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LEGAL POSITION OF THE PROSECUTOR IN ADMINISTRATIVE PROCEEDINGS

Abstract. This text concerns the issue of the participation of the prosecutor in administrative proceedings.

The purpose of administrative proceedings is imperious, unilateral regulation of the legal and administrative situation of a specific entity. Administrative proceedings are inquisitive; its purpose is to implement the provisions of substantive administrative law but, above all, to secure the administered entity against abuse of power by arbitrary administrative authorities.

One of the guarantees of the lawful operation of the administrative body in administrative proceedings is the participation of the prosecutor. The prosecutor's office performs tasks in the field of prosecution of crime and guards the rule of law.

The prosecutor decides about his participation in specific proceedings. His participation in the administrative procedure, like the participation of any other entity, must be clear and obvious, and therefore, the participation of the prosecutor in this procedure cannot, in principle, be presumed.

The prosecutor's powers were analyzed such as the right to request the competent public administration authority to initiate proceedings to remove an unlawful state; the right to participate at any stage of the proceedings to ensure that the proceedings and the resolution of the case are lawful and the right to object to a final decision if the provisions of the Code or special provisions provide for the resumption of proceedings, annulment of the decision or annulment or amendment thereof.

The participation of the prosecutor in administrative proceedings, due to his inquisitive nature, is an important means of controlling the legality of administrative proceedings and taking into account the public interest. The lawfulness of public administration bodies' activities applies to both proceedings conducted on request and ex officio, and therefore

the prosecutor's power includes within these proceedings: the right to request the competent public administration authority to initiate proceedings to remove an unlawful state; the right to participate at any stage of the proceedings in order to ensure that the proceedings and the resolution of the case are lawful, the right to object to a final decision, if the provisions of the Code or special provisions provide for resumption of proceedings, annulment of the decision or its annulment or amendment.

It should be emphasized that each of the above powers of the prosecutor can only be exercised to ensure the rule of law, which means that values such as reliability, economy or purposefulness will not be subject to prosecutor's control in administrative proceedings.

Keywords: prosecutor, rule of law, administrative proceedings, complaints.

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ПРАВОВИЙ СТАТУС ПРОКУРОРА В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ

Анотація: Ця публікація стосується питання участі прокурора в адміністративному судочинстві.

Метою адміністративного судочинства є владне, одностороннє регулювання правового та адміністративного становища конкретного суб'єкта. Адміністративне провадження допитливе; її мета полягає у здійсненні норм матеріального адміністративного права, але, перш за все, у захисті суб'єкта управління від зловживання владою довільними адміністративними органами.

Однією з гарантій законної роботи адміністративного органу в адміністративному судочинстві є участь прокурора. Прокуратура виконує завдання у сфері притягнення до злочину та охороняє верховенство закону.

Прокурор приймає рішення про його участь у конкретних провадженнях. Його участь в адміністративній процедурі, як і участь будь-якого іншого суб'єкта господарювання, повинна бути чіткою і очевидною, а отже, участь прокурора в цій процедурі в принципі не можна вважати.

Було проаналізовано повноваження прокурора, такі як право вимагати від компетентного органу державного управління розпочати провадження щодо усунення протиправної держави; право брати участь у будь-якій стадії провадження для забезпечення законності провадження у справі та вирішення справи, а також заперечувати проти остаточного рішення, якщо положення Кодексу або спеціальних положень передбачають відновлення провадження у справі, анулювання рішення чи анулювання чи зміна рішення.

Участь прокурора в адміністративному судочинстві через його допитливий характер є важливим засобом контролю законності адміністративного судочинства та врахування суспільних інтересів. Законність діяльності органів державного управління поширюється як на провадження, яке ведеться на вимогу, так і за посадою, і тому повноваження прокурора включають до цього процесу: право вимагати від компетентного органу державного управління розпочати провадження щодо усунення незаконної держави; право брати участь у будь-якій стадії провадження з метою забезпечення законності провадження у справі та вирішення справи, право на заперечення проти остаточного рішення, якщо положення Кодексу або спеціальних положень передбачають відновлення провадження у справі, анулювання рішення або його скасування чи зміна.

Підкреслено, що кожне з перерахованих вище повноважень прокурора може бути здійснено лише для забезпечення верховенства права, а це означає, що такі цінності, як надійність, економічність чи цілеспрямованість, не підлягатимуть прокурорському контролю в адміністративному судочинстві.

