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THE GENERAL CLAUSE "*INTEREST OF SERVICE*" AS ONE OF THE GROUNDS FOR OPTIONAL DISMISSAL FROM SERVICE ON THE EXAMPLE OF A POLICE OFFICER – SELECTED THEORETICAL AND CASE LAW ASPECTS

KLAUZULA GENERALNA „*INTERES SŁUŻBY*" JAKO JEDNA Z PRZESŁANEK FAKULTATYWNEGO ZWOLNIENIA ZE SŁUŻBY NA PRZYKŁADZIE FUNKCJONARIUSZA POLICJI – WYBRANE ASPEKTY TEORETYCZNE I ORZECZNICZE

Abstract

The principles of employing Police officers are regulated by the Act of April 6, 1990 on the Police, professional pragmatics of an autonomous nature. In the discussed pragmatics, the legislator divided the exhaustive catalog of reasons for dismissal from service into two reasons – obligatory and optional. The impetus for undertaking the research issues covered in this article was the construction of one of the reasons for optional dismissal from service. Namely, in accordance with Art. 41 section 2 point 5 of the Police Act, a police officer may be dismissed from service when an important interest of the service requires it. The construction of the service's interest is nothing more than the normative construction of a general clause, which by its nature is unspecified. Therefore, the closed catalog of grounds for dismissal from service remains open in this respect. The legislator deliberately and consciously uses this construction to make the generally closed catalog of reasons for dismissal from service more flexible. It should be stated, however, that although the Police authority is provided with a large area of freedom in the process of applying the law, the clause in question is not the basis for the authority to make arbitrary and instrumental assessments. The service interest clause, despite its undefined nature, refers to extra-legal criteria with a semantic context defined by the name of the criterion.

Streszczenie

Zasady zatrudniania funkcjonariuszy Policji normuje Ustawa z dnia 6 kwietnia 1990 r. o Policji, pragmatyka zawodowa o charakterze autonomicznym. W omawianej pragmatyce, ustawodawca podzielił enumeratywny katalog przyczyn zwolnienia ze służby na dwie przyczyny – obligatoryjne i fakultatywne. Asumptem dla podjęcia problematyki badawczej ujętej w niniejszym artykule stała konstrukcja jednej z przyczyn fakultatywnego zwolnienia ze służby. Mianowicie, zgodnie z art. 41 ust. 2 pkt 5 ustawy o Policji funkcjonariusza Policji można zwolnić ze służby, gdy wymaga tego ważny interes służby. Konstrukcja interesu służby to nic innego jak konstrukcja normatywna klauzuli generalnej, która ma ze swej natury charakter niedookreślony. Zamknięty katalog przesłanek zwolnienia ze służby pozostaje zatem w zakresie tej przyczyny otwarty. Ustawodawca celowo i świadomie posługuje się tą konstrukcją aby uelastycznić, co do zasady, zamknięty katalog przyczyn zwolnienia ze służby. Stwierdzić jednak należy, że pomimo, iż organ Policji wyposażony zostaje w duży obszar swobody dokonywanej w procesie stosowania prawa, to omawiana klauzula nie jest podstawą dla dokonywania przez organ ocen dowolnych i instrumentalnych. Klauzula interesu służby pomimo niedookreślonego charakteru odsyła do kryteriów pozaprawnych o określonym przez nazwę kryterium kontekście znaczeniowym.

Keywords: *general clause, important interest served, service relationship, Police Act, police officer, administrative justice*

Słowa kluczowe: *klauzula generalna, ważny interes służy, stosunek służby, ustawa o Policji, funkcjonariusz Policji, sądownictwo administracyjne*

Introduction

De lege summer, in the Polish normative order, the professional group of police officers is a group with a special legal status. The employment of police officers was distinguished from other legal relations and shaped in a specific way (Kuczyński, Mazurczak-Jasińska, Stelina, 2011; Wieczorek, 2017). The employment rules are regulated by the Police Act (Act of April 6, 1990 on the Police), professional pragmatics of an autonomous nature. The basis for the employment of a Police officer is the service relationship established by appointment. This is determined by Art. 28 section 1 of the Police Act, which states that *The service relationship of a policeman is established by appointment on the basis of voluntary reporting for service.* Such an appointment, pursuant to Art. 28 section 1a may be for a period of preparatory or candidate service or a period of contract service or permanently.

