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EFFECTS OF INVOLVEMENT OF SELF-GOVERNMENT EMPLOYEES IN LOCAL ELECTION CAMPAIGNS

INTRODUCTION

The involvement of self-government employees in the local election campaign has recently become almost the norm. Unfortunately, such behavior stirs up more and more discontent among the local community. In their opinion these employees – due to the place of employment – have a greater chance of influencing the voter effectively, while at the same time lower (than other candidates) financial expenses incurred on their part. Therefore, in public perception they conduct an election campaign on privileged terms, which gives them a better chance of achieving electoral success.

The manner in which a self-government employee engages in a local election campaign depends on whether he or she is the candidate in the election himself/herself, and if so, also on whether he or she becomes an opponent for another employee, especially the currently acting head of the office. If however, the employee only engages in someone else's election campaign, then it is important for whom he or she does it. What matters is whether he or she supports the candidate head of the office or their opponent, and if so whether the opponent is an employee in another office or an outsider.

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In general, engaging self-government employees in an election campaign is not prohibited in itself. Therefore, as long as a given behavior cannot be classified as a violation of the statutory rules applicable during the election campaign, or various types of obligations incumbent on self-government employees or statutory prohibitions related to them, or even as petty offenses or offenses defined by criminal law, it will not cause legal consequences. However, by engaging in an election campaign, a self-government employee often acts on the edge of the law, which is not difficult to cross. Therefore, in this study after a short presentation of various issues related to the involvement of this professional group in the local election campaign and indication of the provisions which may be infringed (which is crucial)¹, I will analyze the effects of such violation. However, since many of these behaviors may be classified as an offense against the provisions of the Act on Self-Government Employees², the consequences of violating these provisions, in order to avoid repetition, will be discussed together at the end of the considerations.

THE INVOLVEMENT OF THE EMPLOYEES IN THE LOCAL ELECTION CAMPAIGN

RUNNING AN ELECTION CAMPAIGN PREMATURELY

The first issue that deals with the involvement of self-government employees in the election campaign is its premature running, even before it officially begins. According to Article 104 of the Election Code³, the campaign formally starts on the day the Prime Minister announces the ordinance on the ordering of elections and ends 24 hours before the election day with the so-called 'election silence'. However, there is no doubt that in practice many months earlier some aspects of the *de facto* self-government election campaign can be noticed. The commune heads, mayors and presidents of cities applying for another term often show suspicious hyperactivity. They organize different types of happenings, under the cover of other events, but at the same time they inform the residents about further (going beyond the election year) plans for the development of the municipality (city). By a strange coincidence, the investments are suddenly accelerating at an incredible rate, so that they are closed before the election. Although everyone is well aware of the meaning of such activities, they officially have nothing to do with the election campaign. The fact that in this way the campaign starts much

¹ Often engaging local government employees in a local election campaign means applying informal rules of competition for power. I have analyzed these rules in a paper *Informal rules of competition for power applied by self-government employees in local election*, prepared for the 6th Congress of the *Fontes* Association for Research on Sources and Functions of the Law which took place on 16-17.09.2017 in Kraków. This paper will be published in *Przegląd Prawa Publicznego* 2018, no. 7-8. In this study, however, in order to be able to analyze the effects of such involvement, it was necessary to present such activities once again.

² The Act of November 21, 2008 on self-government employees, Journal of Laws of 2016, item 902 as amended, hereinafter referred to as ASGE.

³ The Act of January 5, 2011, Election Code, Journal of Laws of 2017, item 15 as amended; hereinafter referred to as EC.

earlier and violates the principle of equal opportunities for all candidates (most of whom we do not know at the moment) is only one of the elements that give rise to negative opinions. However, it is virtually impossible to clearly show that these actions – taken in the election year – constitute an unofficial election campaign. Only a wise society can hold the current local authorities accountable, making a decision on who to vote for in the next elections.

RUNNING AN ELECTION CAMPAIGN IN THE OFFICE BUILDING

Definitely more issues are associated with the involvement of self-government employees in the local election campaign when the campaign will officially begin. Then, these employees often undertake certain activities for their own candidacy or for another person – especially the commune head – in the office building where they are employed. Considerations of this issue should be started with the realization that the ‘commune head’ as the executive body of the commune is something else than a personal substrate – the person holding the functions of the commune head (guardian of this organ). The Voivodship Administrative Court drew attention to this in its judgment of June 1, 2005⁴. The commune head as a commune body has specific tasks and competences to perform, he or she represents it, acts on its behalf. Whereas as the guardian of the organ, he or she is also a private individual and it is within this life he or she decides to re-run. Therefore, there are no contraindications to the fact that self-government employees, supporting the current commune head, satisfied with his or her government and cooperating with him or her will help in his or her efforts for another term. According to Article 106 § 1 EC every voter may conduct electoral campaign for candidates, including collecting signatures supporting candidates’ applications, after obtaining the written consent of an electoral representative. There are no restrictions in this respect. It is important, however, that these signatures be collected in place, time and in a way that excludes any pressure to obtain them. Therefore, the issue of the participation of the commune head, as well as every other official of the office, in the upcoming elections is his or her (as a private person) private matter, which he or she absolutely should not transfer to performing the professional duties. Therefore, regardless of whether the self-government employee himself or herself is running in the upcoming elections, or just agitating for other employees, all issues, actions, plans related to the election campaign should be taken outside the workplace and outside of working hours.

In practice, however, it looks different. Some do it in a veiled way; others do it without any constraint. Of course, this does not mean that we do not talk about the upcoming elections, which are a lively event in every office, but that we do not go into issues concerning the people who take part in them. And any kind of agitation in the office is even prohibited by law. It must be remembered that according to Article 108 § 1 point 1 EC it is forbidden to conduct electoral

⁴ Judgment of the Voivodship Administrative Court of 1 June 2005, II SA / Wa 211/2005, LexPolonica No. 1182589

campaigning in the territorial self-government administration offices. The legislator even provided for criminal sanctions in the form of a fine for breaking the above prohibition (Article 494 (1) (1) and Article 497 (1) and (3) of the Civil Code).

