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Refusal to grant a vote of confidence to the municipal executive body – a procedural aspect

Odmowa udzielenia wotum zaufania miejskiemu organowi wykonawczemu – aspekt proceduralny

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Abstract: The subject of the publication is the resolution-making activity of executive bodies. In 2018, a new procedure was introduced into the legal system, regarding resolutions of constitutive bodies of local government units, i.e. the emergence of resolutions by operation of law as a legal fiction and a consequence of a different action. Both the new mode of drawing up resolutions and the legal form of failure to grant a vote of confidence to the executive body of the commune are important. The legal form of expressing the will to refuse to grant a vote of confidence by a decision-making body is a resolution. This resolution is adopted in a special mode – without voting – and has a special character, for its validity it is necessary to justify constituting a formal part of the resolution. Therefore, the legal views presented by the supervisory authorities over the local government, shaping the administrative practice of self-government bodies, do not find a legal justification either in the act on commune self-government or in the jurisprudence practice.

Keywords: resolution, vote of confidence, commune administrator, commune self-government, commune, commune council

Streszczenie: Przedmiotem publikacji jest działalność uchwałodawcza organów wykonawczych. Od 2018 r. wprowadzono do systemu prawnego nową procedurę dotyczącą uchwał organów stanowiących jednostek samorządu terytorialnego, tj. pojawienie się uchwał

z mocy prawa jako fikcja prawna i konsekwencja innego działania. Istotny jest zarówno nowy tryb powstania uchwał, jak i forma prawna nieudzielenia wotum zaufania organowi wykonawczemu gminy. Formą prawną wyrażenia woli odmowy udzielenia wotum zaufania przez organ stanowiący jest uchwała. Uchwała ta jest podejmowana w trybie szczególnym – bez głosowania – i ma szczególny charakter, dla jej ważności niezbędne jest uzasadnienie stanowiące część formalną uchwały. Dlatego też poglądy prawne prezentowane przez organy nadzorcze nad samorządem, kształtujące praktykę administracyjną organów samorządu, nie znajdują uzasadnienia prawnego zarówno w ustawie o samorządzie gminnym, jak i w praktyce orzeczniczej.

Słowa kluczowe: uchwała, wotum zaufania, wójt, samorząd gminny, gmina, rada gminy

1. Introduction

The legislative activity of bodies comprising local government units is one of the issues frequently raised and widely discussed both in the source subject literature of administration law and jurisprudence. This activity is understood quite uniformly as a form of establishing local law in a specific area. It is characterized by independence, which is limited only by the generally applicable provisions of law. In the literature on administrative law, the view persists that the law established by a local government can be divided into at least three categories. The first one includes local law acts, which are issued in the law-making process, corresponding to all the features required by the Constitution for sources of law. The second one consists of legal acts that are not acts of the local law – they are not endowed with the attribute of universal application; they are of an internal nature instead. The third category is represented by legal acts, most often called order regulations (Szewc and Szewc, 1999: 42-43; Szewc, 1999; Dolnicki 2004: 6).

The first two categories of this activity include both creating rules and principles addressed to residents, issuing opinions, and creating evaluations of the activity conducted by executive bodies. This activity is subject to judicial control and supervision of the province governor and regional accounting chambers in terms of finances. Law-making by municipalities is both their privilege and obligation. Legislative activity is the basic activity of decision-making bodies. Considering the legal status in force, it can be stated that it does not change and is relatively stable. Nevertheless, it can be noticed that one of the activities, namely the evaluation of the activities of executive bodies, has recently evolved. This assessment is related to the widely understood condition of the commune, presented in a separate document submitted for analysis to the councillors. Granting a vote of confidence to the executive body of a local government unit

is a new concept, existing only since 2018, but quite controversial in use. In this study, the issues related to this institution in relation to procedural problems will be presented. As the jurisprudence practice shows (II SA/Ol 785/19, III SA/Wr 302/19), in situations where the decision-making body did not want to give a vote of confidence to the commune administrator, a procedural problem occurred, the content of which focused on two aspects. The first one concerned the procedure of creating a legal act and its naming when the resolution on the vote of confidence was not passed. The second one – selected from the background of the first one – refers to a wider issue, namely the question whether a resolution of a collective body may have a different procedure than through voting.