It should be emphasized that the service relationship of a policeman is not an employment relationship (Kotowski, 2024), therefore it cannot be attributed to it the characteristics of an employment relationship specified in Art. 22 of the Labor Code (Act of June 26, 1974, Labor Code). Such a service relationship should also be distinguished from the so-called professional employment relationship based on the appointment referred to in Art. 76 Labor Code. A police officer is not an employee within the meaning of Art. 2 of the Labor Code (see the judgment of the Provincial Administrative Court in Poznań of February 5, 2009IV SA/Po 430/08).

The service relationship of a policeman is an administrative relationship. This means that both the establishment, change and termination of an employment relationship take place by way of an administrative decision (Gacek, 2011). As a result, the superior responsible for personal matters unilaterally and authoritatively shapes the essential components of this relationship. Consensus of the parties is only required to decide on admission to service, and not to establish the conditions for performing this service (see the judgment of the Provincial Administrative Court in Warsaw of April 5, 2006).

According to the position established in the doctrine and case law, the differentia specifica of the legal status of a Police officer is considered to be the obligation for a Police officer to perform official duties at the risk of his

or her life, to issue instructions within the management in the form of an order and a high degree of hierarchical subordination (Paśnik, 2020).Before starting service, a Police officer takes an oath, the rote of which determines that he/she vows to faithfully serve the Nation, protect the legal order established by the Constitution of the Republic of Poland, and protect the security of the State and its citizens, even at the risk of life. A public official additionally takes an oath that, while performing the tasks entrusted to him, he will diligently observe the law, be faithful to the constitutional bodies of the Republic of Poland, observe official discipline and follow the orders and instructions of his superiors. (Art. 27 of the Police Act).

At the same time, the professional group of Police officers was guaranteed greater durability of the service relationship, which included an exhaustive enumeration of the grounds for dismissal from service and subjecting administrative decisions issued in these matters to the control of administrative courts. It should be explained that in the discussed professional pragmatics, the legislator divided the exhaustive catalog of reasons for dismissal from service into two categories of reasons – obligatory (Article 41(1) of the Police Act) and optional (Article 41(2) of the Police Act). In the event of the so-called For obligatory reasons, the authority cannot avoid issuing a personal order of dismissal from service. In the event of optional reasons, the authority has the option, but not the obligation, to dismiss a police officer from service. Neither the application nor the failure to apply the exemption may, in itself, be a reason to bring charges against the authority regarding the dismissal proceedings.

Pursuant to the Police Act, a Police officer may be dismissed from service in cases of: (1) permanent incapacity for service issued by a medical board; (2) unsuitability for service, confirmed in an official opinion during the period of preparatory service; (3) imposing a disciplinary penalty of dismissal from service; (4) conviction by a final court judgment for a crime or a fiscal offence, intentional, prosecuted by public indictment; (4a) the court imposes a punitive measure in the form of a ban on practicing the profession of a police officer by a final judgment; (5) renunciation of Polish citizenship or acquisition of citizenship of another country; (6) expiry of the period of service specified in the contract if no subsequent contract or permanent appointment is concluded; (7)

expiry of the trial period of contractual service, if the policeman or superior exercised the power specified in Art. 28a section 4 of the Police Act.

A police officer may be dismissed from service in cases of (1) failure to fulfill official duties during the period of permanent service or contract service, confirmed in 2 subsequent opinions, between which at least 6 months have passed; (2) being convicted by a final court judgment of an offense or a fiscal offense other than those referred to in section 1 point 4; (3) appointment to another state service, as well as taking up elected positions in local government bodies or associations; (5) when an important interest of the service requires it; (6) liquidation of a Police unit or its reorganization combined with a reduction in staffing, if the transfer of a police officer to another unit or to a lower official position is not possible; (7) the expiry of 12 months from the date of cessation of service due to illness; (7a) two unjustified failures to appear for the examinations referred to in Art. 40a section 1 of the Police Act, or failure to submit to them, or in the event of two unjustified failures to appear for observation at a medical facility, in the event of the officer's consent, unless the referral to the medical board was made at the officer's request; (8) committing an act that constitutes a crime or a fiscal offense, if the commission of the act is obvious and makes it impossible for him to remain in service; (9) the expiry of 12 months of suspension from official duties, if the reasons giving rise to the suspension have not ceased; (10) removal from basic vocational training, in the cases specified in Art. 34f section 1 points 1, 3 and 5-8 of the Police Act.