USING PUBLIC PROPERTY IN THE ELECTION CAMPAIGN

It happens that self-government employees, being public officials, paid by residents' taxes, engage in local public campaign using public services in the form of business computers, photocopiers, scanners, telephones, printers or paper (owned by a commune, poviát or voivodship).

Such activities should primarily be assessed through the prism of Article 24 (1) of Act on self-government employees, according to which the basic duties of a local government employee include care for public tasks and public funds, taking into account public interest and individual interests of citizens. As it is apparent from Article 2 of Act on self-government employees, self-government employees are all persons employed in the offices and units referred to in this provision, and therefore also in the commune office, district starost office and the marshal's office. These employees, pursuant to Article 4 (1) of Act on self-government employees are employed on the basis of a choice, appointment or contract in clerical positions, including managerial posts of clerks, advisers and assistants⁵ as well as auxiliary and servicing.

Because Article 24 (1) of Act on self-government employees refers in general to self-government employees, therefore each employee, regardless of the basis on which he or she is employed is obliged to care for public funds, taking into account the public interest and individual interests of citizens. Therefore, it is unacceptable to use printers, computers, fax machines, photocopiers owned by the commune, poviát or voivodship for the purposes of the election campaign (be it their own or anyone else's, even the current head of the commune seeking another term). In extreme cases, this problem could even be considered through the prism on suspicion of the crimes specified in Article 278 of the Penal Code⁶, and so as the committing of a crime of theft (when, for example, an employee printed the election leaflets on paper owned by the office worth 520 PLN and then distributed them to potential voters - that is, he or she appropriated the paper). At this point, it should be mentioned only that the crime of theft is so-called halved crime. Therefore, the seizure of other movable property up to PLN 500 is only a minor offense under Article 119 of the Misdemeanors Code⁷. Depending on the

⁵ On September 15, 2017, the Sejm adopted an amendment to Article 2 of the Act on local self-government employees eliminating the positions of advisers and assistants. The text of the bill was submitted to the Senate-see Ustawa o pracownikach samorządowych po nowelizacji: koniec doradców i asystentów w samorządach, http://www.samorzad.lex.pl/czytaj/-/artykul/ustawa-o-pracownikach-samorzadowych-po-nowelizacji-koniec-doradcow-i-asystentow-w-samorzadach?utm_source=SARE&utm_medium=email&utm_campaign=NS18092017; [access: 27.09.2017].

⁶ Act of 6 June 1997, Penal Code, Journal of Laws 2016, item 1137 as amended, hereinafter referred to as PC.

⁷ Act of 20 May 1971 Misdemeanors Code, Journal of Laws of 2015 item 1094 as amended, hereinafter referred to as MC.

value of the appropriated property, it can be either a crime or a minor offense.

CONDUCTING AN ELECTION CAMPAIGN DURING WORKING HOURS

Another effect of self-government employees' involvement in the local election campaign (be it their own or conducted for another person) is to carry out various activities related to the campaign during working hours (elaborating election programs during work, making entries on Facebook through which many times nowadays agitation is conducted, design of leaflets, tracking of various types of information and data published on websites, etc.). These behaviors may violate the obligation resulting from Article 24 (2) point 2 of Act on self-government employees, according to which a self-government employee is obliged to perform tasks conscientiously, efficiently and impartially. If the self-government employee took any activities at any time and place – e.g. making telephone calls, copying documents, preparing speeches, or accepting other people cooperating with him or her in this election campaign – then the employer could evaluate them in the light of the violation of this obligation (of course, if any of these activities were agitation, then the prohibition of the Article 108 (1) point 1 of the EC would also have been breached). So if an employee engages in other activities during working hours, he or she may (but does not have to) stop performing his or her duties conscientiously and efficiently. Everything depends on the circumstances of the case – how often such activities took place, how they affected the performance of his or her duties, etc. The very fact that one of the voters will get information that an employee during the working hours took any such action is not enough to talk about violation of Article 24 (2) point 2 of Act on self-government employees. It could have been a short conversation, conducted during a 15-minute break, which according to the provisions of the Labor Code⁸ is entitled to every employee. The employee could also have taken the leave on that day. All these circumstances must be taken into account.

The behavior described above may be assessed by the employer not only through the prism of violation of the obligation under Article 24 (2) point 2 of Act on self-government employees, but also from the point of view of Article 30 (1) of Act on self-government employees prohibiting employees of a clerical position including a senior position from performing activities contrary to the obligations under the Act. This time, however, as you can see, this provision applies only to employees on a clerical position including a senior post of clerks. Therefore, taking into account the regulation of Article 4 (2) of Act on self-government employees it does not cover the remaining positions, e.g. advisers, assistants and auxiliary staff. A list of positions with the identification of which of them are clerical positions, including senior positions are included in the Regulation of the Council of Ministers of March 18, 2009 on the remuneration of self-government

⁸ The Act of June 26, 1974. Labor Code, Journal Of Laws of 2016, item 1666, as amended, hereinafter referred to as LC.

employees⁹, and more specifically in the Annex to this Regulation. Unfortunately, the Annex does not directly indicate the qualification of the positions of the commune head, deputy commune head, mayor of the district of the Capital City of Warsaw, members of the poviats, voivodship and district of the Capital City of Warsaw management units, and the treasurer of a given self-government unit (i.e. posts filled by election and appointment contracts) to clerical positions, including senior positions.

In tables I-III referring to these positions (placed in Annex 3 to the above mentioned Regulation), no introduction was made (contrary to Table IV) to distinguish senior clerical positions, clerical positions, auxiliary and servicing. Only in Table IV, which includes posts filled by a contract of employment, individual groups of positions were distinguished. There is no doubt, however, that in the light of the provisions of Article 4 (1) point 1 and 2 the Annex to this Regulation the posts filled by election and appointment contracts were included in the clerical staff positions, so they must belong to one of the categories defined in Article 4 (2) of Act on self-government employees.

