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LEGAL ASPECTS OF THE TRANSFER OF PUBLIC OFFICIALS

Abstract. The current legislation on the civil service, that regulates the transfer of civil servants, four grounds according to which a civil servant can be transferred without mandatory competition were analyzed. First of all, if the reorganization (merger, accession, division, transformation) or liquidation of the state body is carried out; in the case of transfer of a civil servant to the position of service in local government bodies, during the transfer or delegation of powers and functions from the state body to the local government body; according to the decision of the head of public service in the same state body, including in other district (in other settlement), transfer to the other state body, including in other district (in other settlement), – by the decision of the head of public service in public body from which the civil servant is transferred, and the head of public service in public body to which the civil servant is transferred.

Special attention is paid to the issue of transfer of a civil servant who is suspected of committing a criminal offense. It was found that in the absence of a conviction of the court, which entered into legal force, there are no grounds for termination of public service and dismissal from office. The civil servant shall retain the position of the civil service and the fundamental rights provided for by law, in particular, the right to transfer to an equivalent or lower vacant position to another state body. In addition, the current legislation does not prohibit the transfer of a civil servant suspected of committing a criminal offence to an equivalent or lower vacant position in another state body.

The conclusion is formed that it is not allowed to establish any restrictions on the rights and deterioration of the position of the civil servant in comparison with other employees of this body or institution. In turn, civil servants must comply with the internal regulations and other legislative acts governing the adoption, passage of public service and dismissal from it.

Keywords: transfer, public service, civil servant, competition, local authorities.

ПРАВОВІ АСПЕКТИ ПЕРЕВЕДЕННЯ ДЕРЖАВНИХ СЛУЖБОВЦІВ

Анотація. Розглянуто чинне законодавство з питань державної служби, що регулює переведення державних службовців, проаналізовано чотири підстави, відповідно до яких державний службовець може бути переведений без обов'язкового проведення конкурсу. Насамперед, якщо здійснюється реор-

ганізація (злиття, приєднання, поділ, перетворення) або ліквідація державного органу; в разі переведення державного службовця на посаду служби в органах місцевого самоврядування під час передачі або делегування повноважень і функцій від державного органу до органу місцевого самоврядування; за рішенням керівника державної служби в тому самому державному органі, у тому числі в іншій місцевості (в іншому населеному пункті), переведення в іншому державному органі, у тому числі в іншій місцевості (в іншому населеному пункті), — за рішенням керівника державної служби в державному органі, з якого переводиться державний службовець, та керівника державної служби в державному органі, до якого переводиться державний службовець.

Особливу увагу приділено питанню переведення державного службовця, який є підозрюваним у вчиненні кримінального правопорушення. З'ясовано, що у зв'язку з відсутністю обвинувального вироку суду, який набрав законної сили, відсутні підстави для припинення державної служби та звільнення із займаної посади. За державним службовцем зберігається посада державної служби та основні права, передбачені законом, зокрема, право на переведення на рівнозначну або нижчу вакантну посаду до іншого державного органу. Окрім того, чинним законодавством не встановлено заборони на переведення державного службовця, який є підозрюваним у вчиненні кримінального правопорушення, на рівнозначну або нижчу вакантну посаду до іншого державного органу.

Сформовано висновок, що не допускається встановлення будь-яких обмежень прав і погіршення становища державного службовця порівняно з іншими службовцями даного органу чи установи. Своєю чергою, державні службовці повинні дотримуватися правил внутрішнього службового розпорядку та інших законодавчих актів, що регулюють питання з прийняття, проходження державної служби та звільнення з неї.

Ключові слова: переведення, державна служба, державний службовець, конкурс, органи місцевого самоврядування.

ПРАВОВЫЕ АСПЕКТЫ ПЕРЕВОДА ГОСУДАРСТВЕННЫХ СЛУЖАЩИХ

Аннотация. Рассмотрено действующее законодательство по вопросам государственной службы, регулирующее переводы государственных служащих, проанализированы четыре основания, согласно которым государственный служащий может быть переведен без обязательного проведения конкурса. Прежде всего, если осуществляется реорганизация (слияние, присоединение, разделение, преобразование) или ликвидация государственного органа; в случае перевода государственного служащего на должность службы в органах местного самоуправления, во время передачи или делегирования полномочий и функций от государственного органа в орган местного самоуправления; по решению руководителя государственной службы в том же государственном органе, в том числе в другой местности (в другом населенном пункте), перевод в другом государственном органе, в том числе в дру-

гой местности (в другом населенном пункте), — по решению руководителя государственной службы в государственном органе, с которого переводится государственный служащий, и руководителя государственной службы в государственном органе, в который переводится государственный служащий.