In the opinion of the Supreme Administrative Court, the provisions of the Police Act *(…) define all permissible grounds for dismissing a police officer from service. Termination of the service relationship may additionally take place on the initiative of the officer himself, provided that he resigns from service and demands to be released from service in the manner provided for in Art. 41 section 3 of the Act. In other cases, the employment relationship is terminated as a result of dismissal proceedings. If the conditions specified in Art. 41 section 1 of the Act, exclusion of a policeman from the group of police officers is mandatory, while in the situations specified in Art. 41 section 2 – it is optional (…).* The court also emphasized that the provisions in question *(…) constitute an exception to the principle of durability of police officers' service relationships, and therefore they must be interpreted strictly. A narrow or broad interpretation is*

inadmissible (…) (Judgment of the Supreme Administrative Court of April 20, 2017, I OSK 2943/16).

Article 41 of the Police Act states that the list of reasons justifying the dismissal of a Police officer from service is closed. This means that a police officer is dismissed or may be dismissed from service only if one of the conditions listed exhaustively in the provision is met. The impetus for undertaking the research issues presented in this article was the construction of one of the reasons for optional dismissal from service. Namely, in accordance with Art. 41 section 2 points 5, a Police officer may be dismissed from service when an important interest of the service requires it. The construction of the service's interest is nothing more than the normative construction of a general clause, which by its nature is unspecified. Therefore, the basic research question is whether the enumerative catalog of reasons for dismissal from service becomes an open catalog through the legislator's use of the construction of a general clause? The hypothesis is that the legislator consciously and deliberately uses the general clause in the interests of the service to make the, in principle, closed catalog of reasons for dismissal from service more flexible.

Research methods

The research methods used in this work are adequate to the adopted research assumptions. The basic method is the formal-dogmatic method, which is used to examine the legislator's statements contained in the normative text. Another research method is the method of terminological and conceptual analysis, the use of which is necessary due to the definitional diversity of concepts that are particularly important for this article. The method of analyzing justifications for court decisions, including the decisions of administrative courts, is also used to determine how the interest of the service is perceived by administrative courts.

General clause – selected theoretical and legal remarks

The normative structure of general clauses is an inter-branch and universal structure (Leszczyński, 2016; Sheet, 2016). However, the general clause is not a uniform construction, which means that the legislator does not create one general clause common to the entire legal system or normative act. The general clause is part of a broader issue that occurs in the legal system between its formal and informal elements. The legal system should be understood as the entirety of the legal norms in force in it, the formal source of which are normative acts, and the functional source are court judgments (Korybski, Leszczyński, 2021). Its development should be linked to the need to distinguish in the legal system, apart from stricti iuris provisions, instruments guaranteeing the correct application of the law. The origins of the ius aequam postulate date back to Aristotle himself (Arystotle, 2008). Currently, the general clause functions as a common normative construction.

The concept of a clause should be understood in two perspectives – legislative and decision-making. In the first approach, the general clause is an element of the law-making process (or rather, law-making, which is the basic way of creating law in the Polish legal system). It is an undefined phrase contained in a legal provision, referring to non-legal assessments, values and norms. The legislator formulates the criterion of the clause in a general form, without specifying what is included in its content. From a decision-making perspective, the general clause is an element of the process of applying the law (the normative basis for the decision to apply the law). It is a construction included in the applicable legal provision, or more precisely, constituting part of this provision, which authorizes the entity applying the law to base a specific decision to apply the law on an extra-legal criterion indicated in the content of this provision. The role of the authority is to decode and determine the content of the clause, as well as to include it in the decision-making processes. The content of the clause is intended to reflect the assessments, values and norms commonly accepted from the point of view of a given society or social group.

The basic functions of the general clause should be distinguished. First of all, it is the opening of the legal system to assessments, values and norms that

lie beyond its borders. The main function of the general clause is also to make the application of the law more flexible and to alleviate its rigor by providing the body applying the law with the ability to adapt the content of an individual and specific decision to the circumstances of a specific factual situation. An important function is the function of expanding the decision-making slack in the process of its application. It should be noted that the legislator creates this slack in a deliberate and controlled manner. Finally, a natural consequence of the features discussed above is that the process of creating and applying law is entangled in external (non-systemic) axiology.

The Polish legislator determines the expressis verbis function of general clauses. Namely, § 155 section 1 of the Principles of Legislative Technology provides for the possibility of using the construction of a clause when there is a need to ensure the flexibility of the text of a normative act. The Constitutional Tribunal has also commented on the essence and function of general clauses many times. In the Tribunal's opinion, the legislator is not able to predict all possible future situations when creating a normative act (especially taking into account the temporal dimension of its validity) and specify them in legal provisions. Therefore, *(…) clauses should be used to make a given legal regulation more flexible and to introduce certain axiological references to it (…)* (Judgment of the Constitutional Tribunal of November 22, 2005, ref. no. SK 8/05, OTK-A 2005/ 10/117). The use of general clauses to make regulations more flexible makes the entire legal system more dynamic. The function of the clauses is to protect the legal text against *over-legalization* (Judgment of the Constitutional Tribunal of October 17, 2000, ref. no. SK 5/99, OTK 2000/7/254). *(…) The use of general clauses meets the conditions of the rule of law in the rule of law and does not violate the specificity of legal provisions (…)* (Judgment of the Constitutional Tribunal of 07/06/1994, K 17/93, OTK 1994, item 1, p. 95) . The role of independent courts is to determine the referents of individual general clauses in specific cases. (Judgment of the Constitutional Tribunal of December 7, 1999, file reference number: 6/99, OTK 1999/7/160).