Ключові слова: прокурор, верховенство права, адміністративне провадження, скарга.

Formulation of the problem. Administrative proceedings are defined in the doctrine as a field of law regulating the mode of operation of public administration bodies in matters relating to rights and obligations not subordinated in business, specific entities (administered entities) [1, s.1].

An administrative act is the legal form by which public administration bodies decide about the rights and obligations of administered entities. According to Eugeniusz Ochendowski, a permanent administrative act having a substantive legal basis, the imperious action of a public administration body, whose purpose is to cause specific, individually marked legal effects [2, s.179].

The purpose of administrative proceedings is imperious, unilateral regulation of the legal and administrative situation of a specific entity. Administrative proceedings are inquisitive; its purpose is to implement the provisions of substantive administrative law but above all to secure the administered entity against abuse of power by arbitrary administrative authorities.

One of the guarantees of the lawful operation of the administrative body in administrative proceedings is the participation of the prosecutor. In accordance with Article 2 of the Act on Prosecutor's Office, the prosecutor's office performs tasks in the field of prosecution of crimes and guards the rule of law[1].

The prosecution's main task is to uphold the rule of law [3], which implies the obligation to act in such a way as to achieve the goal intended by the legislator [4, s. 42]. The ways of performing by the prosecutor's office the obligations set out in Article 2 p.p. belongs:

- taking measures provided for by law, aiming at the correct and uniform application of law in judicial and administrative proceedings, in cases of offenses and in other proceedings provided for by law;
- appealing against unlawful administrative decisions to court and par-

[1] t.j. Dz.U. z 2019 r. poz. 740, hereinafter referred to as p.p.

ticipating in court proceedings regarding the legality of such decisions[1].

The prosecutor, taking part in administrative proceedings, acts as a public interest spokesperson, whose task is to protect the rights of citizens guaranteed in the Constitution. The purpose of the participation of prosecutors in administrative proceedings in accordance with Article 3 § 1 point 3 p.p., there is a correct and uniform application of law, not ethical norms [5].

The participation of the prosecutor in administrative proceedings is one of the manifestations of the implementation of the rule of law rule [6, s.80].

The purpose of the article The role of the prosecutor in administrative proceedings is considered, define his powers, rights and responsibilities.

Various aspects of the legal status of the prosecutor as an important subject of the administrative process in Poland have been studied by such scholars as J. Drachal, E. Iserzon, R. Hauser, Z. Kmiecik, G. Łaszczyca, A. Matan, E. Mzyk, E Ochendowski, whose scientific work is used in this article. Research on this issue has also been carried out in earlier publications of the authors of this article. At the same time, the problem raised in the title of our scientific intelligence remains relevant for Poland and may be of interest to Ukraine in the context of the reform of the prosecutor's office and administrative proceedings.

Presentation of the main research material. The participation of the prosecutor in administrative proceedings is subject to regulation IV of the Act of 14 June 1960 Code of Administrative Procedure[2] zatytułowanego „Udział prokuratora".

According to Article 182 k.p.a. the prosecutor has the right to ask the competent public administration authority to initiate proceedings to remove the illegal state.

The prosecutor decides about his participation in specific proceedings. His participation in the administrative procedure, like the participation of any other entity, must be clear and obvious, and therefore, the participation of the prosecutor in this procedure cannot, in principle, be presumed. Even delivery to the prosecutor of the notification of the end of the administrative procedure, or service of the administrative decision does not result in the recognition that the prosecutor was involved in the administrative procedure [7].

The prosecutor, acting in administrative proceedings with the rights of a party, is not associated with any of the parties, he fully performs all procedural acts independently, carrying out his own official tasks related to safeguarding the rule of law. On the other hand, a public administration body has the same obligations towards the prosecutor which it performs in relation to the parties to the proceedings. Therefore, the prosecutor must be served with all decisions issued on the matter, because in the event of failure to do so, this circumstance may constitute a prerequisite for resumption of proceedings pursuant to Article 145 § 1 point 4 k.p.a. [8].

In the opinion of Filip Elżanowski, the legitimacy of the participation of the prosecutor in administrative proceedings

[1] Zob. art. 3 § 1 pkt 3 i 7 p.p.