Therefore, it is a mistake (lack) of the Regulation that the qualifications of these positions were not included in one of the groups of positions defined in Article 4 (2) of Act on self-government employees, constituting a closed catalog of employee positions in self-government. However, taking into account the positions occupied by persons employed on the basis of election or appointment contracts, it is difficult to consider them as persons employed in the positions of assistants, advisers or auxiliary. In addition, it is difficult not to consider the position of a treasurer employed on the basis of appointment contract for a position of a senior clerical office, since his/her deputy (employed under a contract of employment and therefore already placed in Table IV) was included in this category of posts. In addition, the secretary, employed since 2009 on the basis of a contract of employment, was also included in this group. Earlier, like the treasurer, he/she was an appointed employee. His or her position in the office was and still is (which is not changed with different than in 2009 basis of employment) as high as the treasurer's position. So why is the secretary's position now a senior position and the treasurer should not be like that? It is impossible to find rational arguments for such an interpretation. What is more, the Council of Ministers' regulation, which determined the remuneration of self-government employees¹⁰ employed in municipality offices, district starost offices and marshal offices¹¹ under the previous Act on self-government employees, also contained a list of employee positions. However, it was prepared according to another key – the types of offices of individual units were considered rather than the basis for

⁹ Regulation of the Council of Ministers of March 18, 2009 on the remuneration of self-government employees, Journal of Laws of 2014 item 1786 as amended.

¹⁰ Act of 22 March 1990 on self-government employees, Journal of Laws of 2001, No. 142, item 1593 as amended.

¹¹ Regulation of the Council of Ministers of August 2, 2005 on the principles of remunerating local government employees employed in municipal offices, poviats starost offices and marshal offices of 2 August 2005. Journal of Laws No. 146, item 1223 as amended.

employment. Thus the deputy commune head, treasurer and secretary, despite the fact that at that time all three of these posts were filled by appointment, were classified as senior positions (Annex 3, Table 2). A separate table included only election contacts which as in the current legal situation, were also not classified in any kind of positions. Summarizing all the above arguments, it seems that currently despite the lack of classification of posts of election and appointment they should however, be classified as a group of senior clerical posts¹².

Returning to the substance of the case, it should be pointed out that undertaking any activity concerning an election campaign at the workplace and within working hours by a self-government employee hired in the clerical post, including the senior clerical post, can be assessed as an activity contrary to the employee's obligations under the Act. It is his duty to perform the assigned tasks, as has already been said before, efficiently and conscientiously. In its judgment of February 15, 2006¹³ the Supreme Court ruled that the violation of the prohibition to perform activities that are in contradiction with the duties of the self-government employee is the exercise of private business activities at his / her time of employment (different people kept coming to the employee in matters related to the private business run by him, interfering with his and other employees' work).

The court indicated that at the time and place of work every employee should perform work for and in the employer's interest (Article 22 § 1 and Article 100 of the Labor Code), therefore a self-government employee cannot run a private business at the time and place of work within the employment relationship for the self-government employer in the scope of tasks of this self-government entity. It is true that the Supreme Court in the presented judgment subjected the economic activity conducted by the self-government employee, however, as rightly emphasized by A. Rzetecka-Gil, 'the activities referred to in the commented provision are any additional activities, regardless of their legal basis (a contract of employment, a civil law contract, business activity), and even those that are not related to the existence of any legal relationship. From the point of view of the form of activity - it is indicated that this prohibition covers all types of professional, political or social activity other than the employment in self-government. (...) Such activities can be performed whether or not in return for payment'¹⁴. If, in the employer's opinion, activities related to an election campaign undertaken by a self-government employee employed in an clerical position, including senior clerical position not only do not allow him or her to perform the tasks efficiently

¹² See M. Terlikowska, *Czy wójt, zastępca wójta oraz skarbnik są urzędnikami*, http://kadry.infor.pl/kadry/indywidualne_prawo_pracy/odpowiedzialnosc_prawa_i_obowiazki/533116,Czy-wojt-zastepca-wojta-oraz-skarbnik-sa-urzednikami.html, [access: 26.09.17]. Unlike S. Płażek, *Komentarz do art. 30 ustawy o pracownikach samorządowych*, teza 2, [in:] *Prawo urzędnicze*, (ed.) K.W. Baran, LEX 2014, e-version, <https://sip.lex.pl/#/komentarz/587643790/441230/baran-krzysztof-w-red-komentarz-do-ustawy-o-pracownikach-samorzadowych-w-prawo-urzednicze-komentarz?cm=URELATIONS>, [access: 26.09.17].

¹³ Judgment of the Supreme Court of 15 February 2006, II PK 134/05, LexPolonica No. 1087850, OSNP 2007, No. 1-2, item 6.

¹⁴ A. Rzetecka-Gil, *Komentarz do art. 30 ustawy o pracownikach samorządowych*, [in:] *Ustawa o pracownikach samorządowych. Komentarz*, A. Rzetecka-Gil, LexisNexis 2009.

and conscientiously but also additionally constitute activities contrary to the obligations arising from the Act, the employer may recognize that the employee also violated the prohibition laid down in Article 30 (1) of Act on self-government employees.

RUNNING A CAMPAIGN WITH VIOLATION OF THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY

Another issue that needs to be considered is the involvement of self-government employees in the local election campaign with violation of the principle of respect for dignity, especially counter-candidates. If such activities are performed by a self-government employee (regardless of the basis of employment and the position held) they may also violate Article 24 (2) point 6 of Act on self-government employees, according to which a self-government employee's duties include in particular behavior with dignity in workplace and outside the workplace. Assuming that the self-government employee in the workplace should be cut off from the ongoing election campaign, even referring only generally to the elections themselves should be done with dignity. However, going beyond the workplace and most importantly also outside of working hours, when engaging in an election campaign, especially candidates, which is already a normal thing, they should also behave in a dignified manner. Therefore, participation in electoral rallies, meetings or any other type of events must be done with dignity. The term 'dignity', however, is extremely imprecise and evaluative. One has to be very careful when assessing behavior, because what is 'dignified' for some for others may not. Everything depends on the adopted system of values. Generally, however, the doctrine assumes that 'Undignified behavior of a self-government employee referred to in Article 24 (2) point 6 of the Act is a behavior that offends one's feelings, attitudes, violates generally accepted social norms, violates good customs, diminishes the seriousness of the office, etc.'¹⁵. It can be, for example, tearing off, destroying, and painting over the opponent's election posters. Such an act is in addition a minor offense with an applicable sentence of custodial arrest, restriction of freedom or a fine (Article 67 and Article 124 of the Misdemeanors Code). However, the legal classification of the minor offense may be changed into a crime specified in Article 288 of the Criminal Code (similar to the theft), when the value of the destroyed election material exceeds the amount of Ł of the minimum wage, i.e. currently PLN 500.

