

LEGAL FORMS OF ACTIONS BY PUBLIC ADMINISTRATION IN THE AREA OF SOCIAL WELFARE – THE EXAMPLE OF POLAND

The topic of this paper, the legal forms of actions by public administration in the area of social welfare in Poland, is very important, from both theoretical and practical point of view. The author discusses the three principal forms of activities by social welfare administration bodies provided for in the Polish law on social welfare: administrative decisions, contracts, and actual actions. Particular emphasis is placed on administrative decisions and non-authoritative actions such as social welfare performance contracts and civil law contracts with recipients of benefits.

Keywords: social welfare, social welfare administration bodies, administrative decisions, contracts, actual actions.



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1. Introduction

The view that social welfare is a part of administrative law has been present in the doctrine of administrative law for a long time [1, p. 31]. The links between administrative law and social welfare can be found in many areas. Social welfare, being one of the services performed by public administration entities, is regulated by administrative law. According to the current laws, the entities that are required to provide social welfare are bodies of government and self-government administration; in their performance of such duties they cooperate with non-governmental organizations, the Catholic Church and other religious associations, foundations, associations, and employers, as well as natural and legal persons [2, p. 234].

Most social welfare benefits are awarded in a general administrative procedure conducted pursuant to the Act on social welfare (Act of 12 March 2004 on social welfare, consolidated text as of 2008, Dz. U. [Journal of laws] no. 115, item 728) (hereinafter referred to as ASW) and the Code of Administrative Procedure (Act of 14 June 1960, Dz. U. [Journal of laws] no. 98, item 1071, as amended) (hereinafter referred to as the CAP). Article 14 of the ASW includes a reference to the CAP. According to this article, the provisions of the Act apply to social welfare procedures only with regards to issues that are

not regulated by the Code. The procedural provisions of the ASW constitute *lex specialis* in relation to the CAP.

There are three principal forms of provision of social welfare services: administrative decisions, contracts, and factual actions. Because of the importance of administrative decisions and contracts, this paper focuses on these two forms.

2. Administrative decisions

When administrative law norms authorize a public administration entity to award or decline benefits to individuals and when they authorize such an entity to impose or to relieve from an obligation, the entity must take a proper legal action in the form of an administrative decision [3, p. 340]. The general principle, provided for in art. 106 (1) of the ASW is that benefits must be awarded in a formal administrative proceeding in the form of an administrative decision. This form is not required in the case of assistance provided as social work, advisory services, crisis intervention, funded ticket, and a referral to a special education and care center. Providing assistance to a person who needs shelter, clothes, or food does not have to be preceded by an administrative decision, either. Benefits awarded on the basis of an administrative decision include permanent allowance, periodic allowance, designated benefit and special benefit, referral to a social welfare home, and determination of the fee for the stay [4, p. 274–301].

In proceedings regarding the scope of social welfare services, provisions of the CAP are applied directly, while exceptions to the general principles are

stipulated in the ASW. In the case of discrepancies between the provisions of the two acts, those of the ASW take precedence. The differences between the two laws concern the following elements of administrative procedure: determination of local competence of an entity; initiation of a proceeding and determination of entities entitled to appeal a decision, to conduct an explanatory proceeding, and to verify a final decision [5, p. 201–207]. This is due to the unique nature of administrative procedures where the provisions of the CAP must be applied with the view to the good of the persons receiving social welfare and to the protection of their personal rights.

The rules of determination of local competence are stipulated in the CAP, while detailed regulations regarding social welfare are provided for in the ASW. According to the ASW, the local competence of a commune is determined on the basis of the place of residence of the person applying for a benefit. In the case of a homeless person, the commune with local competence is the one where the person was domiciled most recently. The legislator has provided for two exceptions to the above rule: 1) in the case of an inhabitant of a social welfare home, the commune with local competence is the one that has referred him or her there; 2) in cases where the situation of the person applying for benefits justifies it and where decisions must be made without delay, the commune with local competence is the one where the person is staying.