The target of this study will be to answer the questions asked. They constitute a key concept of a procedural nature that has recently emerged as a contentious issue considered as a result of disagreements by administrative courts. The position of the bodies granting or not granting the vote of confidence in this respect differed significantly from the position of the supervisory authorities over local government units. Hence, the subject is worth scrutinizing, considering that in 2021 probably similar situations will take place, and the poor reference literature and jurisprudence on this subject do not yet constitute a sufficient source of knowledge.

2. Resolution as a legal form of the municipality's executive body activity evaluation

When starting the considerations, it should be remembered that the institution of granting a vote of confidence was introduced to the act on municipal self-government (The Act of 8 March 1990 on the municipal government, *Journal of Laws* of 2021, item 1372, hereinafter referred to as LGL) on 31 January 2018 (The vote of confidence was introduced with the Act of 11 January 2018, amending certain acts in order to increase the participation of citizens in the process of selecting, functioning and controlling certain public bodies, which was introduced into local government system acts). It was closely related to the report on the state of the commune, which is required to be prepared by the commune administrator under Article 28aa of the Local Government Law. It is drawn up annually and presented to the municipal council by 31 May of each year at the latest. It includes “a summary of the commune administrator’s activity from the previous year, in particular the implementation of policies, programs and strategies, resolutions of the commune council and the civic budget” (Article 28aa sec. 2 LGL). Granting a vote of confidence is an institution that assesses the activity of the commune head on the basis of the

presented report. This assessment takes the form of a resolution on granting or not granting a vote of acceptance, the issue appearing to be quite obvious, although there arose a problem with it whether the failure to give discharge also takes the form of a resolution. And, consequently, is it possible that the resolution is drafted in a manner other than voting?

The resolution, as a legal form, has no statutory definition. However, in the doctrine of administrative law, there is a view according to which “the adopted expression of the position of the collective body” (Właźlak, 2013: 14). On the other hand, the administrative judiciary, in a broad sense, presents the thesis that the resolution is simply a typical form of expressing the will or presenting a substantive position by a collective public administration body – and such a body is undoubtedly the commune council – in matters reserved by statute to its jurisdiction. In the form of a resolution, the municipal council may therefore establish both local law provisions and issue individual administrative acts (decisions or provisions), if specific provisions give it such competence, it may decide to accede, for example, to an agreement or a municipal association, and may finally enact other acts or documents of a non-normative nature assigned to its tasks – such as the resolution on the adoption of the Strategy for Integration and Solving Social Problems (II GSK 39/06). Thus, the resolution is the basic legal tool which enables expressing the will of the decision-making body. It also constitutes a legal form of evaluation of the executive body’s activity. This happens when the commune head is discharged and a vote of confidence is granted.

3. The legal form and procedure for not granting a vote of confidence

Two opposing positions can be distinguished with reference to the discussed subject matter. Pursuant to the first one, failure to grant a vote of confidence does not have the form of a resolution, and a possible resolution not to grant a vote of confidence is illegal, because failure to adopt a resolution to grant a vote of confidence does not result in a substantive creation of a resolution not to grant a vote of confidence as a separate act. Failure to pass a resolution on granting a vote of confidence is not passing a resolution on not granting the president a vote of confidence – it is only ‘tantamount’ to passing such a resolution. Which means that this act is not a resolution. This act does not have the characteristics of a resolution, because it was not adopted by a decision-making body and was not a declaration of the will of this body.