[2] t.j. Dz. U. z 2020 r. poz. 256, ze zm., hereinafter referred to as k.p.a.

may only result from the intention to remove the unlawful state, which results from Article 182 k.p.a. and the nature of the institution of the prosecutor, who is tasked to uphold the rule of law [9].

The initiation of proceedings is not dependent on the will of the authority, as is the case in the event of a request to initiate proceedings in a case concerning another person by a social organization [10, s.102].

According to some representatives of the legal doctrine, the prosecutor cannot demand that proceedings be instituted in cases where, in accordance with the law, a party's request is required to initiate proceedings, i.e. a situation where the proceedings can only be initiated on her own initiative. In such a situation, one cannot speak of the existence of a state contrary to the law, i.e. the basic premise for the prosecutor to exercise his right of legal initiative. The prosecutor is not entitled to demand that proceedings be instituted also in the case that is the subject of the regulation in Article 61 § 2 k.p.a., and therefore, when an exception of the public administration body (due to a particularly important interest of the party) may initiate proceedings ex officio in which law requires a party's application [10, s.103; 11, s.481].

However, both in jurisprudence and in legal doctrine [1, s.242] a different position is presented, in the light of which the prosecutor has a procedural legitimacy to request the initiation of proceedings in each case subject to settling by means of an administrative decision, both initiated at the request of a party and ex officio. As emphasized in the judgment of the Provincial Administrative Court in Poznań of June 6, 2019: "According to Article 182 k.p.a. the prosecutor has the right to ask the competent public administration authority to initiate proceedings to remove the illegal state. In addition, the prosecutor has the right to participate at any stage of the proceedings to ensure that the proceedings and the resolution of the case are lawful (Article 183 k.p.a.). One should agree with the view that the provision of Article 182 k.p.a., further to the public prosecutor, has a procedural ID to demand that proceedings be instituted in each case to be settled by means of an administrative decision. The prosecutor's right to request the initiation of administrative proceedings is independent of whether the shaping of the legal situation of the individual by administrative decisions can be made ex officio or on application"[1].

The judgment of the Provincial Administrative Court in Poznań of 21 January 2016 stated that: «1. The request to initiate administrative proceedings from the prosecutor binds the public administration body in such a way that the assessment of the occurrence of an <<unlawful state>> occurs only in the substantive decision terminating the administrative procedure. If, after the investigation, the public administration body finds that the state of unlawfulness does not occur, it refuses to make the expected by the prosecutor to specify the legal situation of the individual.

2. As a consequence, the «state of illegality» referred to in Article 182 k.p.a., cannot be qualified as another legitimate reason within the meaning of Article 61a k.p.a., because of which proceedings cannot be initiated.

3. The political position of the Prosecutor's Office, as a body of legal protec-

[1] Sygn. akt II SA/Po 188/19, Legalis nr 1951692

tion whose task is to safeguard the rule of law, excludes that the public administration body, within the admissibility of conducting administrative proceedings, assesses the admissibility of the prosecutor's ID to demand that administrative proceedings be instituted.

4. Implementation of the premise «in order to remove the state inconsistent with the law» as a condition of requesting the initiation of administrative proceedings is exclusively subject to the prosecutor's own control, as a limitation of his systemic powers to safeguard the rule of law. In this respect, the prosecutor's request is binding on the public administration body. The competences of the public administration body do not include the control of the Prosecutor's Office in the implementation of its constitutional tasks, but the handling of administrative matters"[1].

Referring to the divergent positions presented above, it seems that the prosecutor has a legal standing to request the initiation of administrative proceedings in each case subject to settling by means of an administrative decision, regardless of whether it is initiated at the request of a party or ex officio. In accordance with Article 182 k.p.a. the prosecutor has the right to request «to initiate proceedings». According to Article 61. § 1 k.p.a. administrative proceedings are instituted at the request of a party or ex officio.

Asking the prosecutor to initiate proceedings is not the same as the initiation of proceedings ex officio (or with the request of a party), because it is binding on the public administration body, and therefore he does not assess whether in fact there are premises to initiate the proceedings or whether there are none. Moreover, it seems unjustified to limit the protection of the rule of law by the prosecutor only to proceedings instituted ex officio; public administration bodies are obliged to act on the basis of legal provisions in all proceedings. The participation of the prosecutor in proceedings instituted at the request of a party will also be justified if there is a fear that the public interest will not be implemented in the fullest possible manner in a given proceeding.