It must be emphasized that the cost of the benefits awarded in emergencies (e.g. a permanent allowance, a periodic allowance, shelter, or food) is eventually

borne by the commune with local competence determined on the basis of the place of residence or the most recent domicile of the recipient of benefits. The commune must return the cost to the commune where a benefit was awarded and where the recipient of a benefit was staying. In case of any doubts, after an explanatory proceeding is conducted, the social welfare entity decides on its own of the nature of the residence of a person applying for benefits in a given commune.

Determination of local competence does not raise any significant concerns. Another important requirement is to determine the material competence of entities on the level of a commune or a district. The general competence of local self-government entities to make administrative decisions regarding social welfare is provided for in the laws that define Poland's system of government (the law on commune-level self-government and district-level self-government) and stipulated in more details in the ASW. The entities with the material competence to conduct administrative proceedings and to make decisions that determine the title to social welfare benefits are the head of the commune self-government (*wójt*), the town mayor (*burmistrz*), or the city mayor (*prezydent*), as well as the head of the district self-government (*starosta*). According to the ASW, the *wójt* (*burmistrz*, *prezydent*) can delegate the authority to issue decisions regarding social welfare to the manager of the local social welfare center. Such authority can also be delegated to other persons, upon request of the manager of the social welfare center. On the other hand, in individual cases

regarding social welfare where it is the district self-government that is competent, administrative decisions are made by the *starosta* or, if delegated by the latter, the manager of the district center for family assistance. Other employees of the center may also be authorized to make such decisions, upon request of the manager. It must be emphasized that the social welfare institution must observe the laws regarding the local and material competence and that, if the laws are breached, any decisions made by such institutions become invalid.

According to the ASW, benefits are awarded upon request of the recipient, a statutory representative of the person concerned, or a third party with the consent of the person concerned or his or her statutory representative (a third party may also, with the consent of the person applying for the benefits, appeal the decision). Social welfare benefits may be awarded *ex officio*. The parties that may be involved in social welfare proceedings are persons (individuals or families, as well as each member of a family) who are directly interested in receiving a benefit (decision of the Supreme Administrative Court (NSA) of 5 March 2003, SA/Ka 878/99, *Prawo Pracy* [Labor Law] 2003, no. 11, p. 39).

The person who applies to be awarded a benefit must meet certain conditions stipulated by law: he or she must be in a difficult position and be unable to overcome it using his or her own resources, capacities, and rights; the person must be included in the catalogue of entities entitled to receive benefits; finally, he or she must meet the income criteria for monetary benefits. According to the provisions of the ASW,

a social welfare proceeding may be initiated upon request of a third party, subject to the consent of the recipient of the benefits or his or her statutory representative. Since the legislator has not defined the term «third party», it can be either another natural person or an entity, e.g. a hospital or a school.

A proceeding can also be initiated *ex officio*. On the one hand, the legislator's decision to implement this solution is right, because persons who are in very difficult position very often do not apply for welfare due to their ineptitude or shame. Despite the obvious benefits of this solution, especially to persons who are unaware of their rights, there is a concern regarding potential breach to the rights of individuals. Therefore, the legislator has been right to introduce limitations on *ex officio* proceedings. One of the limitations in such proceedings is the consent of the recipient or his or her statutory representative to be referred in a social welfare home.

Another difference between the procedures provided for in the ASW and the CAP concerns the requirement to perform a community interview regarding the family prior to issuing a decision to award or decline a benefit. The details of the method of the interview, the documents required to determine the actual family, income, and financial situation, the format of the identity card of the social worker, the interview form, and the statement of financial status are provided for in the regulation of the Minister of Social Policy of 19 April 2005 on family community interviews (Dz. U. [Journal of laws] no. 77, item 672). The information collected in a community interview is a specific type of evi-

dence. As the decision of the NSA dated 7 May 2002 (SA 3337/01, Lex 81651) indicates, an interview is a method of collecting information, a conversation with the person applying for a welfare benefit, and a certain kind of evidence-collection procedure. According to the relevant laws, interviews are conducted by social workers with the aim to determine the personal, family, income, and financial situation of individuals or families; to issue opinions related to the establishment of foster families; to award a financial allowance to support a child in a foster family; to evaluate the care and education given to a child in a foster family; to award financial assistance to an adolescent in a foster family to help him or her to become independent and to continue education; and to refer a child to a special education and care center. It should also be mentioned that such documents as official documents, statements of parties, testimony of witnesses, and experts' opinions may play an important role in explanatory proceedings.