ISSUING OF 'OFFICIAL ORDERS' REGARDING THE CONDUCT OF AN ELECTION CAMPAIGN

Another aspect related to the involvement of self-government employees in the local election campaign concerns 'forcing' other self-government employees to perform certain activities for their own campaign as part of performing

¹⁵ A. Rycak, *Komentarz do art. 24 ustawy o pracownikach samorządowych, teza 68*, [in:] *Ustawa o pracownikach samorządowych. Komentarz*, Wydanie II, A. Rycak, M. Rycak, J. Stelina, J. Stępień, Warsaw 2016, e-version, <https://sip.lex.pl/#/komentarz/587356315/503970/rycak-artur-i-in-ustawa-o-pracownikach-samorzadowych-komentarz-wyd-ii?cm=URELATIONS> [access: 23.09.2017].

‘official orders’. Of course, this concerns behaviors of superiors in relation to subordinate employees. Such actions can be assessed as ‘undignified behavior of the superior’ referred to above, but also as a violation of employee rights, who is obliged to perform official orders regarding obligations under the employment contract (or appointment). Sometimes it would even be possible to qualify them (depending on the entirety of circumstances) as mobbing, which the superior applies (Article 94³ of the Labor Code). For many intimidated workers, fearing losing their job, justified by statements (or other manifestations of behavior) of superiors directed to them, perform these ‘official orders’ against their will and conviction. Often the employee is obliged to perform these activities outside of the place and time of work. Then they do not look like official orders at all. But how qualify such ‘requests’ which are impossible to refuse?

It is true that according to Article 25 of Act on self-government employees, a self-government employee should conscientiously perform the superior’s official orders. However, if a self-government employee is convinced that the order is unlawful or contains a mistake, he or she is obliged to inform his or her immediate superior in writing. In the case of a written confirmation of the order, the employee is obliged to perform it, at the same time notifying the head of the unit in which he or she is employed. However, if a self-government employee is convinced that this would lead to committing a crime, offenses or threaten with irreparable losses, he or she will not execute the order, about which he or she will immediately inform the head of the unit in which he or she is employed.

However, this does not mean that if the suspicions described above do not appear, the self-government employee is obliged to follow all instructions of the superior. The provision of Article 25 of Act on self-government employees is *lex specialis* in relation to the provisions of the Labor Code. Therefore, it applies to this employee group. But one cannot forget that in accordance with Article 43 of Act on self-government employees, in the remaining scope (in matters not regulated), the Act applies general provisions resulting from the Labor Code. Therefore, statutory solutions regarding the obligation of self-government employees to perform their supervisors’ orders should be considered in the context of labor law, especially Article 100 § 1 the Labor Code, which stipulates that the employee is obliged to follow the orders of his/ her supervisors, which concern work, if they are not contrary to the provisions of law or the contract of employment. Therefore, it is not the exercise of all orders, but only those that concern work. Because Article 25 of Act on self-government employees does not refer to how the employee should (can) act if the order is contrary to the employment contract, it should be assumed that in this respect the Article 100 § 1 of the Labor Code could be applied according to which ‘an employee may also waive the execution of the supervisor’s order if it is incompatible with the employment contract’¹⁶.

¹⁶ P. Zuzankiewicz, *Komentarz do art. 25 ustawy o pracownikach samorządowych, teza 3*, [in:] *Ustawa o pracownikach samorządowych. Komentarz*, W. Drobny, M. Mazuryk, P. Zuzankiewicz, Warszawa 2010, e-version, <https://sip.lex.pl/#/komentarz/587285902/83342/drobny-wojciech-mazuryk-marcin-zuzankiewicz-piotr-ustawa-o-pracownikach-samorzadowych-komentarz?cm=URELATIONS>, [access: 27.09.2017].

FINANCING THE ELECTION CAMPAIGN WITH PUBLIC FUNDS

The last issue that concerns the involvement of self-government employees in the local election campaign are the activities that can be defined as illegal financing of the election campaign. For obvious reasons, such allegations can be raised to a small group of self-government employees, rather to those who in principle implement the budget of a given unit. Unfortunately, it happens very often in practice that under the guise of all kinds of promotional activities of the municipality (such as ‘our municipality has changed in recent years’) or integration events, the authorities in charge of the commune’s money run a hidden campaign. It violates the principle of equality in force during elections. The other candidates are already in a losing position at the start in the face of such activities of the commune authorities seeking the next term of office.

But it is not only about equality, it’s about and above all about financing these ventures with public money. In this case, depending on the circumstances, we may also deal with an act determined as a violation of public finance discipline, if it is performed by a self-government employee, under the subjective scope of the Act on liability for violation of public finance discipline¹⁷. It may turn out that, for example, the financing of the event ‘integrating the local community’ (which in reality was a hidden campaign) took place from public funds not in accordance with the budget act, budgetary resolution or financial plan or exceeding the scope of these acts or in violation of the provisions regarding the individual types of expenses. In this case – in accordance with Article 31 (1) of the Act – penalties for violating the discipline are: 1) warning; 2) reprimand; 3) financial penalty; 4) a ban on performing functions related to the disposal of public funds. The same behavior can also be considered a crime of exceeding the powers under Article 231 the Criminal Code if it is performed by a public official who exceeds his or her rights or fails to fulfill his / her duties, thereby acts to the detriment of the public interest. In extreme cases, this deed can be classified as a crime of abuse of trust under Article 296 of the Criminal Code, if the employee being obliged under the provisions of the Act, the decision of the competent authority or contract to deal with property or business activities of a natural or legal person or an organizational unit without legal personality, by abusing his/ her powers or failing to fulfill his/ her duty causes its significant material loss¹⁸. The punishment provided by the legislator for committing these acts is a penalty of imprisonment up to 10 years. The assessment of whether the conditions of Article 231 or Article 296 of the Criminal Code belongs to law enforcement agencies. The role of residents suspecting committing the above-described crimes is to submit an appropriate notification. It is obvious that the

¹⁷ Act of December 17, 2004 on liability for violation of public finance discipline, Journal of Laws of 2017 item 1311.