The second position assumed that it should be considered that failure to grant a vote of confidence also takes the form of a resolution. The resolution

is a manifestation of the will of the decision-making body, and also that the manifestation of this will should not always be voted on. In the light of the provisions of Article 28aa sec. 9 of the LGL, we are dealing with a new, different method of creating a resolution – in this case, the resolution is created by operation of law. The legislator established a legal fiction consisting in the assumption that failure to pass a resolution on granting a vote of confidence is tantamount to adopting a resolution not to grant a vote of confidence. The act created on the basis of a legal fiction in accordance with the content of the norm of Article 28aa sec. 9 of the LGL is of a declaratory nature; it confirms a certain state of affairs, as well as the factual and legal situation resulting from the failure to adopt a resolution on granting a vote of confidence. It is not undertaken in the regular mode. It should be emphasized that the case law of 2008 and 2012 is not fully up-to-date because the provision of Article 29aa of the LGL is relatively new and took effect in 2018. Only since then have we been dealing with an additional procedure for drawing up a resolution. The case law of 2008 and 2012 cannot raise arguments assessing the legal status that we have had as of 2018. Therefore, it is not authoritative in this case. It cannot be considered that with the norm of Article 28aa sec. 9 of the LGL with the wording “Failure to pass a resolution on granting a vote of confidence to a commune administrator is tantamount to adopting a resolution not to grant a vote of confidence to a commune administrator,” there is no obligation to prepare the material form of a legal fiction. This, in turn, means that all follow-up activities, after the resolution is adopted, should be performed as if it were being processed. Thus, adopting the thesis that such an act would not be a resolution to be true would, in consequence, lead to enormous factual complications, because, for instance, in the register of resolutions from the session during which the vote of confidence was passed, there would be no material trace of the procedure, i.e. inaction on the actions that should be taken after the session would occur.

It should be emphasized that the first of the presented standpoints is internally contradictory, because if the assumption of the supervisory authority was true, i.e. if the sent act was not a resolution, the supervisory authority does not have the power to control this act, as pursuant to Article 91 of the Act, only resolutions and orders are subject to control. Consequently, this would mean that no proceedings could be initiated to declare the resolution invalid. And, therefore, further control proceedings over this type of act would be unfounded.

It is also worth noting that in a similar legal situation, when proceeding with the discharge, the legislator did not establish the fiction of the adoption of a resolution in the event that discharge was not granted. Accordingly, it cannot

be assumed that in similar legal states, despite different regulations regarding the failure to adopt a resolution on granting a vote of acceptance or a vote of confidence, the consequences are to be identical, i.e. – there is no resolution. The legislator clearly regulated these consequences differently.

It should also be emphasized that in the supervisory decisions published so far, which examine and question the act taken by the relevant decision-making bodies, no entity that violated the law was indicated. Pursuant to Article 91 of the LGL “A resolution or order of a commune body that is inconsistent with the law is invalid. The invalidity of a resolution or order, in its whole or in part, is ruled by the supervisory authority within no more than 30 days from the date of submission of the resolution or order, in accordance with the procedure set out in Article 90.” Thus, the supervisory procedure regulated in this provision is reserved for resolutions and orders of commune authorities. Against the background of the above, assuming the first position as appropriate, another additional problem emerges. The resolution on not granting the vote of confidence is proceeded by the commune council, therefore a violation of the law cannot be attributed to this body. On the other hand, the chairman of the council, who signed the resolution as a material substrate for the failure to adopt the resolution on the vote of confidence – does not have the status of a body. Effective termination of supervisory proceedings requires – in addition to indicating the violation of law – the authority that committed the violation. It is impossible to indicate such an authority in the analysed case, which also proves that this resolution was drafted in a different mode than other ones. It was established by law.

It is worth accentuating that adopting one of the two positions proposed at the beginning as appropriate also differs in the sphere of legal effects. The first submission, stating that the act resulting from the failure to grant the vote of confidence is not a resolution, leads to the conclusion that it cannot constitute the source of the legal relationship between the authority supervising local government units and the decision-making body of these units with regard to the control of resolutions pursuant to Article 90 of the LGL. Moreover, in the doctrine of administrative law, a new category of the so-called other acts created by decision-making bodies of local government units would occur. Until now, resolutions have always been the basic legal form of activities of the authority such as the commune council (Article 14 of the LGL):