Benefits are awarded or declined after an administrative proceeding is completed and take the form of a written administrative decision. According to the CAP, a party that is not satisfied with a decision has the right to appeal it. In principle, an appeal may be filed by the party who was concerned by the decision. Nevertheless, the ASW allows a third party to do so, as long as the third party does so with the consent of the person who has applied for the benefit (art. 106 (6) of the ASW). Because the ASW does not define a higher-instance entity in social welfare cases, appeals are considered by the self-government

appeals council, which acts according to general principles stipulated in art. 17 (1) of the CAP.

The council, besides its powers to consider appeals, has the right to verify administrative decisions in extraordinary procedures. This is strictly related to the protection of acquired rights and the principle of permanence of administrative decisions and its binding effect on the issuing body and the parties concerned. The standards that constitute a basis for changing and annulling decisions to the disadvantage of the parties involved are not uniform. There are both obligatory prerequisites that require the administrative body to verify decisions and facultative prerequisites that only provide for a possibility to verify decisions, if the appeals council finds it to be advisable. The obligatory prerequisites for changing or annulling administrative decisions to the disadvantage of the parties involved, without the parties' consent, include a change in laws, collection of benefits that the parties were not entitled to, and a change in the financial or personal situation of the recipients of benefits. The facultative prerequisites include wasteful use by the recipient of the awarded benefits, a discrepancy between the documented income and the actual financial status of a family or individual, the recipient causing damage to the awarded benefits or to his or her own assets.

3. Contracts in actions by social welfare administration entities

In modern law-abiding states, the unilateral nature of actions conducted by social welfare institutions is mitigated by the principle of decentralization and

subsidiarity to bi-lateral actions (civil-law contracts and administrative agreements) [6, p. 345–355]. Contracts stipulated in the ASW were rightly divided by J. Jończyk into the following categories: contracts for the performance of a social welfare task (the so-called performance contracts), civil-law contracts with recipients (for the provision of monetary or material aid and with regards to child care), special contracts (social contracts), and contracts regarding the delegation of administrative functions concluded between the province governor (województwo) and the local self-government or government administration body for audits of the quality of services of social welfare services provided by non-public entities [7, p. 332–333].

Contracts for performance of a task (so-called performance contracts)

The law requires social welfare tasks to be performed by public administration bodies [8, p. 385–400]. Even when such bodies are very efficient, if the scope of social welfare, the needs of recipients, and the number of tasks increase, they are unable to fulfill the basic social needs of the population. Therefore, the legislator rightly requires public administration bodies to work, following the principle of partnership, with non-public entities that do not constitute a part of the structure of public administration, such as voluntary and non-governmental organizations, the Catholic Church, other churches and religious associations, as well as natural and legal persons.

The ASW (art. 25–35) and the subordinate ordinances regulate in detail

the matter of delegating social welfare tasks to non-public entities, mostly to foundations and associations. According to the ASW, delegation of the performance of a social welfare tasks must be preceded by a bid, so that the contract is concluded with the entity that offers the best performance (the guidelines for conducting bids are stipulated in art. 26–32 of the ASW).

Once the entity is selected in a bid, a contract for the performance of a task is concluded; in the contract, the entity undertakes to perform a specific task and the «employing body» transfers money to it as a subsidy and requires it to submit a report from the performance of the task. As to the freedom of contract, it must be emphasized that it is partly limited by both the provisions of the Act on social welfare and the ordinance of the Minister of Social Policy of 4 April 2005 on the template of a contract for the performance of a social welfare task (Dz. U. [Journal of Laws] no. 61, item 545).