Особое внимание уделено вопросу перевода государственного служащего, который является подозреваемым в совершении уголовного преступления. Установлено, что в связи с отсутствием обвинительного приговора суда, вступившего в законную силу, отсутствуют основания для прекращения государственной службы и увольнения с занимаемой должности. По государственным служащим сохраняется должность государственной службы и основные права, предусмотренные законом, в частности, право на перевод на равнозначную или низшую вакантную должность в другой государственный орган. Кроме того, действующим законодательством не установлен запрет на перевод государственного служащего, который является подозреваемым в совершении уголовного преступления, на равнозначную или низшую вакантную должность в другой государственный орган.

Сформирован вывод, что не допускается установление каких-либо ограничений прав и ухудшение положения государственного служащего по сравнению с другими служащими данного органа или учреждения. В свою очередь, государственные служащие должны соблюдать правила внутреннего служебного распорядка и других законодательных актов, регулирующих вопросы по принятию, прохождению государственной службы и освобождение от нее.

Ключевые слова: перевод, государственная служба, государственный служащий, конкурс, органы местного самоуправления.

Analysis of the latest scientific research. The issue of transfers of civil servants in the civil service, in the scientific literature is extremely rare, they are little investigated, because according to the current legislation, admission to the civil service is considered in the context of competitive tests, but in the Law of Ukraine “On civil service” there is also the alleged possibility of transfer of civil servants without competitions, which led to scientific interest.

The purpose of the scientific article. The purpose of the article is to highlight the legal aspects of the trans-

fer of civil servants in public authorities and positions in local governments.

Presentation of the main material. The transfer of a civil servant in accordance with the current legislation is the ability to change the position without mandatory competition stipulated by the Law of Ukraine “On civil service” [1].

The law outlines four grounds on which a public servant may be transferred:

- part five of article 22 of the Law of Ukraine “On civil service” states that in the case of reorganization (merger, accession, division, transformation) or

liquidation of a state body, the transfer of a civil servant to an equivalent or lower (with his/her consent) position in a state body to which the powers and functions of such body are transferred, shall be carried out without mandatory competition[1];

- part six of article 22 of the Law of Ukraine “On public service” provides for the possibility of transferring a civil servant to the position of service in local self-government, during the transfer or delegation of powers and functions from the state body to the local self-government body, is carried out without mandatory competition in the case of compliance of his professional competence with the qualification requirements for the relevant position and subject to admission to service for the first time according to the results of the competition[1];

- according to clause 1 of part one of article 41 of the Law of Ukraine “On public service”, on other equivalent or lower vacant position in the same public authority, including in other district (in other settlement), – by the decision of the head of public service;

- according to clause 2 of part one of article 41 of the Law of Ukraine “On public service”, on equivalent or lower vacant position in other public body, including in other district (in other settlement), – by the decision of the head of public service in public body from which the civil servant, and the head of public service in public body to which the civil servant[1] is transferred.

When analyzing the possibility of transferring a civil servant to an equivalent position, it should be understood that in accordance with article 2 of the same law, an equivalent position is a po-

sition of the civil service, belongs to one group of wages, taking into account the jurisdiction of the state body. Thus, the chief specialist that works in structural division of regional public administration, can be transferred to a position of the chief specialist in structural division of regional public administration, similarly the head of structural division of the office of local public administration can be transferred to a position of the chief of staff, the head of independent structural division of the local public administration of the same or similar level of jurisdiction of without obligatory carrying out competition. However, the chief specialist of the structural subdivision of the district state administration cannot be transferred to the position of the chief specialist of the structural subdivision of the regional state administration, since one of the conditions of transfer is not met – the level of jurisdiction of the state body where there is a desire to transfer a civil servant) [2, p. 39].

With regard to the definition of “lower position”, analyzing the norms of the legislation, it can be concluded that the lower position is the position of the public service, which belongs to the lower group of wages. The level of jurisdiction of the public authority is not taken into account. As an example, we can note that the chief specialist of the structural unit of the district state administration (7th group of wages) can be transferred to the position of leading specialist (8th group of wages), specialist (9th group of wages) of the structural unit of the regional state administration, and for example, the head of an independent structural unit of the district state administration (4th group of

wages) can be transferred to the position of deputy head of an independent structural unit of the regional state administration (5th group of wages) [3, p. 49].

I would like to pay particular attention to the transfer of a public servant suspected of committing a criminal offence.

Part one of article 17 of the Criminal Procedure Code of Ukraine provides that a person is considered to be innocent of a criminal offence and may not be subject to criminal punishment until his/her guilt is proved in the manner prescribed by this Code, and established by a guilty verdict of the court that gained legal force. And article 533 of the Criminal Procedure Code of Ukraine provides that the sentence or the judgment which entered into legal force are obligatory for the persons participating in criminal proceedings, and also for all physical and legal entities, public authorities and local governments, their officials and are subject to execution in all territory of Ukraine[4].

