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Performing the Function of a Commune Head (Mayor, City President) by a Person Convicted of Public Prosecution to a Fine

Keywords: public figure, local government, commune head, mayor, president, holding office, public accusation

Słowa kluczowe: osoba publiczna, samorząd, wójt, burmistrz, prezydent, sprawowanie funkcji, oskarżenie publiczne

Abstract

The subject of the article is an analysis of the possibility of holding the function of a commune head (mayor, city president) in the light of the generally applicable law in Poland by a person convicted of public prosecution with a fine.

Streszczenie

Sprawowanie funkcji wójta (burmistrza, prezydenta miasta) przez osobę skazaną z oskarżenia publicznego na karę grzywny

Przedmiotem artykułu jest analiza możliwości sprawowania funkcji wójta (burmistrza, prezydenta miasta) w świetle przepisów prawa powszechnie obowiązującego w Polsce przez osobę skazaną z oskarżenia publicznego na karę grzywny.

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When analyzing the subject matter of the article, one should refer in particular to legal regulations such as: the Constitution of the Republic of Poland of April 2, 1997², the Act of January 5, 2011³ the Electoral Code, and the Act of November 21, 2008 on local government employees⁴.

I.

The Art. 62 of the Constitution provides the active right to vote, which is a subjective constitutional right⁵. According to the Art. 62 sec. 1 of the Constitution, a Polish citizen has the right to participate in a referendum and the right to elect the President of the Republic, deputies, senators, and representatives to local self-government bodies, if he or she turns 18 at the latest on the day of voting⁶. According to the Art. 62 sec. 2 of the Constitution, these rights are not granted to persons who are legally incapacitated or deprived of public or electoral rights⁷.

² Constitution of the Republic of Poland of April 2, 1997. (Dz.U. No. 78, item 483).

³ Election Code of 5 January 2011 (consolidated text Dz.U. 2018, item 754); J. Marszałek-Kawa, D. Plecka (eds.), *Dictionary of Political Knowledge*, Toruń 2019.

⁴ Act of 21 November 2008 on local government employees (consolidated text Dz.U. 2018, item 1260).

⁵ L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, "Państwo i Prawo" 2001, No. 10, pp. 21–22; K. Opalek, *Prawo podmiotowe. Studium z teorii prawa*, Warsaw 1957, p. 165; K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 204; A. Stępkowski, *Problem „istoty” prawa podstawowego w perspektywie klasycznych teorii prawa podmiotowego*, "Zeszyty Prawnicze" 2013, No. 4, pp. 117–120.

⁶ A. Lubaczewska, *Gwarancje realizacji czynnego i biernego prawa wyborczego*, [in:] *Demokratyczne standardy prawa wyborczego Rzeczypospolitej Polskiej. Teoria i praktyka*, ed. F. Rymarz, Warsaw 2005, pp. 177–188; K. Prokop, *Prawa wyborcze młodzieży*, "Studia Wyborcze" 2010, vol. IX, p. 100.

⁷ M. Dąbrowski, *Ubezwłasnowolnienie częściowe a prawo wyborcze w świetle standardów europejskich*, "Przegląd Prawa Konstytucyjnego" 2010, No. 2–3, pp. 261–280; A. Wierzbiца, *Referendum i wybory oraz zarządzenia i uchwały jednostek samorządu terytorialnego. Władcze*,

According to the Act of May 7, 2009 on the amendment of the Constitution of the Republic of Poland to the Art. 99 of the Constitution, para. 3 in the following wording: “A person who has been sentenced by a valid sentence to imprisonment for an intentional offense prosecuted by public prosecution may not be elected to the Sejm or the Senate”⁸. Thus, the legislator introduced negative conditions for the passive election right to the Sejm and Senate on the constitutional grounds. Article 99 (1) 3 of the Constitution is consistent with the Art. 11 § 2 of the Election Code. Based on the Art. 11 § 2 of the Electoral Code, there is no right to be elected to the Sejm, Senate, President of the Republic of Poland, or the European Parliament in the Republic of Poland, the governing bodies of local self-government units, and a commune head (a mayor, a penalty of imprisonment for an intentional offense prosecuted by public indictment or an intentional fiscal offense and a person against whom a final court decision has been issued stating the loss of the right of the election referred to in the Art. 21a para. 2a of the Act of October 18, 2006 on disclosure of information about documents of state security organs from 1944–1990 and the content of these documents⁹.