¹⁸ For further details see S. Huczek, *Odpowiedzialność karna a działalność jednostek samorządu terytorialnego – wybrane zagadnienia*, Biuletyn Informacyjny No. 1 (47) 2005 Regionalnej Izby Obrachunkowej w Bydgoszczy, http://www.bip.bydgoszcz.rio.gov.pl/?p=document&action=show&id=382&bar_id=549, [access: 24.09.2017].

end of the current term of office the proceedings will certainly not be concluded in this case, and therefore the incumbent head of commune will not lose his/ her seat anyway. However, if in the upcoming elections he/ she managed to take office again and during this new term of office he/ she would be convicted of acts committed during the election campaign, his/ her current mandate would expire due to the loss of passive electoral law as a result of the release a valid criminal conviction for imprisonment for an intentional crime prosecuted by public prosecution or intentional fiscal offense (Article 492 (1) (4) in conjunction with Article 11 (2) (1) (b)). Thus, in the next term of office he/ she may be painfully affected by the effects of illegal activity in the elapsed election campaign.

However, proving the fulfillment of the features defining these kinds of crimes is in practice extremely difficult, and often despite the fact that everyone knows what the truth was all about, the person committing this type of behavior will not be responsible. It is necessary to express a clear and unambiguous demonstration of his/ her real intentions to hold them accountable.

EFFECTS OF VIOLATION OF THE PROVISIONS OF THE ACT ON SELF-GOVERNMENT EMPLOYEES BY EMPLOYEES INVOLVING IN LOCAL ELECTION CAMPAIGN

As mentioned in the introduction, many of the behaviors described above may often violate the same provisions of the Act on self-government employees. Therefore, in the text discussing particular issues related to the involvement of self-government employees in the local election campaign, only the indication of violation of some provisions of professional pragmatics was shown in this case. However, due to the fact that it sometimes happens that the same deed can simultaneously qualify as a violation of a completely different legal act, discussing the given issue the author immediately analyzed the effects of such an infringement. At this point, however, one should finally look at what results from the various forms of self-government involvement in the local election campaign from the perspective of the Act on self-government employees (ASGE). However, due to differences between employees employed under a contract of employment and appointment and employees hired on the basis of an election, this should be done separately in relation to these two groups of employees.

EMPLOYEES EMPLOYED UNDER A CONTRACT OF EMPLOYMENT AND APPOINTMENT

Starting from the first group, it should be pointed out that the breach of duties set out in Article 24 (1) and Article 24 (2) points 2 and 6 of the ASGE constitutes a justified reason for terminating the employment contract (an appeal following such termination, in accordance with Article 70 § 2 of the Labor Code). However, whether the employer, or more strictly – in accordance with Article 7

of the ASGE who acts on their behalf in the field of labor law – the head of the commune, district governor or marshal, decides to terminate the employment relationship with the employee because of this, depends on his/ her recognition. The very determination of whether any of these obligations has been breached at all is extremely questionable. The use of such phrases as ‘conscientiously’, ‘carefully’ or ‘dignity’ always leaves a huge margin of freedom. In principle, in each case one would be able to defend both the claim that the given behavior violated the obligations under Article 24 of the ASGE or not violated them. Thus, at the outset much depends on the attitude of the office manager representing the employer. Certainly in a situation where the activities of a self-government employee are related to the election campaign of that manager, or even his/ her own, but in circumstances favorable to this manager (when e. g. a commune head does not want to try once again for governance, or sees in the employee his or her successor, or if an employee from the same electoral committee is running for a councilor) acting on behalf of the employer will not take advantage of this option. If, however, this employee was the candidate of the head of the commune, district governor or the marshal or even just agitated for him/ her, you can expect with a much higher probability the employer’s termination of the employee’s contract (dismissal).

However, the situation is slightly different when the employee breaches the established Article 30 of the ASGE. According to Article 30 (2) of the ASGE in the event of a breach of such a prohibition by a self-government employee, it is obligatory to immediately terminate the employment agreement with him/ her, without notice in accordance with Article 52 § 2 and 3 of the Labor Code or dismiss him/ her from office. And that means that the content of this provision (more precisely the phrase ‘or dismiss from office’) reinforces the assumption adopted earlier in this study, that this prohibition relating to employees employed in an clerical position, including a senior post, includes not only those employees employed under a contract of employment, who occupy positions specified in the ordinance as clerical, including senior clerks, but also the employees employed on the basis of appointment (deputy head of the commune and treasurers of all self-government units)¹⁹, despite the fact that they were not classified as such positions in the regulation²⁰. Otherwise, an order to dismiss an employee from a position that only refers to appointed employees would be unnecessary²¹ (Article 30 (2) of the ASGE). For employees hired on the basis of an employment contract, an obligation to terminate the employment agreement without notice would suffice.

¹⁹ And since posts filled by appointment are classified as clerical or senior clerical positions, in the same way we can include the posts filled by election, , however, the order to dismiss the employee referred to in Article 30 (2) ASGE does not apply to employees by election, which I will come back to later.

²⁰ A different position in this matter is taken by S. Płażek - see S. Płażek, Commentary to Article 30 ASGE, thesis 2 and 9 ...

²¹ It is true that one can also dismiss an employee employed on election only through the entity that previously elected that employee. Moreover, the order to dismiss the employee referred to in Article 30 (2) ASGE is directed to the employer. I will return to this issue later in the study.

