

Magdalena Gurdek

Local government unit councillor as deputy borough leader

Roczniki Administracji i Prawa 14/1, 117-124

2014

Artykuł został opracowany do udostępnienia w internecie przez Muzeum Historii Polski w ramach prac podejmowanych na rzecz zapewnienia otwartego, powszechnego i trwałego dostępu do polskiego dorobku naukowego i kulturalnego. Artykuł jest umieszczony w kolekcji cyfrowej bazhum.muzhp.pl, gromadzącej zawartość polskich czasopism humanistycznych i społecznych.

Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

LOCAL GOVERNMENT UNIT COUNCILLOR AS DEPUTY BOROUGH LEADER

A councillor, as a member of the deciding body of a local government unit performs the function on voluntary basis. Therefore councillors are also very often professionally active apart from this activity. However, there are posts at which performing duties is combined with the functioning of local self-government units, for instance the office of the provincial governor. Moreover, due to the fact that they are by law members of a district, county and provincial self-governing community, they would like to participate many times in exercising authority not only in one of them, but also in the remaining ones, joining for example a mandate of the district councillor with the membership of the county board. In both of these cases it may happen that at some moment there will arise dependence or “a conflict of interests”. That is why in order to eliminate such disadvantageous situations the legislator introduced the *incompatibilitas* principle in the self-governing system acts. According to article 25b of the district self-government act¹, article 21 section 8 of the county self-government act² and article 23 section 3 of the province self-government act³ it is not allowed to join a mandate of the councillor with:

- 1) a mandate of the Member of Parliament or senator,
- 2) performing the function of a provincial governor or provincial deputy governor,
- 3) the membership of a body of another local government unit.

From the point of view of the title research problem, what is significant is the interdiction determined in point No 3, which concerns the lack of joining a mandate of the councillor with the membership of a body of another local government unit. There is no doubt that the term of membership is inseparably connected with the functioning of a collegial body. In the structure of the local self-government these are the deciding bodies of all the three units and the executive bodies of a county and province. Therefore in accordance with article 25b point 3 of usg, article 21 section 8 point 3 of usp and article 23 section 3 point 3 of usw, they cannot be simultaneously neither a councillor nor a member of the board of another local government unit. At this point a question should be asked whether these provisions forbid a councillor only to be a member of the body of another local government unit or whether they can be a borough leader or a deputy borough leader? Making a literal interpretation of article 25b point 3 of usg, article 21 section 8 point 3 of usp and article 23

* dr; Wyższa Szkoła Humanitas w Sosnowcu.

¹ District self-government act of 8th March 1990, Journal of Laws 2013, item 594 as amended (in Polish: ustawa o samorządzie gminnym); hereinafter referred to as usg.

² County self-government act of 5th June 1998, Journal of Laws 2013, item 595 as amended (in Polish: ustawa o samorządzie powiatowym); hereinafter referred to as usp.

³ Province self-government act of 5th June 1998, Journal of Laws 2013, item 596 as amended (in Polish: ustawa o samorządzie województwa); hereinafter referred to as usw.