The right of election is also not granted to a citizen of the European Union who is not a Polish citizen, deprived of the right to elect in a European Union Member State of which he is a citizen¹⁰. Moreover, such a right is not granted to a person who has previously been a twice elected commune head in this commune in elections of a commune administrator ordered under the Art. 474 § 1 of the Electoral Code (Art. 11 § 3 and § 4 of the Electoral Code)¹¹.

administracyjnoprawne formy wyrażania woli przez jednostki samorządu terytorialnego, Warsaw 2014, pp. 47–48.

⁸ Dz.U. No. 114, item 946.

⁹ Dz.U. 2017, item 2186, Dz.U. 2018, item 538.

¹⁰ T. Strzałkowski, *Wpływ miejsca zamieszkania na realizację praw wyborczych w Polsce*, “Przegląd Prawa Konstytucyjnego” 2015, No. 4, p. 23; M. Dąbrowski, *Obywatelstwo polskie a obywatelstwo Unii Europejskiej*, “Państwo i Prawo” 2005, No. 2, p. 72.

¹¹ M. Chrzanowski, *Zastosowanie cenzusów w wyborach do organów stanowiących jednostek samorządu terytorialnego*, “Przegląd Prawa Konstytucyjnego” 2020, No. 4, pp. 235–239; P. Uziębło, *Cenzusy wyborcze w XXI w. – potrzeba nowego podejścia*, [in:] *Wykłady im. Prof. Wacława Komoranicznego. Wykład VI*, Toruń 2014, p. 6; M. Chmaj, *Wybory do rady gminy*, [in:] *Status prawny rady gminy*, ed. M. Chmaj, Warsaw 2012, p. 33.

When analyzing the issue that is the subject of this article, the conclusion is that, in the light of the regulations of both the Constitution and the Election Code, a person who meets the relevant conditions set out in law, and at the same time convicted for an intentional crime prosecuted by public prosecution, but to a penalty other than imprisonment, will may be a candidate in local government elections.

II.

Doubts arise under the act on local government employees, in connection with the Art. 6 u.p.s. According to the Art. 6 sec. 1 of the AUC, a self-government employee may be a person who is a Polish citizen, has full legal capacity and enjoys full public rights, and has professional qualifications required to perform work in a specific position¹². In the para. 2 of the discussed provision, it is clarified that a local government officer employed based on election or appointment may be a person who meets the requirements specified in the para. 1 and has not been convicted by a valid court judgment for an intentional crime prosecuted by public indictment or a deliberate tax offense¹³.

Undoubtedly, the content of Art. 6 sec. 2 u.p.s. is in obvious logical contradiction to the provisions of the Art. 62 sec. 1 and Art. 99 sec. 3 of the Constitution, and Art. 11 sec. 2 of the Code. Contrary to the mentioned regulation of the Electoral Code and the constitutional regulation, it does not differentiate the situation of persons convicted by a final court judgment for an intentional crime prosecuted under public prosecution and imprisonment and the situation of persons sentenced to a lesser penalty, including a fine.

To decide which of the rules of law should have priority of application, one should refer to the conflict of laws rules which are interpretative directives,

¹² A. Rzetecka-Gil, *Konsekwencje ukarania karą grzywny za przestępstwo ścigane z oskarżenia publicznego z perspektywy możliwości pełnienia funkcji wójta, burmistrza, prezydenta miasta*, "Monitor Prawniczy" 2018, No. 18, pp. 3–5.

¹³ M.P. Gapski, *Czynne i bierne prawo wyborcze do organów samorządu terytorialnego w Polsce (wybrane zagadnienia)*, [in:] *Dziesięć lat reformy administracji publicznej w Polsce. Ogólnopolska konferencja naukowa, Łańcut, 12–14 czerwca 2008 r.*, eds. J. Parchomiuk, B. Uliasz, E. Kruk, Warsaw 2009, p. 188; J. Marszałek-Kawa (ed.), *Samorząd terytorialny. Studium politologiczne*, Toruń 2007.

resolving contradictions between incompatible and at the same time binding legal norms. There are three basic types of conflict of laws in the science of law¹⁴. The first is the hierarchical rule (*lex superior derogat legi inferiori*), according to which the hierarchically higher norm overrules the hierarchically lower norm that is inconsistent with it. The second is the chronological rule (*lex posteriori derogat legi priori*), according to which an act issued later repeals an act issued earlier if the later act has no lower legal force than the earlier act. The last rule is the substantive rule (*lex specialis derogat legi generali*) – a more detailed norm repeals a more general one¹⁵.