Thus, delegation or a refusal to delegate the performance of a public task in the area of social welfare (delegation of performance of an administrative function) to entities that do not constitute a part of the structure of public administration takes the form of a contract and not that of an administrative decision. Consequently, entities that are refused such contracts are only entitled to file a complaint pursuant to the code of administrative procedure (verdict of the NSA of 10 November 1992, II S.A. 2068/92, OSP 1994, b. 10, item 196).

The increase in the number of changing and different tasks performed by public administration entities makes the

support of social welfare bodies by non-public entities quite necessary. Therefore, delegation of tasks to non-public entities has become a beneficial common occurrence. If entities stipulated in the ASW did not undertake to perform public tasks, these tasks would have to be performed by social welfare administration bodies. Moreover, it has turned out that delegating some social welfare tasks is cost-effective.

Civil-law contracts with recipients of benefits

It is often more reasonable and effective for social welfare administration entities to use civil-law contracts than to use their administrative powers. Civil law contracts concluded with recipients of social welfare benefits include contracts for child care as well as contracts for monetary and material aid.

A family becomes a foster family to a non-related child under a contract concluded between the family and the starosta who has local competence in the place of residence of the family. Such a contract is a civil law contract. The legislator clearly indicates that such contracts are subject to the provisions of the Act of 23 April 1964 (the Civil Code) regarding the stipulated contract – contract of mandate (Journal of Laws [Dz. U.] no. 16, item 593 as amended – art. 734–751). The contract must be made in writing and provide a detailed list of the obligations of each party. According to the ASW, a contract of mandate can be terminated in three ways: each of the parties can terminate it on the terms stipulated therein; each of the parties can terminate it on the basis of a written notice (the termination takes effect 3

months after the date of the notice); the contract can be terminated by the *starosta* without a notice period if the foster family does not fulfill its obligations and does not meet formal requirements. Termination of the contract according to the latter method requires the *starosta* to assure continued care of the child.

The category of civil law contracts includes contracts with persons who apply to the commune for benefits in the form of a monetary loan or a loan for use of items for the purpose of becoming economically independent. Aid in the form of a monetary benefit may be awarded as a one-time designated benefit or an interest-free loan for the purpose of becoming economically independent. The terms of the loan and its pay-off as well as the security are defined in the contract concluded between the person applying for the welfare benefit and the commune. The contract must define the terms of the loan, the method of repayment (e.g. in installments or in a single payment), and the security (guarantee, lien, or mortgage). According to the ASW, a loan can be remitted, in full or in part, by the commune (as long as this contributes to quick achievement of social welfare goals). Even though the legislator has not decided to apply relevant provisions of the Civil Code concerning loans (art. 720–733), such application is not excluded since the contract is named a «loan contract». Declination to conclude a loan contract (declination to consider the applicant as entitled to take advantage of public aid) is an administrative act performed pursuant to the Code of Administrative Procedure.

The law requires communes to loan machines and tools that are necessary

to provide proper living conditions by means of contracts of loan for use (contracts of loan for use are subject to the provisions of the Civil Code on loans for use – art. 710–719).

Civil law contracts also include contracts concluded by communes or districts with family members of a person applying for social welfare assistance regarding the fee they must pay for the person's sojourn in a social welfare home.

The social contract as a new instrument in the activities of social welfare administration bodies

Nowadays, social work can be performed under a contract concluded with recipients of benefits defined in the ASW as a social contract. A social contract is defined as a written contract concluded with a person who applies for aid, which defines the rights and obligations of the parties in common activities aimed at overcoming the difficult situation of the person. The contract is a means to cooperate in solving the problems of individuals and families who apply to receive social welfare benefits. It can be concluded with such individuals and families who may in the future become independent and not need any further assistance.

The contract must include provisions concerning the assessment of the situation of the person or family and the related goals, in particular the causes of the difficulties, the environmental limitations and barriers, the detailed objectives and deadlines of the planned actions, and the method of provision of the benefits.

