise specific competences of the body does not turn the employee into a public administrative body, and a specific person who exercises the competences of the body has to be differentiated from the body – this person may be called the office holder.

Therefore, if a person being the office holder is sentenced by the final and valid court judgment to a fine, the condition of the lack of jurisdiction of the body is not met, both with respect to venue, subject-matter or in functional terms.

#### **4.2. Gross breach of law as a condition of declaring the invalidity of a decision**

Pursuant to Article 156 § 1 Section 1 of the Administrative Procedure Code, a public administrative body declares the invalidity of a decision that was issued without any legal grounds or in gross breach of law. Gross breach of law is understood broadly and by its scope covers the provisions of substantive law, procedural law and the regulations related

to the system and competence. Additionally, one should remember that we can speak about gross breach of law when the breach of law is obvious, clear without the necessity to make an interpretation of the breached regulation and, as a result, not every instance of the breach of law can be identified with gross breach of law.

In view of the above, it is undisputable that the condition of gross breach of law may also regard the regulation related to the system and competence. The case law indicates that the fact of issuing an administrative decision without own signature of a person authorised to issue the decision results in its invalidity in connection with gross breach of law. From the perspective of this article, however, one should note that a person performing the function of the mayor and whose mandate remains in effect at the time when the decision is issued is authorised to issue an administrative decision. Therefore, if the conditions of the expiration of the mandate are not met, the authorisation to issue administrative decisions continues, because the authorisation to issue administrative decisions, in the case of the mayor, has its source in the mandate that is carried out and not in the employment based on election.

Additionally, it has to be noted that even if the holder of a public administrative body (office) is missing, it does not interrupt the existence of the public administrative body, and the organisational and subject-matter concept adopted under the systemic law ensures stability of the public administrative body. In other words, the lack of the office holder does not deprive this body (office) of legal existence and, as a result, despite the fact that the personnel may be changed, the office continues to exist – administrative instruments are issued by administration bodies and not by natural persons who constitute the personnel of a given administrative entity. Also, it should be noted that administrative decisions issued by the employees of the office are issued on behalf of the body that has granted an appropriate authorisation and not on behalf of a specifically identified office holder.

In the practice of the operation of public administration bodies, most frequently administrative decisions are issued by the authorised employees of the office.

Disappearance of the basic relationship (e.g. termination of the employment contract of the principal performing the function of the body) remains with no effect on the existence and the scope of authorisation, if the granted administrative power of attorney has not been revoked. The authorisation to issue administrative decisions does not expire as at



the date when the mandate of the person performing the function of public administrative body expires. If it has not been revoked, altered or if its invalidity has not been declared, it maintains its validity. Otherwise, proper operation of decision-making authorities would have been disturbed.

Even in the case when the procedure of the mandate expiration is applied, until a given supervision decision expiring the mandate becomes final and valid, the mayor may hold his/her office and exercise all competences that he/she is entitled to in the sphere of the empire. This means that such determination is *ex nunc*, i.e. it triggers legal consequences in the future.

## Conclusions

The objective of the article was to present conclusions and comments following from an analysis on the possibility of declaring invalidity of an administrative decision in the light of the final and valid judgment of conviction for committing an offence by a person performing the function of the mayor.

First, a preliminary issue of the legality of the performance of the function of a mayor by a person convicted based on the final and valid court judgment was considered. There are significant discrepancies between the regulations of the Election Code and the Act on Self-Government Employees. Under the Election Code, a person sentenced by the final and valid judgment for an intentional offence prosecuted by public indictment to a fine will retain a passive electoral right in elections for the mayor, however, it seems that in under the Act on Self-Government Employees it will not be possible to establish an employment relationship with such a person to work in the capacity of a self-government employee based on election. This issue is not clarified by the provisions of the Labour Code, either.

Next, possible grounds for declaring the invalidity of an administrative decision were examined in detail. The analysis of selected conditions leads to a conclusion that there are no grounds for declaring the invalidity of a decision, as the regulations on jurisdiction will not be breached and the decision will not be issued in gross breach of law. The right to issue administrative decisions in the case of the mayor has its source in the mandate that is carried out, and not in the employment based on election – the essence of the mandate is the granting

of a power of attorney to perform a function in a given organisational unit. Therefore, even if one were to consider that in under the Act on Self-Government Employees, a given person cannot be a self-government employee, it seems that this does not prevent the issuance of administrative decisions.

In conclusion, it is not possible to refute or challenge an administrative decision as a result of a conviction of a person issuing the decision. There is no legal possibility to conclude from the fact of conviction that the decision would entail such far-reaching consequences.

### **POTENTIAL INVALIDITY OF THE DECISION OF A PUBLIC ADMINISTRATIVE BODY AS A RESULT OF THE CONVICTION OF A PERSON PERFORMING A FUNCTION**

#### **Summary**

The article presents the reflections on the potential invalidity of an administrative decision of a public administrative body as a result of the conviction of a person performing a function for an offence under Polish law. Firstly, the author analyses the legal situation of a person convicted for an offence under the Election Code (*Kodeks wyborczy*), the Act on Self-Government Employees (*Ustawa o pracownikach samorządowych*) and the Labour Code (*Kodeks pracy*). He examines in detail the discrepancies between the three legislative acts which may influence the legal position of a convicted person. The conclusion is that a person with the final and valid judgment for intentional offence prosecuted by public indictment to a fine or to penalty of imprisonment retains a passive electoral right in the elections for the mayor, however it seems that under the Act on Self-Government Employees it will not be possible to establish an employment relationship with such a person to work in the capacity of a self-government employee based on election. Secondly, the author analyses the potential invalidity of administrative decisions issued by a person convicted for an offence. The two conditions that could be taken into account as grounds for declaring the invalidity of an administrative decision in the context of the conviction are: a lack of jurisdiction of the authority as a condition of declaring the invalidity of a decision and a gross breach of law as a condition of declaring invalidity of a decision. The analysis of the selected conditions leads to a conclusion that there are no grounds for declaring the invalidity of a decision, as the regulations on jurisdiction will not be breached and the decision will not be issued in gross breach of law. Therefore, even if one were to consider that under the Act on Self-Government Employees a given person cannot be a self-government employee, it seems that this does not prevent the issuance of administrative decisions.

**Keywords:** invalidity of a decision – conviction for an offence – expiration of mandate – self-government employees