Following the assumption that the position presented as the second one is appropriate, according to which the act resulting from the failure to adopt a resolution on the vote of confidence by the commune council has the character of a resolution, the effects are slightly different. First of all, a normative act is created in legal transactions, which is subject to the province governor’s

as well as administrative and judicial control. This means that it is formalized, actionable and open. It is in line with the normative order concerning the legal forms of operation of organs constituting local government units and has the same normative value as the resolution on granting a vote of confidence. It is worth indicating that the jurisprudence of administrative courts on the assessment of the legality of failure to grant a vote of confidence is that this act takes the form of a resolution. In one of its rulings, the Provincial Administrative Court, stated that “in accordance with Article 18 sec. 2 point 4a of the Act, both the resolution on granting the vote of confidence and the resolution on not granting the vote of confidence must be adopted as a result of considering the report. Naturally, the lack of a resolution in a ‘paper’ version does not mean that it has not been adopted, at the most there is insufficient knowledge of the desired procedure of local government units; nevertheless, in order to be able to verify this requirement, the resolution must contain a justification” (II SA/Sz 669/20). The content of the ruling shows not only that the failure to grant a vote of confidence should take the form of a resolution, but also that the resolution has a special form, as it must contain a justification. The so-called ‘ordinary’ resolutions do not entail such a requirement. The obligation to state reasons applies only to draft resolutions, not the resolutions themselves. Certainly, the unanimous view presented in jurisprudence that it is a resolution with the necessity of justification, is even more convincing that in the dispute over the name and form of the act on not giving the vote of confidence, the approach that prevails is that in this case we are dealing with a resolution.

4. Conclusions

Two conclusions can be drawn in the light of the above considerations – one of a general nature, and one that is more specific. The general one refers to the legal order and the procedure for drafting normative acts. In 2018, a new procedure was introduced into the legal system over the resolutions of the constitutive bodies of local government units, i.e. the emergence of resolutions by virtue of law as a legal fiction and a consequence of a different action. However, a more detailed conclusion is the response to the question posed at the beginning about the legal form assigned to the failure to grant a vote of confidence to the executive body of the commune. Such a conclusion is unequivocal – the legal form of expressing the will to refuse to grant a vote of confidence by a decision-making body is a resolution. This resolution is adopted in a special procedure – without voting – and has a special character, as for its validity, a justification constituting a formal part of the resolution is indispensable. Therefore, the legal views presented by the supervisory authorities over the

self-government, shaping the administrative practice of self-government bodies, do not find legal grounds either in the act on the municipal self-government or in the jurisprudence practice.

References

Legal act

The Act of March 8, 1990 on the municipal government. Dz. U. of 2020, item 713, hereinafter referred to as LGL.

Case law

Judgement of the Supreme Administrative Court of 25 February 2021, II SA/Sz 669/20, LEX nr 3158539,

Judgement of the Supreme Administrative Court of 25 May 2006, II GSK 39/06, LEX No. 236397,

Judgment of the Provincial Administrative Court in Olsztyn of November 14, 2019, file ref. No: II SA/Ol785/19, LEX No. 2741804,

Judgement of the Provincial Administrative Court in Wrocław of October 10, 2019, file ref. No. III SA/Wr 302/19, LEX No. 3014158.

Secondary sources

Dolnicki, Bogdan. 2004. Akty prawa miejscowego samorządu terytorialnego (Acts of law of the local self-government). *Samorząd Terytorialny*, No. 5.

Szewc, Andrzej. Szewc, Tomasz. 1999. *Uchwałodawcza działalność organów samorządu terytorialnego* (Resolution procedure activities of local government bodies). Warszawa: Difin.

Stec, Mirosław. 2001. Kontrowersje i spory wokół pojęcia i regulacji normatywnej prawa miejscowego w Konstytucji i ustawach o ustroju samorządu terytorialnego i administracji publicznej – uwagi de lege ferenda (Controversies and disputes over the concept and normative regulation of local law in the Constitution and the acts on the system of local government and public administration – de lege ferenda comments). In: *Reforma administracji publicznej 1999 – dokonania i dylematy* (Public administration reform 1999 – achievements and dilemmas). Warszawa: Instytut Spraw Publicznych.

Właźlak, Katarzyna. 2013. In: *Ustawa o samorządzie gminnym. Komentarz* (Act on the municipal self-government. Comment), ed. Chmielnicki, Paweł. Warszawa: Lexis Nexis.