According to the proper social work methods, the process leading to the

conclusion and the performance of social contracts must include the following stages: determination of common goals, definition of problems and objectives, development of a work plan and schedule, verification of the completion of the agreed actions and the outcomes of the efforts [9, p. 152–153]. Social contracts are a new instrument used by social welfare administration bodies in order to make the aid they provide more effective by mobilizing the individuals and families to make every effort to become independent. In its current form, the ASW does not provide any guidance as to the legal nature of social contracts, nor does it define the proper way to apply the provisions of the Civil Code or to resolve any conflicts. The ASW emphasizes that social welfare benefits must be awarded with certain obligations on the recipients and that active cooperation of the parties and involvement of the recipient is essential.

4. Actual actions

Actual actions are such activities by public administration bodies as serving a document, summoning a person, or conducting a community interview; such actions have specific legal consequences (e.g. delivery of a decision starts the course of the term of appeal). The activities lead to legal consequences through facts and not through procedural norms. These actions do not involve the exercise of any power and can be performed by any entity providing social welfare. The material and technical activities have a solid legal basis in the form of authorization by a normative or administrative act and lead to specific legal outcomes. Citizens must

observe them and public administration bodies must participate in the activities involved.

Thus, actual actions in social welfare are tasks that are expressly stipulated in the Act on social welfare: organization of a funeral, social work, intervention in a crisis, specialized counseling, awarding a designated benefit in the form of a funded ticket, and assistance to homeless persons (shelter, food, clothes).

In order to prevent the development of dysfunctional situations, such as domestic violence, social welfare bodies perform crisis interventions which can be defined as a set of activities for the benefit of individuals or families consisting in providing counseling and a twenty-four hours shelter [10, p. 179]. Crisis interventions involve immediate specialized psychological assistance and, depending on the circumstances, social or legal counseling. In justified cases, shelter can be provided for up to 3 months.

Communes are legally required to organize funerals of deceased persons. Communes and districts are required to provide shelter, food, and clothes to individuals and families who are deprived of such goods.

Social work can be defined as professional activities aimed at helping individuals and families to strengthen or regain the capacity to exist in a society, by performing proper social roles, and at creating supportive conditions. Social work is provided to improve the functioning of individuals and families in their social environment. It involves individuals and families who need to develop or enhance their activity and independence, as well with local com-

munities, to assure cooperation and coordination of activities of institutions and organizations that are essential to fulfill the needs of the members of the communities [11, p. 86].

Final remarks

Even though a large part of social welfare benefits is awarded to individuals and families experiencing hardship by way of administrative decisions (allowances or institutional aid), more and more of them are provided through contracts and actual actions. Relations regulated by the civil law, besides administrative and legal relations, are very important in social welfare. The use of civil law contracts by social welfare administration bodies is often more reasonable and effective than the use of their authority. The laws that regulate social welfare often list contracts as a form of performance of social welfare. Such contracts are described in many different ways, depending on the parties involved and the subject. There are performance contracts, which involve the delegation of public tasks to non-public entities, as well as various contracts with the recipients of benefits. Public administration entities are required to choose such forms of activities that, in their opinion, will be the best in specific circumstances, although the Act on social welfare defines administrative decisions as the basic form that in many cases is obligatory.

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Міруч А. Правові форми дії державного управління в галузі соціального забезпечення – приклад Польщі.

У статті проаналізовано правові форми дії державного управління в галузі соціального забезпечення в Польщі як з теоретичної, так і з практичної точки зору. Автор розглядає три основні форми діяльності з соціального забезпечення

органів управління, передбачені в польському законодавстві про соціальне забезпечення, – управлінські рішення, контракти і фактичні дії.

Ключові слова: соціальне забезпечення, соціальне забезпечення органів управління, управлінські рішення, контракти, фактичні дії.

Мируч А. Правовые формы действия государственного управления в области социального обеспечения – пример Польши.

В статье анализируются правовые формы действий государственного управления в области социального обеспечения в Польше, как с теоретической, так и с практической точки зрения. Автор рассматривает три основные формы деятельности по социальному обеспечению органов управления, предусмотренные в польском законодательстве о социальном обеспечении, – управленческие решения, контракты и фактические действия.

Ключевые слова: социальное обеспечение, социальное обеспечение органов управления, управленческие решения, контракты, фактические действия.

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