The prosecutor is entitled under the provisions of the k.p.a. the following permissions:

I. The right to request the competent public administration authority to initiate proceedings to remove the unlawful state. The right to ask the competent authority to initiate administrative proceedings is, in essence, the procedural right of the prosecutor to request the initiation of proceedings in a situation where there is a state of unlawfulness. The assessment of whether such a condition exists belongs to the prosecutor and is not subject to verification by a public administration body [12]. The date of initiation of the proceedings as a result of the prosecutor's request is the date of delivery of the application in this matter to the public administration body [13].

II. The right to participate at any stage of the proceedings to ensure that the proceedings and the resolution of the case are lawful.

The prosecutor notifying his participation in the proceedings becomes its participant. A public administration body may not refuse the prosecutor to participate in the proceedings. The prosecutor may already participate in the proceedings before the authority of the first in-

[1] Sygn. akt III SA/Po 743/15, Legalis nr 1470013.

stance either from the moment of its initiation or join only in its course or only in the appeal proceedings [10, s/192].

Regarding the power of the prosecutor who did not take part in the proceedings before the first-instance authority, there is a discrepancy in the case-law against the decision. According to the theses expressed in the jurisprudence, the prosecutor does not have such power.

In a judgment of March 10, 2011, the Supreme Administrative Court stated that: «1. If the prosecutor did not join the administrative procedure before the decision was issued by the first instance authority, he may not join this procedure by appealing against the decision issued in the administrative procedure in which he did not participate. After the decision of the first instance authority, there is no pending proceedings to which the prosecutor could join. It is only because the lodging of an appeal starts the further course (stage) of the administrative procedure, enabling verification, deletion or reformation of the decision of the first instance body.

2. A prosecutor who did not participate in the proceedings preceding the decision by the first instance body may not appeal against that decision. If the stage of the appeal procedure, to which the prosecutor could join, does not start, then only when such a decision becomes final the prosecutor may use the procedural instruments in the form of an objection"[1].

However, in the light of part of the case law, the prosecutor who did not participate in the proceedings before the first instance authority may, within a 14-day time limit running from the delivery of the decision, to initiate appeal proceedings [14]. This view was upheld in the judgment of the Supreme Administrative Court of February 6, 2009: «To achieve the objectives of the prosecution, it is necessary for the prosecutor to appeal against the decision of the first instance authority, regardless of whether he was involved in the proceedings before that authority or no. Otherwise, the administrative authority would not be subject to control by the second instance authority on the initiative of the prosecutor when issuing a decision favorable to the party but infringing the law".[2]

Referring to the above, divergent views, it seems that the prosecutor can only appeal if he has been involved in administrative proceedings. Such a conclusion results from Article 188 k.p.a., which provides that a prosecutor who participates in the proceedings in the cases specified in Article 182–184 k.p.a., serve the rights of the party [15].

The participation of the prosecutor in administrative proceedings involves such procedural rights of that body as: access to the file, the right to submit motions,

[1] Sygn. akt II OSK 431/10, Legalis nr 369155; analogicznie WSA w Gliwicach w wyroku z dnia 21 marca 2005 r., sygn. akt 4 II SA/Ka 1659/03, Legalis nr 89324.

[2] Sygn, akt I OSK 324/08, Legalis nr 183822. Analogicznie NSA w wyroku z dnia 3 lutego 2009 r. sygn. akt I OSK 272/08, Legalis nr 215418: „*Możliwość przyłączenia się do postępowania w każdym stadium – dla realizacji celu wskazanego w art. 183 § 1 KPA oznacza, że prokurator może się przyłączyć do postępowania również poprzez zgłoszenie udziału w postępowaniu wraz z wniesieniem odwołania, bowiem musi on podejmować działania właściwe dla danej fazy postępowania. Przeciwne stanowisko, zakładające, że w takim przypadku, mimo że prokurator ocenia daną decyzję jako niezgodną z prawem winien on oczekiwać na jej ostateczność i dopiero wówczas wnieść od tej decyzji sprzeciw, wydaje się oczywiście nieracjonalne*".

the right to lodge a complaint against the decision or the right to appeal the decision. On the other hand, the prosecutor does not have the rights vested solely in the party to the proceedings (so-called disposable acts) such as the possibility of concluding a settlement [6].