Returning however to the very breach of the prohibition referred to in Article 30 (1) of the ASGE it should be pointed out that the evaluation of this- as in relation to Article 24 of the ASGE- is done by the employer himself/ herself, which is not an easy task. The phrase ‘activities contrary to the obligations arising from the Act’ used in Article 30 (1) of the ASGE is very general and may be interpreted differently by different people. In the case of violation of obligations under Article 24 of the ASGE the legislator does not oblige the employer to terminate the employment agreement, and in the case of breaking the prohibition specified in Article 30 (1) of the ASGE the legislator does. In this case, the employee’s behavior should be evaluated with great precision. Therefore, it is necessary to take into account all circumstances, the duration of such activities, their frequency, but first of all to examine whether a given person has personally violated this prohibition. The information that e.g. a candidate employee put new entries on Facebook during the working hours is not sufficient. This kind of event does not mean that the entries were made by the employee himself/ herself. It could have been done by anyone else – e.g. spouse or other family member, electoral representative, or any other person dealing with agitation for his/ her benefit. This is an activity that can be done remotely and not necessarily in person. The employer, in order to apply Article 30 (2) of the ASGE legitimately and lawfully would have to determine exactly that the entries were actually made by the employee personally at the time he/ she was at work. It is also important to determine the frequency of such behaviors and their possible period of time. It should be remembered that each employee is entitled to an already mentioned break of 15 minutes, which he/ she can use in any way. Therefore, if it is a short entry, appearing extremely rarely during office hours, it will be difficult for employers to demonstrate that the employee thus detached himself/ herself from work, neglected his/ her duties as an employee, thereby violating the norm of Article 30 (1) of the ASGE. Obviously, if the head of the commune, district governor or marshal who represents the employer is the employee’s counter-candidate or the person’s for whom he/ she agitates, then the assessment made by him/ her will certainly be subjective. But in the event of an unlawful termination of employment, the employee has the right of defense. Then an objective assessment of these circumstances should be made by an independent court if the employee brings a relevant action.

On the other hand, the situation will be completely different when the employee ‘hangs’ on the Internet for many hours, conducts continuous telephone calls related to his/ her election campaign, receives visitors during working hours and at work, then there is no doubt that there are grounds for applying the consequences envisaged in Article 30 (2) of the ASGE. Obviously, if an employee undertakes all of these activities as part of the election campaign of the acting head of the commune, district governor or marshal, either voluntarily or within the of the ‘official orders’ described above, then he or she will certainly not be interested in terminating the employment relationship with such an employee,

despite his/ her obligation. In such cases, it will probably be explained by the fact that in his/ her opinion there was no violation of the prohibition specified in Article 30 (1) of the ASGE.

What then can the local community do indignant with the conduct of the employee, who in their opinion wastes the taxes they pay, because in working hours instead of performing the tasks and responsibilities entrusted to him, he/ she deals with something completely different? In principle, when it comes to the possibility of residents' influence on the continuation of employment of such an employee, the only way is to inform the head of the office about their observations. If the latter does not react, then the local community can hold such an employee accountable for the actions taken by him/ her only in the next election, without giving their voice to him/ her – if he/ she is a candidate at all. If however, his/ her actions were connected with someone else's campaign, then the residents will not vote in the election for the candidate for whom this employee was active (it will most likely be the office of the commune head, district governor or marshal who has not responded to the residents' signals). The situation is similar when the employee violates the obligations under Article 24 of the ASGE.

When it comes to issuing work orders not related to work by employees hired on the basis of appointment or employment contract such behavior can also be assessed as the reason for justifying termination of employment relationship with notice. But as in both cases described above, everything will depend on the role of the head of the commune, district governor or marshal acting on behalf of the employer. In addition, in special circumstances – as mentioned earlier – they can also be qualified as mobbing. Admittedly, regardless of the perpetrator, the responsibility for the occurrence of mobbing always rests on the employer, because it is his/her obligation to counter mobbing. The sanction for the supervisor who shows such behavior to the subordinate under the guise of a 'business order' will be the termination of the employment contract or the dismissal.

In conclusion, one more issue needs to be addressed. The employee's actions taken as part of his/ her election campaign or someone else's when the opposing candidate is the commune head, district governor or marshal, apart from the fact that they may violate the legislator's various obligations or prohibitions may also be assessed in terms of the loss of employer's trust, which in turn may be a legitimate reason for terminating the employment relationship. In particular, this applies to the closest associates of the commune head, district governor or marshal - for example, the secretary. As the Supreme Court rightly observed in the judgment of February 7, 2013²² the secretary is one of the highest positions in the organizational structure of the office. Therefore, referring to the earlier verdict of the Full Court of the Labor and Social Insurance Chamber of 27 June 1985 (thesis V)²³, the Supreme Court emphasized that it was justified to apply stricter assessment criteria to employees in senior and independent positions.

²² Judgment of the Supreme Court of February, 7 2013; III PK 25/2012, LexPolonica no. 5794633.

²³ Decision of Full Court of the Labor and Social Insurance Chamber of the Supreme Court of June, 27 1985;., III PZP 10/85, OSNCP 1985, no. 11, item 164.

The secretary is a direct subordinate of the commune head, to whom, pursuant to Article 33 (4) of the ASGE specific municipal matters may be entrusted. In addition, pursuant to Article 5 (4) of the Self-Government Law (SGL)²⁴ the commune head may authorize him/ her to carry out tasks on their behalf, in particular in the field of ensuring proper organization of the office work and pursuing the policy of human resources management. The possibility of commissioning these tasks is undoubtedly dependent on the supervisor's full confidence in their proper performance by the subordinate.

With regard to the secretary, one could also wonder whether he/ she also did not violate the prohibition of established Article (5) of the ASGE prohibiting this group of employees from forming political parties and belonging to them. From the literal wording of this provision, it is only forbidden to create and belong to such a party, and the action for the election campaign of a candidate, even a party member, is not. Meanwhile, the justification for the draft law on local self-government employees shows that the legislator establishing a prohibition referred to in Article 5 (5) of the ASGE wanted the persons occupying this position to be apolitical, and this is a much broader concept than the one apparent from the literal wording of this provision. Therefore, in practice, the general requirement of apolitical nature on the part of the secretary is loudly spoken. However, the Supreme Court, in its judgment of February 7, 2013 already held that even candidacy in the local party elections, but as an independent candidate, does not constitute a violation of Article 5 (5) of ASGE although there is no doubt that in this case we are not dealing with apolitical nature. Thus, it seems that, however, the judicature stands for the narrow (literal) interpretation of the prohibition of the established Article 5 (5) of ASGE. However, it is difficult not to recognize that engaging in politics, even local and participating in the election campaign for 'opponents' (including your own), the commune head may be assessed in terms of losing trust.