section 3 point 3 of usw, the question should be given a positive answer. But was it really the aim of the legislator? It seems it was not. Till 2002, when collegial boards were the executive bodies in the structure of district self-government, the term "membership of a body" comprised also the membership of the district board, so both the post of a borough leader and the post of a deputy borough leader. Carrying out a significant systemic reform of the district in 2002 and wanting to keep valid the interdictions legislated by article 25 b point 3 of the district self-government act, article 21 section 8 point 3 of the county self-government act and article 23 section 3 point 3 of the province self-government act, the legislator should also amend the content of these regulations adding, for instance, the expression "and performing the function of a borough leader and a deputy borough leader", which has not been done up till now. While currently it would be potentially possible to allow a very broad interpretation of the term "membership in a body" recognising that a borough leader is also a member of a body but the only one⁴, with reference to a deputy borough leader it is not possible. Contrary to the borough leader, the deputy borough leader is not a body. That is why in the current legal status performing the function of a deputy borough leader cannot be considered equivalent to the membership of such a body. However, taking into consideration provisions determining the conditions of expiring of a mandate of the councillor, it appears that making a broad interpretation of the interdiction under discussion is not so simple even with reference to a borough leader. Up till 2002, till when the collegial board was an executive body in the district, joining of a mandate of the councillor with the function of a borough leader or a deputy borough leader was a violation of the legal interdiction of joining of a mandate of the councillor and performing functions or activities defined in separate regulations, so it was the reason for expiring of a mandate of the councillor determined in article 190 section 1 point 2a of the Elections Statute⁵. When a one-man executive body was introduced, there arose doubts whether joining a mandate of the councillor with a mandate of the borough leader or performing the function of the deputy borough leader is still such a violation or not. It was as late as in 2004 when the legislator added another condition in the form of electing a councillor as a borough leader to article 190 section 1 of ord.wyb. (point 2b) – but there was no reference to performing the function of a deputy borough leader. What was the most important, however, was the fact that the new regulation, according to article 8 of the amended act, was to be applied only in the case of the terms of office following the term of office during which the act took effect, which was the term of office of 2006-2010. Such a move may have implied that when assessed by the legislator, the term "membership in a body" should not have been broadly interpreted. Owing to that implication, electing a councillor as a borough leader should not be judged in terms of the violation of the legal interdiction which was discussed in article 190 section 1 point 2a of ord.wyb., so performing the function of a deputy borough leader should not be judged in this way, either. Such a conclusion could be drawn mainly from the fact that since the legislator decided on the change to be applied only to the following term of office, it was not the point in this case to merely regulate explicitly what had been

⁴ Personally, I am not in favour of such a broad interpretation of the term "membership in a body".

⁵ The act of 16th July 1998 – Elections Statute for district councils, county councils and regional councils of provinces, Journal of Laws 2010, No 176, item 1190, as amended (in Polish: ordynacja wyborcza); hereinafter referred to as ord.wyb.

in force so far, but to make fundamental changes of the legal status during the term of office of 2002-2006. According to the rules concerning amendments, the changes which trigger significant results should not concern the ones who got a mandate before the introduction of the changes. If, therefore, adding of point 2b to article 190 section 1 of ord.wyb. was to serve only to cut off short the discussion and digressions on interpreting the term "membership in a body", the legislator surely would like it to happen immediately and not as late as in two years. Due to these reasons, it could be assumed that in the legislator's assessment, after the changes made in the organisation structure of the district between 2002 and 2006, owing to legislative defects, joining a mandate of the councillor with performing the function of a borough leader was acceptable. Performing the function of a deputy borough leader is fully acceptable from the moment of the liquidation of collegial boards and the deputy's loss of the attribute of "the member of a body", although it is an irrational assumption. It results from the very essence of replacement that this person performs the function of a borough leader themselves in some situations after all. Since, however, the analysed research problem concerns joining a mandate of the councillor with performing the function of a deputy borough leader, what should be also examined is the regulations establishing the interdiction addressed to the latter one.

It appears that the basis to review the above advanced thesis that joining a mandate of the councillor with the function of a deputy borough leader is acceptable is provided by article 27 of usg. The current reading was given to this regulation when it was introduced to the districts of one-man executive bodies. This regulation being the equivalent of article 25b of usg, article 21 section 8 of usp and article 23 section 3 of usw is addressed to the borough leader and, interestingly enough, also to the deputy borough leader. The deputy as such is not a district body and does not exercise the entrusted mandate and despite that, the legislator established for this function the same interdictions as for the borough leader. It mainly results from the obvious role that is played by the deputy. That is why the legislator assumed in article 27 of usg that the function of a borough leader and a deputy borough leader cannot be joined with:

- 1) the function of a borough leader or a deputy borough leader in a different district,
- 2) the membership of the bodies of self-government units, including the district in which they are a borough leader or a deputy borough leader,
- 3) being employed in government administration,
- 4) a mandate of the Member of Parliament or senator.