According to article 41 of the Law of Ukraine “On civil service”, a civil servant, taking into account his / her professional training and professional competence, may be transferred without obligatory competition to an equivalent or lower vacant position in another state body, including in another locality (in another locality) – by decision of the head of the state service in the state body from which the civil servant is transferred, and the head of the state service in the state body to which the civil servant is transferred. It should be remembered that the translation is carried out only with the consent of the civil servant.

So, considering the data specified above, we consider that in connection with absence of the conviction of the court which entered into legal force, there are no bases for the termination of public service and dismissal from a position. The civil servant shall retain the position of the civil service and the fundamental rights provided for by law, in particular, the right to be transferred to an equivalent or lower vacant position to another state body. In addition, the current legislation does not prohibit the transfer of a civil servant suspected of committing a criminal offence to an equivalent or lower vacant position in another state body.

Since practically there are a number of issues related to the transfer from the position of a civil servant to the position of an official of local self-government, I would like to focus on this aspect. Part one of article 3 of the Law of Ukraine “On civil service” defines that this legal act regulates relations arising in connection with the entry into the civil service, its passage and termination, determines the legal status of a civil servant. According to the letter of the Ministry of Justice of Ukraine dated December 26, 2008 № 758-0-2-08-19 concerning the practice of application of the law in case of conflict, in case of discrepancy between the general and special legal act, the special legal act prevails, if it is not canceled later issued by the general act [5].

Article 83 of the Law of Ukraine “On public service” specifies an exhaustive list of grounds for termination of public service, including: in case of loss of the right to public service or its limitations (article 84 of this Law); in case of termination of appointment to the posi-

tion of public service (article 85 of this Law); on the initiative of a public servant or by agreement of the parties (article 86 of this Law); on the initiative of the subject of appointment (article 87 of this Law); in case of circumstances that have developed independently of the will of the parties (article 88 of this Law); in case of disagreement of the civil servant to perform public service in connection with change of its essential conditions (Art. 43 of this Law); in case of achievement by the public servant of the age of 65 if it is not otherwise provided by the law; in case of application of the ban provided by the Law of Ukraine "About purification of the power" [6]. Also, part three of article 5 of the Law establishes that the provisions of labor legislation applies to civil servants in terms of relations not regulated by this Law of Ukraine "On civil service" [1].

Taking into account the above, a civil servant may be transferred to a position in local self-government bodies only during the transfer or delegation of powers and functions from the state body to the local self-government body, carried out without mandatory competition. It is advisable to note the appointment to the position of public service with the probation period. According to article 35 of the Law of Ukraine "On public service" in the act on appointment the subject of appointment can establish the probation period for the purpose of check of compliance of the public servant with the position with indication of its duration.

At the same time, during the established probation period, the head of the state service analyzes the quality of the execution of orders; compliance with

the deadlines; performance of the total amount of the proposed work, compliance of the civil servant with professional and qualification requirements; understanding of legislative acts and the ability to apply them in practice; ability to organize and plan work; skills of effective communication and ability to work in a team; maintenance and observance in their activities of professional ethics, values and principles of public service, formation of its positive image.

A thorough study of probation period makes it possible to apply it correctly and draw up the decision properly. When appointing a person to the position of public service for the first time the establishment of the probation period is mandatory. The probation periods at appointment to a position of public service are established for a period of up to six months.

It should be noted that the minimum probation period is not regulated by law. Setting a probation period to a public servant, the subject should specify the probation period in the appointment order for the position with the obligatory indication of the term of such probation period [3, p. 67].

The provisions of the Law do not define a list of categories of persons or positions of the civil service, to which such additional condition as the establishment of a probation period cannot be applied when appointing a civil servant.

If the civil servant during the test was absent from work for valid reasons, the probation period shall be extended by the appropriate number of days during which he did not actually perform his/her duties. The continuation of the

probation period under any other conditions would be unlawful even if the public servant consented to such extension. During the test period, the civil servant is subject to the legislation on civil service and labour.

Consequently, it is not allowed to impose any restrictions on his rights and deterioration of the situation in comparison with other employees of this body or institution. In turn, civil servants must comply with the internal regulations and other legislative acts governing the adoption, passage of public service and dismissal from it.

The subject of appointment has the right to dismiss the civil servant from a position before the expiration of the probation period in case of establishment of discrepancy of the public servant to the position on the basis of clause 2 of part one of article 87 of the Law of Ukraine “On public service”. The subject of appointment warns the civil servant about dismissal in writing no later than seven calendar days with indication of the bases of discrepancy with the position [1].