According to Article 183 § 2 k.p.a. a public administration authority shall notify the prosecutor of the initiation of proceedings and pending proceedings whenever it considers the participation of the prosecutor in the proceedings necessary.

The assessment of whether there is a need for public prosecutor's participation in the proceedings belongs to the public administration body that conducts them.

Delaying by the public administration body in examining the case in connection with notifying the prosecutor of the pending proceedings does not constitute an obstacle to settling the case; can not be justified [16].

III. The right to object to a final decision if the provisions of the Code or specific provisions provide for resumption of proceedings, annulment of the decision or its annulment or amendment.

As underlined in the case-law, the opposition is a separate appeal. The prosecutor's objection is an extraordinary legal remedy against final administrative decisions, which has a legal basis in Article 184 § 1 k.p.a. In the light of Article 184 § 1 k.p.a. there are three types of opposition:

- requesting annulment,
- with a request to resume the proceedings,
- requesting annulment or amendment of a decision.

When submitting an objection, the prosecutor is required to cite the provisions on annulment, resumption of proceedings or annulment or amendment of a decision [17].

According to Article 184 § 1 of the Code of Civil Procedure the prosecutor has the right to object to a final decision if the provisions of the Code or specific provisions provide for resumption of proceedings, annulment of the decision or its annulment or amendment.

The prosecutor is not entitled to object to the order [18].

The prosecutor lodges an objection to the authority competent to resume proceedings, annul the decision or annul or amend it, while the objection against the decision issued by the minister is lodged by the Prosecutor General.

If the basis of the objection is the lack of participation of the party (without her fault) in the proceedings, then the objection requires the consent of the party. "A contrario, the prosecutor is not obliged to obtain the party's consent to exercise the right to object in the event of an opposition based on other grounds for renewal, including on the basis of Article 145a and Article 145b k.p.a." [19].

Article 185 § 1 k.p.a. stipulates that the prosecutor's objection should be considered and dealt with within thirty days of its filing. In the event that the authority fails to settle the matter within this period, the public administration body shall be obliged to notify the prosecutor of the delay, giving its reasons, setting a new deadline and advising on the right to make a reminder.

An objection results in the following actions taken by a public administration body:

- he initiates the proceedings ex officio, notifying the parties thereof,

- is obliged to immediately consider whether there is a need to suspend im-

plementation of the decision until the objection is resolved.

In accordance with Article 189 k.p.a. a prosecutor who has lodged a complaint against a decision of a public administration body to an administrative court cannot raise an objection for the same reasons.

The jurisprudence emphasized that the restriction resulting from Article 189 k.p.a. will not apply

«In a situation where the prosecutor lodges an objection against the decision stating the reasons that were the basis for lodging an appeal to the administrative court, which complaint the court did not consider substantively due to rejection» [20].

Article 189 k.p.a. should be understood as meaning that it is inadmissible to raise objections in a case which was the subject of substantive assessment of an administrative court, and for reasons which the court deemed not to justify revocation or annulment of the decision. They should not, however, close the way to the prosecutor to demand that the decision be reviewed in an administrative manner those reasons that constitute negative procedural grounds for subjecting the decision to an administrative court review. This also applies to the situation when the court proceedings discontinued based on a complaint filed by the prosecutor.

Conclusions. The participation of the prosecutor in administrative proceedings, due to his inquisitive nature, is an important means of controlling the legality of administrative proceedings and taking into account the public interest. The lawfulness of public administration bodies' activities applies to both proceedings conducted on request and ex officio, and therefore the prosecutor's power includes within these proceedings: the right to request the competent public administration authority to initiate proceedings to remove an unlawful state; the right to participate at any stage of the proceedings in order to ensure that the proceedings and the resolution of the case are lawful, the right to object to a final decision, if the provisions of the Code or special provisions provide for resumption of proceedings, annulment of the decision or its annulment or amendment.

It should be emphasized that each of the above powers of the prosecutor can only be exercised to ensure the rule of law, which means that values such as reliability, economy or purposefulness will not be subject to prosecutor's control in administrative proceedings.

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