From the point of view marked by the title of the research problem, what is significant is the interdiction established in point 2. It follows from the point that a borough leader and a deputy borough leader (in fact, a person performing the function of a borough leader or a deputy borough leader⁶) cannot be simultaneously a member of the body of any self-government unit, including "their" district. Therefore, from the perspective of a deputy borough leader the analysed issue looks as follows: since 2002 a deputy borough leader has

⁶ In article 27 of usg the legislator used the term "function" of a borough leader or a deputy borough leader, which means that the interdictions established in article 27 of usg refer not only to a borough leader and a deputy borough leader, but also to every person who on different basis and on account of different events performs these functions, not necessarily filling the post personally – and similarly WSA (Province Administrative Court) in Olsztyn in the sentence of 29th November 2012, II SA/OI 1210/12, LEX No 1241114.

been forbidden by the legislator to be simultaneously a councillor in spite of the fact that in the provisions addressed to councillors they are not forbidden to perform the function of a deputy borough leader. Proper legislation would require the interdictions should be bilateral and then it would be obvious what positions or functions cannot be joined. Unfortunately, article 25b point 3 of usg, article 21 section 8 point 3 of usp and article 23 section 3 point 3 of usw are not a perfect reflection of article 27 point 2 of usg. However, what cannot be forgotten is the content of article 383§1 point 6 of the Election Code⁷ (formerly article 190 section 1 point 2b of ord.wyb.), which recognises the election of a councillor for a borough leader as the condition of the expiration of their mandate. So, a councillor is indirectly forbidden to join this mandate with the function of a borough leader. Unfortunately, article 383§1 of the Election Code does not provide for such a sanction in the case of joining a mandate of the councillor with the function of a deputy borough leader.

Despite legislative defects, there is no doubt that if one and the same person performs these two functions, what is applied are the regulations establishing the interdictions addressed both to a deputy borough leader and to a councillor. In this connection it is not important that in the provisions of self-government acts concerning the interdictions of joining a mandate of the councillor the legislator did not take into consideration the change which took place in 2002 in the district as it was taken into consideration being given a new reading in article 27 of usg, which establishes interdictions addressed to a borough leader and a deputy borough leader.⁸ The whole problem comes down to the question of what the results of such joining will be. Will such a person lose a mandate of the councillor or should they be deprived of the function of a deputy borough leader? From the point of view of a councillor, the violation of the legal interdiction of joining a mandate of the councillor with performing functions or activities determined in separate provisions constitutes according to article 383§1 point 5 of kw (the equivalent of former article 190 section 1 point 2a of ord.wyb.) the condition of the expiration of a mandate. Without a doubt, the breach of the interdiction determined in article 27 point 2 of usg is exactly such a violation. From the deputy borough leader's point of view, the issue looks completely different. A deputy borough leader does not hold a mandate as a borough leader or a councillor does. That is why in the case of a deputy borough leader there is no application of the provisions concerning the results of joining a mandate with other mandates or functions providing for the expiration of a mandate in the case of the violation of such a legal interdiction of joining. What is more, the legislator did not provide for any sanctions with reference to a deputy borough leader for the violation of interdictions established in article 27 of usg. Does it therefore mean that in the case of joining a mandate of the councillor with performing the function of a deputy borough leader we always deal with the expiration of a mandate and retention of the post of a deputy borough leader? Does it thus mean that it is "stronger" than the membership in the executive body of a self-government unit? It seems yet to be a not completely correct thesis. Analysing the problem, one cannot forget that performing the function of

⁷ The act of 5th January 2011. The Election Code, Journal of Laws No 21, item 112 as amended (in Polish: kodeks wyborczy); hereinafter referred to as kw.