During the probation period, a civil servant may be dismissed from office also on the general grounds provided for by law.

Part six of article 11 of the Law of Ukraine “On civil service” establishes that if the rights of a civil servant established by Law are violated by the head of the civil service by a civil servant of the Supreme body or if these persons created obstacles to the exercise of the rights of a civil servant, he/she may file a complaint indicating the facts of violation of his rights or obstacles to their implementation directly to the central executive body, which ensures the for-

mation and implementation of state policy in the public service. That is, the appeal of the decision on dismissal for non-compliance of the civil servant to the position during the probation period is carried out.

It should be noted that a public servant who has been tested to verify his or her suitability for the position may be transferred to another equivalent or inferior position if the professional competence of such person meets the requirements of the candidate for the position. In case of transfer, a civil servant is no longer considered to have taken up the position of civil service for the first time, and therefore the probation period after transfer to another position of public service is not mandatory.

Today, our legislation provides that the appointment of a civil servant is carried out indefinitely, but there are other cases, also defined at the level of the law. A fixed-term employment contract may be concluded only in cases where the employment relationship cannot be established for an indefinite period. Article 34 of the Law of Ukraine “On civil service” determines that the fixed-term appointment is carried out in the case of [1]:

- appointments to the public service of category “A” — for five years, unless otherwise provided by law, with the right to re-appointment for another term or the next transfer to an equivalent or lower position to another public authority;
- replacement of the position of public service for the period of absence of the public servant behind who according to the legislation saves the position of public service.

If the employment contract in the cases provided by the Law of Ukraine “On public service” is concluded for a certain period, to define the last day of the period one should be guided by article 2411 of the Labor Code[7]. According to it, the term calculated in years expires in the corresponding month and the date of the last year of the term; the term calculated in months, expires in the corresponding date of the last month of the term. If the end of the period falls on such a month without a corresponding date, the period shall expire on the last day of that month; if it is calculated in weeks, it shall expire on the corresponding day of the week; the terms determined by days shall be calculated from the day following the day on which the term begins. If the last day of the term falls on a holiday, weekend or non-working day, the day of the end of the term is the next working day.

Admission of a person to the position of public service for a certain period is carried out on the general conditions of admission to the public service. Admission to the civil service is carried out by appointing a citizen of Ukraine to the position of public service according to the results of the competition. A person who takes office in the public service for the first time, acquires the status of a public servant from the date of public oath of public servant, and for a person appointed to the position of public service again – from the date of appointment. When appointing a person to the position of public service for the first time the establishment of the probation period is mandatory. It is not allowed to appoint to the position of public service a person who will be directly subordinated to a close person or

to whom close persons will be directly subordinated. In the document on appointment to the position of public service for a specified period, the period of appointment must be specified.

A civil servant is allowed to perform duties under a fixed-term employment contract, after the issuance of the administrative act of the employer on employment and notification of the territorial body of the state fiscal service in accordance with the resolution of the Cabinet of Ministers of Ukraine dated June 17, 2015 № 413[8].

Civil servants employed under a fixed-term employment contract are subject to the rights defined by the Law of Ukraine “On civil service” [1]:

1) the right to annual leave, as well as all other types of leave, including annual additional, all types of social leave, additional leave in connection with training, leave without pay, etc., provided by the Law of Ukraine “On holidays” [9];

2) transfer, change of essential working conditions, application of incentives and disciplinary sanctions;

3) the right to temporary disability benefit.

Civil servants accepted to a position of public service for a certain term have labor books the records in which are kept. In this case, the record of employment should not contain instructions on the term of the employment contract. The dismissal of a civil servant is formalized by an administrative act of the employer and does not require an application of the employee. On the day of dismissal, the employee is issued a completed work book, as well as a copy of the administrative act on dismissal upon his request.

If necessary, a civil servant employed under a fixed-term employment contract may be transferred to another position or job. But it should be noted that the employment contract with a civil servant remains fixed-term, if the position or work to which he/she is transferred, also provides for the conclusion of a fixed-term employment contract. Otherwise, the employment contract will be indefinite.

Summary. This scientific article considers all possible legal grounds for the transfer of civil servants and provides examples of such transfers. The attention is focused on the transfer to the local authorities, during the transfer or delegation of powers and functions from the state body to the local government, carried out without mandatory competition. Also, the scientific article clearly highlighted the possibility of transfers of civil servants, who were provided a probation period for admission to the civil service. The conclusion was made that it is not allowed to establish any restrictions on the rights and deterioration of the position of the civil servant in comparison with other employees of this body or institution. In turn, civil servants must comply with the internal regulations and other legislative acts governing the employment, passage of public service and dismissal from it.

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