Referring to the first, hierarchical, rule, it should be pointed out that in case of a conflict with the regulation of the act on local government employees, the constitutional regulation and the mentioned Art. 62 and 99 sec. 3 of the Constitution should have priority. Referring, respectively, to the chronological rule, it should be noted that the applicable Electoral Code together with Art. 11 § 2 in the wording unchanged to this day is the act of 5 January 2011¹⁶, while the act on local government employees with Art. 6 sec. 2 u.p.s. with the same wording applicable until now, was adopted on November 21, 2008¹⁷. According to the chronological rule, priority should be given to the regulation of the Electoral Code, and more specifically to the Art. 11 (2) of the CCC in case of a conflict with the Art. 6 sec. 2 of the Act on Local Government Employees. Going further, to apply the conflict of law rule *lex specialis derogat legi generali*, attention should be paid to the high level of generality of the provisions of the Act on local government employees. Undoubtedly, the Electoral Code contains more detailed legal norms. These norms apply strictly to the election matter, including the election law of local government employees. Regarding this observation, guided by the principle of merit, one should also opt for the priority of applying the provisions of the Electoral Code when resolving the contradictions that arise in the context of both acts¹⁸.

¹⁴ K. Ziemiński, *Rola i miejsce reguł kolizyjnych w procesie dekodowania tekstu prawnego*, "Ruch Prawniczy" 1978, No. 2, pp. 1–15.

¹⁵ L. Morawski, *Zasady wykładni prawa*, Toruń 2014, p. 255.

¹⁶ Entry into force on January 31, 2011.

¹⁷ Entry into force on January 1, 2009.

¹⁸ B. Springer, *Winny – niewinny? Kandydowanie w wyborach samorządowych a zarzuty prokuratorskie i wyrok sądu. Studium przypadku Hanny Zdanowskiej*, "Nowa Polityka Wschodnia" 2019, No. 2, pp. 119–135.

Not without significance is also the fact that in the Electoral Code, Art. 492 specifies the conditions for the expiry of the mandate of the commune head (mayor, city president) and the catalog indicated therein did not include the grounds for conviction by public indictment to a fine referred to in Art. 6 sec. 2 u.p.s. This is of particular importance because the catalog indicated therein is a closed catalog of factual circumstances constituting premises for the termination of the mandate of the head of the commune head (mayor, city president) before the end of the term of office.

III.

In the context of the considerations made, attention should also be paid to the importance of the mandate of the commune head (mayor, city president) and its importance¹⁹. A mandate is a relationship that generates a special kind of bond. A person selected to perform this function comes from general elections, acquires a mandate to exercise power and represent voters²⁰. Since a given person may win a mandate, there is no justification for accepting the thesis that it may be refused in connection with the wording of the provision of the act, which is in direct contradiction to the constitutional regulation and the Electoral Code itself.

IV.

In the light of the provisions of the Constitution and the Electoral Code, a person who meets the relevant conditions set out by law, and at the same time convicted of an intentional crime prosecuted by public prosecution, but to a penalty other than imprisonment, may run for the office of a commune head (mayor, city president) in local elections.

¹⁹ J. Czerw, *Zasady wyboru wójta – stan aktualny i zgłaszane propozycje zmian*, [in:] *Samorządy w procesie decentralizacji władzy*, eds. M. Chrzanowski, J. Sobczak, Lublin 2017.

²⁰ M. Wrzalik, *Ograniczenie możliwości kandydowania na wójta (burmistrza, prezydenta miasta) po piastowaniu urzędu przez dwie kadencje*, "Athenaeum" 2018, vol. 58, pp. 128–138.

Article 6 sec. 2 u.p.s. is in obvious logical contradiction to the provisions of the Art. 11 sec. 2 of the CC, as well as the Art. 62 sec. 1 and Art. 99 sec. 3 of the Constitution.

To eliminate the contradiction between the applicable legal norms, let us refer to the conflict of laws rules. Referring to the hierarchical rule, it should be pointed out that in case of a conflict with the regulation of the act on local government employees, the constitutional regulation and the quoted Art. 62 and 99 sec. 3 of the Constitution. According to the chronological rule, priority should be given to the regulation of the Electoral Code, and more specifically to the Art. 11 (2) of the CCC in case of a conflict with Art. 6 sec. 2 of the Act on Local Government Employees. Following the substantive rule, due to the high level of general nature of the provisions of the Act on local government employees, one should also opt for the priority of applying the provisions of the Electoral Code. The conclusions are additionally confirmed by the jurisprudence of the Supreme Administrative Court.

Article 492 of the Electoral Code specifies the conditions for the expiry of the mandate of the commune head (mayor, city president) and the closed catalog does not include the grounds for conviction by public prosecution to a fine.

Summing up, since a given person can obtain the seat of a commune head (mayor, city president), there is no justification for accepting the thesis that a mandate may be refused in connection with the act, which is in direct contradiction to the regulations of the Constitution and the Election Code.

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