⁸ For many representatives of the doctrine it is so obvious that it is indisputable – and so, for instance, S. Jaroszyński, *Commentary on article 25b...*, thesis 3; and so B. Dolnicki, A. Wierzbica, *Commentary on article. 23 of the province self-government act*, thesis 6, [in:] *Province self-government act. Commentary*, B. Dolnicki (ed.), Warszawa 2012, Lex; access 21st September 2014.

a deputy borough leader takes place on the basis of a borough leader's instruction. Owing to that fact, the statement of invalidity of this instruction is possible if it was issued with the violation of law. We deal with such a case in a situation when a person was appointed a deputy borough leader by means of this instruction (or when a person was only entrusted with the duties of a deputy borough leader) and this person already holds a mandate of the councillor. However, a problem will arise when a given person had first performed the function of a deputy borough leader and later they became a councillor. In such a case at the moment of issuing the instruction it was lawful, so the statement of its invalidity cannot be taken into account. So, since the possibility of applying supervision measures depends on the chronological sequence of events, it seems that the analysed problem should be considered exactly taking into account which of the functions was performed by a given person as the first one. If the person had previously been a member of a deciding collegial body and only later they were appointed as deputy borough leader, there is no doubt that there was a violation of legal interdiction determined in article 27 point 2 of usg. In this connection there were circumstances determined in article 383§1 point 5 of kw, which in turn results in the expiration of a mandate of the councillor. On the other hand, this instruction, owing to the content of article 27 point 2 of usg, is unlawful and that is why the supervision body should state its invalidity. Therefore, since such an instruction is eliminated from the conduct of legal transactions (with the *ex tunc* result), a councillor does not become a deputy borough leader at all and thus does not violate the legally determined interdiction resulting in the expiration of a mandate. This problem attracted attention during the examination of the case of entrusting a county councillor with the duties of a deputy borough leader till the moment of appointing appropriate replacement⁹. In this case the provincial governor called the borough leader to reverse the above mentioned instruction as unlawful within 14 days from the date of receiving the summons. When the latter refused to do so, the provincial governor appealed against the instruction to the administrative court. Obviously, he also recognised that in such a case supervision measures should be applied to the borough leader's instruction, entrusting the county councillor with the duties of a deputy borough leader. Otherwise instead of calling the borough leader to reverse the instruction, he should turn to the county council under the course of article 85a of usp for adopting a resolution concerning the statement of the expiration of a mandate of the councillor, and in the case of its idleness he should give a substitute ruling. He did not do it, though.

Getting back to the analysed issue of giving the instruction to appoint a person holding a mandate of the councillor a deputy borough leader (or to perform the deputy borough leader's duties), it should be indicated that there will arise a problem when, despite the existence of necessary circumstances, the supervision body does not state the invalidity of the instruction – appropriateness of applying the discussed supervision measures in the specific case was left for the exclusive competence of the provincial governor as a supervision body¹⁰. Admittedly in order to eliminate the instruction which violates the law, it would be alternatively possible to appeal against that instruction to the administrative court under the course of article 101 of usg, article 87 of usp and article 90 of usw. However, in the case of not ap-

⁹ From the reasons for the judgement of WSA (Province Administrative Court) in Olsztyn of 29th November 2012, II SA/OI 1210/12, LEX No 1241114.

¹⁰ So Supreme Administrative Court (NSA) in the decision of 19th February 2013, I OSK 35/13, Legalis, No 919410.