The interest of the service in the jurisprudence of administrative courts – selected aspects

Analysis of numerous case law of administrative courts relating to optional grounds for dismissal from service regulated in Art. 42 section 2 point 5 of the Police Act allows us to present the following general principles of application of the general clause of the interest of the service.

The analyzed reason for dismissal from service is *(…) a type of general clause, the meaning, meaning and manner of application of which is up to the authority applying this provision in the context of a given case (…)*. Basing the reason for dismissal on the general clause *(…) means that the Police authority must analyze the facts that formed the basis for initiating proceedings in the case (…) and also assess whether the event [related to the service of a given Police officer and not always caused by him] culpable], is classified negatively in the context of legal provisions and whether the principles of deontology of the profession of a police officer and the ethos of police service justify the termination of the service relationship with an officer (…)* (Judgment of the Supreme Administrative Court of July 4, 2018, I OSK 40/18, LEX no. 2531191).

The Police Act does not define this concept or provide any guidance on the interpretation of this concept. This means that *(…) the existence of an important interest of the service must be considered against the background of the facts of a given case and taking into account the provisions regulating the goals and tasks of the Police and the special status of officers of this formation (…)*. It may be *(…) one really existing cause or a series of circumstances or events proving that it is not possible for a policeman to continue to serve (…). Moreover, the cause does not have to be limited only to cases of breach of professional duties during service. The dismissal of a police officer may also be „(…) justified by any other behavior of the police officer, even during his off-duty time, if such behavior makes it impossible to continue the service without prejudice to his important interests (…)* (Judgment of the Supreme Administrative Court of April 21, 1999, ref. no. act II SA 426/99).

The reason for the important interest of the service *(…) should be specified in each individual case by indicating the factual circumstances constituting such an assessment (…)* (Judgment of the Supreme Administrative Court of April

21, 1999, II SA 426/99) *(…) or [circumstances] creating it,as well as the criteria of the assessment in both objective and subjective aspects (…)* (Judgment of the Supreme Administrative Court of January 29, 2016, I OSK 1640/14).

Indicating Art. as the basis for dismissal from service. 41 section 2 point 5 of the Police Act always requires proof that the dismissal was necessary due to the important interest of the service (Judgment of the Supreme Administrative Court of April 21, 1999, II SA 426/99). *(…)This means that the continued service of a police officer conflicts with an important interest of the Police, and that this officer, for the good of the parent formation, should not continue to serve (…)* (see: Judgment of the Supreme Administrative Court of March 7, 2019, I OSK 1484/17) . It should be noted that the concept of an important interest of the service justifying the dismissal of a Police officer should be understood as a situation *(…) in which priority is given to the Police for protection, even if it is at the expense of the dismissed police officer (…)* (Judgment of the Supreme Administrative Court of July 12, 2019 r., I OSK 710/17).

In the discussed procedure, it is permissible to terminate the service relationship with a Police officer who *(…) in the opinion of his superiors, should not perform service for various non-substantive reasons and cannot be dismissed from service on another legal basis specified in the Police Act (…)* (Judgement Supreme Administrative Court of January 11, 2017, I OSK 2386/16). What's more,the interest of the service should be strictly interpreted and applied only exceptionally when non-dismissal from service could actually expose an important interest of the service to serious losses (Judgment of the Supreme Administrative Court of January 29, 2016, I OSK 1491/14).

The interest of the service is a vague criterion that allows the authorities to assess all the facts within a certain freedom, but not arbitrarily. According to the Court, the authority should take into account *(…) substantive as well as general rules of procedure, including the rule of law, full explanation of the facts, taking into account the interest of the authority and the legitimate interest of the party, and finally, it is necessary to provide a convincing justification for the position taken (…)* (Judgment of the Supreme Administrative Court of January 29, 2016, I OSK 1491/14).