EMPLOYEES HIRED ON THE BASIS OF AN ELECTION

As for holding self-government employees hired on the basis of an election-accountable for various actions undertaken as part of the election campaign the matter is much more complicated. If the violation of any of the obligations specified in Article 24 or in Article 25 of ASGE justifies the termination of the employment contract by the employer (dismissal of the appointed employee) and violation of the prohibition of the established Article 30 of ASGE obliges the employer to an obligatory termination of the contract (dismissal of the appointed employee) without notice, these circumstances do not entitle the employer to apply any sanctions to employees hired on the basis of election. It is true that in Article 30 (2) ASGE there is even a reference to the need to dismiss an employee violating the prohibition laid down in Article 30 (1) ASGE. This dismissal is

²⁴ The Act of March, 8 1990 on Self-Government Law, Journal of Law of 2016, item 446 as amended; hereinafter referred to as: SGL.

referred to an employee hired on the basis of an election, only that the obligation contained in this provision is addressed to the employer. However, the employer is not entitled to dismiss the employee hired on the basis of an election. This can only be done only by the entity that previously elected him/her. The employment on the basis of an election is a consequence of a previously made act of election, if this election makes it compulsory to perform work as an employee (Article 73 (1) Labor Code). Therefore, the commune head chosen through direct election can only be dismissed by the local community through a referendum, not the employer. However, this dismissal although it would not have been effected by the employer, would lead to the dissolution of the employment relationship with the commune head, in accordance with Article 73 § 2 of Labor Code where it is resolved with the expiration of the mandate. However, in Article 492 § 1 of the Election Code the dismissal of the commune head in the referendum was included in the circumstances resulting in such expiration. But the dismissal is the result of a sovereign decision of the local community and no one can impose his/her unconditional obligation to do so. Of course, the reason for the referendum may be both the violation of any of the obligations specified in Article 24 or Article 25 of ASGE as well as the prohibition established in Article 30 (1) of ASGE but also any other manifestation of dissatisfaction with the work of the commune head. However, since the election campaign starts at the earliest 4 months before the election day, the dismissal of the commune head on the initiative of residents is out of the question at all, because according to Article 5 (2) of the Act on the local referendum²⁵, the residents' motion regarding a referendum concerning the dismissal of the commune head, may be submitted no later than eight months before the end of his/her term. Therefore, it will not be possible to make him/her accountable for actions taken during the election campaign. It would only be possible if these behaviors were committed much earlier before the date on which the Prime Minister issued a regulation regarding the date of elections.

In relation to management board members, the case is somewhat different. The members of the poviats or provinces management come from the elections made by the poviat council/ local parliament (sejmik). This is called indirect election therefore, no provision prescribes that the members of the management board at the time of their election acquire a mandate, which is a kind of power of attorney granted by the public during direct elections. In addition, the mere fact of electing them does not always mean that they will be hired on the basis of an employment relationship based on election. It depends on whether the poviat / voivodship statute provides such an effect (Article 4 (1) (1a) and (1b) of ASGE). If however, an elected member of the management board becomes a self-government employee hired on the basis of an election, it may raise doubts about the termination of employment relationship, since pursuant to Article 73 § 2 of the Labor Code the employment relationship based on an election is resolved with the expiration of the mandate, which board members do not acquire after all.

²⁵ Act of 15 September 2000 on local referendum, Journal of Laws of 2016, item 400.

It is true that the poviát council (sejmik) may pursuant to Article 31 (1) and (5) of the Poviát Self-Government Act²⁶ (Article 37 (1) and (5) of the Voivodship Self-Government Act (VSG)²⁷) dismiss a member of the board during the term of office for which he/she has been elected, although they may do so for any reason; however this dismissal was not (because it could not be) qualified as a condition of expiry of the mandate. The mere violation of Article 24, 25 or also 30 (1) of the ASGE however, is a sufficient reason to take an appropriate resolution. Therefore, although the dismissal of a member of the management board does not result in the expiration of the mandate, it should probably be assumed that, analogously to the dismissal of the commune head it entails the dissolution of the employment relationship on the basis of an election. However, the dismissal itself is a sovereign decision of the members of the poviát council (sejmik) taken in the form of a resolution, and no one can impose the obligation to adopt such a resolution. It should be remembered that only the district governor and the marshal are elected fully by the legislative body of the given unit. The other members are already elected at the request of the elected district governor or marshal. As a result, the dismissal of the district governor or marshal itself is tantamount to the dismissal of the entire board (Article 31 (4) of the PSG, Article 37 (4) of the VSG. Therefore, dismissal of the chairman of the board of directors for violation of Article 24, 25 and 30 (1) of the ASGE will result in the dismissal of the whole board. Therefore, those who have not acted against the law in force will also lose their jobs.

Additionally, in this case, as in the case of the referendum regarding the dismissal of the commune head, the legislator also introduced some time restrictions, but of a slightly different kind and only in relation to the dismissal of the district governor or marshal. According to Article 31 (3) of the PSG (Article 37 (3) of the VSG) vote on the district governor's dismissal (or marshal's) is conducted by the poviát council (sejmik) after hearing the opinion of the audit commission at the next session after the request for dismissal, but not earlier than after 1 month from the date of the submission of the motion. If the motion to dismiss the district governor (marshal) has not obtained the required majority of votes, a subsequent motion may be filed no earlier than after 6 months from the previous vote. As can be seen, it may happen that either the council (sejmik) before the expiration of its term cannot make a resolution (when only one month remains until the end of the term), or due to the recently filed ineffective motion to dismiss the district governor (marshal), this time they will have their hands tied due to too short passage of time (less than 6 months). In relation to other members of the management board, the legislator did not introduce any time limits as to the possibility of requesting their dismissal.