plying the supervision measures and not stating the invalidity of the instruction it seems that the only way of healing this situation would be to issue the statement of the expiration of a mandate of the councillor. What is important, though, is the will of the person concerned. If a person decides to perform the function of a deputy borough leader and enters it, it is obvious that being aware of the existing interdiction of joining these two functions they agree to the expiration of a mandate of the councillor. However, if despite the issued instruction this person chooses the membership in the executive body and does not take on performing the duties of a deputy (abandoning them), it seems this person should not lose a mandate of the councillor merely because of the fact that the instruction appointing them to a given position was issued (to perform a given function), whose invalidity was not stated although it violates article 27 point 2 of usg. In article 27 point 2 of usg the legislator clearly determines the interdiction of joining the function of a deputy with the body membership and in article 383§1 point 5 of kw the expiration of a mandate in the case of the violation of this interdiction, and not the expiration of a mandate as a result of issuing the instruction itself. There is a considerable difference between performing the function of a deputy and being appointed one (being entrusted with the duties). So, if a given person does not take on performing this function (that is, does not accept it), in fact there is no violation of article 27 point 2 of usg. If, however, the deciding body, contrary to the above-mentioned point, stated the expiration of a mandate to the councillor, the councillor could appeal against the resolution of the council pleading the instruction which violates the law and not taking on the function of a deputy borough leader in the claim. The councillor would have to simultaneously appeal against the instruction itself so that the court can state its invalidity in place of a not acting provincial governor, as a result of which the invalidity of the resolution of the council concerning the expiration of the mandate of the councillor could be then stated.

Introducing appropriate legislative changes could also be some kind of solution. The changes consist in among others, for instance, accepting, as it was done by the legislator in article 24f section 2 sentence 2 of usg (article 25b section 3 sentence 2 of usp, article 27b section 3 sentence 2 of usw) the fact that appointing a councillor a deputy borough leader (or to perform the deputy's duties) is invalid by right of law. Then all the problems with the lack of taking appropriate actions by the supervision body would be eliminated and a councillor would retain the mandate in every case. Another (opposite) possibility would be to recognise such appointment as another condition for the expiration of a mandate of the councillor, following the example of electing the councillor as a borough leader. In principle, in this case such a condition would have to be constituted by performing the function of a deputy borough leader and not a mere appointment. While with reference to election it is acceptable for the election itself to result in the loss of the mandate as in a sense it depends on the will of the elected person which is presented in the act of standing for the position itself, with reference to appointment it should not be assumed that the appointment itself is desired by the person concerned. This is why including the appointment as a deputy borough leader (or to perform the deputy's duties) in the catalogue of conditions immediately resulting in the expiration of a mandate of the councillor, this person's rights could be violated. Perhaps this person would not be interested in performing this function at all, whereas they would be deprived of a mandate of the councillor just because of the fact that a borough leader issued such an instruction against their will. So, only taking on

performing duties of a deputy borough leader (real performing of this function) should result in the loss of a mandate of the councillor as it would be tantamount to the consent to the appointment that was made.

If, however, chronological sequence of events was different and presented itself in the way that the incumbent deputy borough leader (performing the duties of a borough leader) became a councillor, certainly, which I have already described, it would be impossible to state the invalidity of the act on the basis of which they performed the function, that is the instruction. At the moment of its issuing it did not violate article 27 point 2 of usg, and therefore it was not illegal. In this situation, as a matter of fact, the councillor would violate the legal interdiction of joining the mandate with performing the function determined in the act, but according to article 383§5 of kw, if they performed this function before the day of the election, they are obliged to abandon it within 3 months from the date of taking an oath. Therefore, also in this case everything would depend on their will. If they abandoned the function of a deputy borough leader, then they could still hold the mandate of the councillor with no obstacles. Otherwise, the council would be obliged to state the expiration of their mandate within a month from the lapse of the aforementioned time limit. Still if the council did not adopt such a resolution in time against the obligation resting with it, then the supervision council should start the procedure connected with the issuing of a possible substitute instruction.

Summing up, it is obvious that since according to article 27 point 2 of usg the function of a borough leader cannot be joined with the membership of the body of self-government unit, that is for instance with a mandate of the councillor, it should also be assumed that this interdiction analogically works in the opposite direction despite the fact that it is not provided for in article 25b point 3 of usg, article 21 section 8 point 3 of usp and article 23 section 3 point 3 of usw. Owing to that fact, in order to eliminate any doubts, what should be called for is the fastest possible change of the content of article 25b point 3 of usg, article 21 section 8 point 3 of usp and article 23 section 3 point 3 of usw through its broadening by the interdiction of joining a mandate of the councillor with the function of a borough leader and a deputy borough leader.