Pursuant to art. 1 of the Act on the System of Administrative Courts, administrative courts administer justice by controlling the activities of public

administration in terms of compliance with the law of the activities of this administration, unless the Act provides otherwise. (Act of August 30, 2002, Law on proceedings before administrative courts). This means that in cases involving optional dismissal from service, administrative courts only examine whether the decision is arbitrary or made using prohibited criteria. This is because the optional exemption from service has been left to the so-called administrative discretion. The jurisprudence of administrative courts has established a line of jurisprudence according to which *(…) control of a decision based on administrative discretion has a limited scope. It comes down to examining whether the contested decision is not arbitrary, i.e. whether the administrative body chose a legally permissible method of resolution and whether it made such a choice after determining and considering the circumstances relevant to the case (…)*. The Supreme Administrative Court decided that the discussed *(…) control does not include an assessment of how administrative bodies, while implementing a specific policy of applying the law, fulfill the content of non-system fairness or expediency criteria (…)* (Judgment of the Supreme Administrative Court of October 2, 2018 ., I OSK 716/17, LEX no. 2571175). In practice, this means that administrative courts in such cases only examine whether the police authorities have not exceeded the limits of discretion in a specific case. However, the courts cannot interfere with the competences of the Police authorities and assess the validity of the personnel policy they implement (Judgment of the Supreme Administrative Court of April 11, 2018, I OSK 1980/16).

Conclusions

To sum up the above considerations, it should be stated that the concept of interest of the service is a general clause. It is deeply saturatedshe axiologically. This clause is vague, but its understanding should in any case be contextual. Its meaning, meaning and method of application belong to the authority applying it in the context of a given case. In order to apply it, it is necessary to ad casum assess all the circumstances of a given case and closely link the interest of the service with the given factual situation. Moreover, although the clause is universal, it should only be used exceptionally. On its basis, the authority was provided with a large area of freedom in the process of applying the law. However, it is not the basis for making arbitrary assessments. The service interest clause, despite its undefined nature, refers to extra-legal criteria with a semantic context defined by the name of the criterion. When decoding the content of this criterion, one should assume the special status of police officers and, consequently, a special measure of professional diligence. The content of the criterion is determined by the principles of deontology of the Police officer's profession and the ethos of service in the Police, as well as the goals and tasks of the Police.

In this context, it is worth noting that artvol. 1 section 1 of the Police Act determines the objectives of establishing the Police. It was established as a uniformed and armed formation serving society and intended to protect people's safety and maintain public safety and order. The basic tasks of the Police are regulated in Art. 1 section 2 of the Police Act. More detailed tasks are regulated by Art. 14 of the Police Act, and the powers of Police officers Art. 15 of the Police Act. In accordance with the oath of office, a police officer before entering serviceundertakes to protect the secrets related to the service, the honor, dignity and good name of the service and to observe the principles of professional ethics.Art. also plays an important role. 25 section 1 of the Police Act, according to which *(…) a Polish citizen of good repute who has not been convicted by a final court judgment of a crime or a fiscal offense (…) may serve in the Police*. Against the background of this provision and in the context of the discussed grounds for dismissal from service, the Supreme Administrative Court ruled that *(…) due to the objectives pursued by the Police, only a person of*

good repute may serve in it. Even the mere suspicion of a police officer of criminal behavior contrary to the undertaken obligations jeopardizes the good name of the service, the maintenance of which constitutes the content of an important interest of the service (…) (Judgment of the Supreme Administrative Court in Warsaw of April 13, 2011, I OSK 1886/10). Similarly, the reason justifying the dismissal of a Police officer from service was a situation in which the Police officer was charged with committing an intentional crime, prosecuted by public prosecution, with the application of a preventive measure in the form of pre-trial detention (Judgment of the Provincial Administrative Court in Warsaw of November 25, 2006, II SA/Wa 1287/06).

The closed catalog of grounds for dismissal from service remains open as far as the grounds for the interest of the service are concerned. The general clause of the interest of the service allows for the assessment of facts that were not expressly provided for in the Police Act and which the legislator himself could not have predicted during the process of creating the act. It should be stated that the legislator deliberately and consciously used the construction of the general clause in the interests of the service to make the generally closed list of reasons for dismissal from service more flexible. However, so that the use of this reason for dismissal from service does not lead to abuse and instrumental actions of the Police authority, the content of the general clause should be determined each time in accordance with the principles discussed above. The authority should additionally take into account the axiology of the Police Act and the method of interpreting the value of the service's interest, established and accepted in case law. Finally, it should be emphasized that the general clause of the interest of the service is preceded by the evaluative element *important*, which determines the nature and rank of the decoded designates.

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