A resolution on this matter may be adopted by the council (sejmik) on the justified request of the district governor (marshal) by a simple majority of votes in the presence of at least half of the statutory composition of the council (sejmik), by secret ballot (Article 31 (5) of the PSG and article 37 (5) of the VSG).

²⁶ Act of 5 June 1998 on poviát self-government. Journal of Laws, of 2016, item 814 as amended, hereinafter referred to as PSG.

²⁷ Act of 5 June 1998 PSG, Journey of Laws of 2016, item 814 as amended, hereinafter called PSG.

However, in relation to employees hired under a contract of employment, the reason justifying the termination of a contract of employment or termination without notice must be real and specific, and will be subject to review by the court if the employee brings an action in this case the reason for initiating a referendum regarding the dismissal of the commune head, or the motion to adopt a resolution to dismiss the board or just a member of the management board does not have to meet these conditions. In this case, the reason for dismissal of the commune head or board member is subject only to the assessment made by the voting society or the poviat council adopting the resolution. The dismissed employee is not entitled to any protection – he/she cannot challenge the legitimacy of holding a referendum or adopting a resolution by the council (*sejmik*). Therefore, he/she cannot count on the court to make an objective assessment of his/her actions that have been the reason for the dismissal.

The reason for dismissal of a commune head, district governor or marshal may also be a failure to react to the actions of other employees who by their behavior during the election campaign violate the obligations arising from Article 24 and Article 30 (1) of ASGE, or they issue ‘official orders’ to their subordinates regarding activities carried out as part of their campaign or even mobbing. Of course, such behavior of the office manager is usually the result of the fact that these employees do it for his/her election campaign, or for another person whose candidacy he/she supports.

Concluding the deliberations on the effects of engaging self-government employees hired on the basis of an election in a local election campaign, one should also indicate the possibility of dismissing them under the regime of supervision. According to Article 96 (2) of the Act on community self-government if the commune head commits a repeated violation of the Constitution or statutes, the voivode calls him to cease the violations, and if the summons does not have effect, he applies to the Prime Minister to dismiss the head of the commune. In the case of the commune head’s dismissal, the Prime Minister, at the request of the minister competent for public administration, shall designate a person who until the new election for the commune head performs his/her function. Thus, if the commune head despite the statutory obligation to terminate the employment relationship with an employee who by his/her conduct violates the prohibition established by Article 30 (1) ASGE, does not do this, or violates this prohibition himself/herself or the obligations specified in Article 24 or in Article 25 of the ASGE or any other provisions including the Penal Code, the Prime Minister is entitled to dismiss him/her under supervision regime. The Voivode preliminarily assesses such actions of the commune head and later the Prime Minister himself/herself making the final decision on dismissal. However, due to the short period of the election campaign from 3 to a maximum of 4 months, there is a high probability that also in this case the procedure will not be carried out due to the passage of time. However, even if the current head of the commune was re-elected, it will no longer be possible to apply a supervisory measure to him/her in the next

term holding him/her accountable for the actions taken in the previous term. The supervision measure, in contrast to a valid criminal judgment is closely related to the period in which acting as a body it committed a repeated violation of the Constitution or statutes. A valid judgment, on the other hand, constitutes the premise of losing the passive electoral law and thus the expiration of the mandate which is exercised at the moment when the verdict became valid.

In relation to the poviát or voivodship management, the legislator provided the same means of supervision but the procedure for its application is slightly different. According to Article 83 (2) of the PSG and Article 84 of the VSG if a the poviát or province management commits a repeated violation of the Constitution, the voivode calls on the poviát council / sejmik to apply the necessary measures and if the call does not take effect- through the minister competent for public administration- requests the President of the Council of Ministers to dissolve the poviát / voivodeship management board. In the event of dissolution of the management board, until the election of a new board, the function of the board is performed by a person appointed by the Prime Minister. However, the application of this measure is only possible if the board (and therefore the entire collective body) commits a violation of the Constitution or statutes. Therefore, in the case of acting in violation of the law by one member of the board (especially the district governor or marshal acting on behalf of the employer) who engages in the election campaign, there are no grounds for using this measure.

CONCLUSION

Concluding the considerations, it should be stated that if self-government employees let various types of behavior related to the involvement in a local election campaign, the least exposed to any sanctions are employees hired on the basis of an election, in particular acting as the commune head. Therefore, in practice they most often commit violations mentioned above, practically without any liability. The reason for this is also the fact that they are more likely to be candidates in the upcoming elections than other self-government employees. Therefore, the only way to account for such activities is the conscious and prudent participation of the local community in the upcoming elections. If the residents did not like the self-government employees' previous behavior, they should consider this by casting their vote on the candidate of their choice. Likewise, they should act in relation to other candidates who are employees of the city office on the basis of an appointment or contract of employment.

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Summary: In local elections, many local government employees are involved in the election campaign. Unfortunately, they often violate the principles of ethics, human honesty, and even the applicable law. In this report, therefore the author, after a brief presentation of the various types of behavior of self-government employees that can be dealt with in the fight for local authority and indication of the provisions to which the behavior may conduct, analyzes the possible effects of such violation.

Key words: involvement, self-government employees, election campaign, consequences of the violation, duties of a self-government employee, self-government elections, power struggle for power, official orders.

SKUTKI ANGAŻOWANIA SIĘ PRACOWNIKÓW SAMORZĄDOWYCH W LOKALNĄ KAMPANIĘ WYBORCZĄ

Streszczenie: W wyborach lokalnych wielu pracowników samorządowych angażuje się w kampanię wyborczą. Niestety niejednokrotnie naruszają oni przy tym zasady etyki, ludzkiej uczciwości, a nawet zdarza się, że i obowiązujące prawo. W związku z tym w niniejszym opracowaniu Autorka po krótkim przedstawieniu różnego rodzaju zachowań pracowników samorządowych z jakimi można mieć do czynienia w walce o władzę lokalną i wskazaniu przepisów do naruszenia których może prowadzić określone zachowanie, poddaje analizie ewentualne skutki takiego naruszenia.

Słowa kluczowe: angażowanie się, pracownicy samorządowi, kampania wyborcza, skutki naruszenia, obowiązki pracownika samorządowego, wybory samorządowe, walka o władzę, polecenia służbowe.