Bibliography

Dolnicki B., Wierzbica A., *Commentary on article. 23 of the province self-government act*, thesis 6, [in:] *Province self-government act. Commentary*, B. Dolnicki (ed.), Warszawa 2012.

Jaroszyński S., *Commentary on article 25b of the district self-government act*, [in:] *District self-government act. Commentary*, R. Hauser, Z. Niewiadomski (ed.), Warszawa 2011.

District self-government act of 8th March 1990, Journal of Laws 2013, item 594 as amended (in Polish: ustawa o samorządzie gminnym).

County self-government act of 5th June 1998, Journal of Laws 2013, item 595 as amended (in Polish: ustawa o samorządzie powiatowym).

Province self-government act of 5th June 1998, Journal of Laws 2013, item 596 as amended (in Polish: ustawa o samorządzie województwa).

The act of 16th July 1998 – Elections Statute for district councils, county councils and regional councils of provinces, Journal of Laws 2010, No 176, item 1190, as amended (in Polish: ordynacja wyborcza).

The act of 5th January 2011. The Election Code, Journal of Laws No 21, item 112 as amended (in Polish: kodeks wyborczy)

Judgement of WSA (Province Administrative Court) in Olsztyn of 29th November 2012, II SA/Ol 1210/12, LEX No 1241114

Decision Supreme Administrative Court (NSA) of 19th February 2013, I OSK 35/13, Legalis No 919410.

Summary: In the self-governing system acts the legislator introduced the *incompatibilitas* principle, according to which, among other things, it is not allowed to join a mandate of the councillor with the membership of another body of a self-governing unit.

The content of this interdiction was established in 2001, when the bodies of all self-governing units were collegial. When in 2002 a fundamental change was made in the system of an administrative district by means of eliminating the collegial management and making a borough leader the one-man executive body, the legislator did not take this change into consideration in the provisions determining the *incompatibilitas* principle. Since only joining a mandate of the councillor with the membership of the body of a self-governing unit is still prohibited, the author has made an attempt to answer the question whether it is therefore possible for the councillor to simultaneously perform the function of the deputy borough leader in the valid legal status. Consequently, the issues concerning possible sanctions which will be applied in the case of such a situation have also been analysed in the context of the given answer.

Key words: *incompatibilitas* interdiction, joining of a mandate of the councillor, deputy borough leader, expiration of a mandate of the councillor, statement of nullity of a borough leader's disposition

RADNY JEDNOSTKI SAMORZĄDU TERYTORIALNEGO ZASTĘPCĄ WÓJTA

Streszczenie: Prawodawca w samorządowych ustawach ustrojowych wprowadził zasadę *incompatibilitas*, zgodnie z którą m.in. mandatu radnego nie można łączyć z członkostwem w organie innej jednostki samorządu terytorialnego. Brzmienie tego zakazu zostało ustalone w roku 2001, kiedy to organy wszystkich jednostek samorządowych były kolegalne. Gdy w roku 2002 dokonano zasadniczej zmiany w ustroju gminy, likwidując kolegalny zarząd i ustanawiając organem wykonawczym jednoosobowo wójta, prawodawca nie uwzględnił tej zmiany w przepisach określających zasadę *incompatibilitas*. Skoro nadal zakazane jest jedynie łączenie mandatu radnego z członkostwem w organie innej jednostki samorządowej, autorka podjęła się próby udzielenia odpowiedzi na pytanie: czy możliwe jest zatem, aby w aktualnym stanie prawnym radny pełnił równocześnie funkcję zastępcy wójta? W konsekwencji, w kontekście udzielonej odpowiedzi, analizie poddane zostały także kwestie dotyczące ewentualnych sankcji, jakie znajdą zastosowanie w razie zaistnienia takiej sytuacji.

Słowa kluczowe: zakaz *incompatibilitas*, łączenie mandatu radnego, zastępca wójta, wygaśnięcie mandatu radnego, stwierdzenie nieważności zarządzenia wójta