

S u m m a r y
of the PhD dissertation on
Legal character of the personal order,
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The subject of the PhD dissertation is the theoretical analysis of issued connected with the legal character of the personal order. The starting point of the dissertation is the assumption that performing employment in the uniformed services has not been submitted to the regimentation of the act dated 26th June 1974 – the Labour Code¹. The regulation regarding the employee functioning status decided that both establishment and formation of the constitutional elements of the employment relationship and termination of such relationship is done by the administrative act². Thus, we are dealing with some modified employment relationship regulated by the Labour Code but with the employment relationship that exists due to ruling, unilateral dictum of a public administration body³ directed at the person employed in the public administration instrument⁴. Such act is a specific, imperative type of official orders, for which the base of issuing is the legal regulations of universally binding law. Such formula of forming relations between the employed person and the employing body was present in some public administration bodies, which are commonly referred to as national uniformed services⁵. Such services include: Police, Government Protection Bureau, Central Anti-Corruption Bureau, Internal Security Agency, Intelligence Agency, State Fire Service, Border Guard, Customs Service, Prison Service, Polish Armed Forces, Military Intelligence Service and Military

¹ Dz.U. from 2014, item 1502 as amended.

² J. Łętowski clearly indicated that the acts of the employer-state authority, the content of which includes appointment to the position, removal from the position, suspension in the exercise of official function, transfer to another position or to another office - have a character of ruling, unilateral act; they are both official orders and administrative acts. J. Łętowski, *Polecenie służbowe w administracji [Official order in administration]*, Warsaw 1972, p. 150.

³The status of the public administration body (official superior empowered to employ) decides on the fact that the employment relationship has a character of *strict* official sense. T. Kuczyński, *Pojęcie stosunku służbowego, [A notion of service relationship] [w:] System...*, p. 12.

⁴The rulership, including the type expressed as a feature of administrative decision, are lacking in the acts of appointment issued in the relations shaped by the Labour Code. Por. S. Borowiec, *Mianowanie jako podstawa nawiązania stosunku pracy z urzędnikami państwowymi [Appointment as a foundation of establishing the employment relationship with the national officials]*, OMT 1987, No. 6, p. 26. „Increase in availability” of the appointed employee compared to the employee employed based on the employment contract is moderate. It does not include especially the typical for the service relationship rendering service with danger to their life or health.

⁵In the Constitutional Tribunal decision from 14 December 1999, SK 14/98, OTK ZU No 7, item 163 it was found, based on the service relationship of the professional soldier that the service relationships in the uniformed formations „are not the relations of employment, but they have character of administrative-legal relations, created by appointment in connection with voluntary reporting for service”. Similarly, the Supreme Administrative Court in its decision from 5th of June 1991, II SA 35/91, ONSA 1991, no. 3-4, item 64, found that the service relationship of the employed based on the appointment of the professional soldier, officers of Government Protection Bureau, Military Intelligence Service and Military Counterintelligence Service, Central Anti-Corruption Bureau, Police and Prison are not the employment relations within the meaning of art. 2 of the Labour Code. They are administration-legal relations”.

Counterintelligence Service. Regulations of performing employment in such uniformed services are contained in the statutory regulations regarding the administrative law, called official experiences. Establishing of the employment relationship is done by an instrument of appointment of the officer issued by the service superior towards the subordinate⁶.

The character of the employment of the uniformed service officer was formed in a special way. The employment relationship itself was formed as a service relation, sometimes referred to in the doctrine as the administrative employment relationship. The administrative acts establishing the employment relationship, shaping its content and terminating it are imparted with the virtues of administrative decisions in the meaning of art. 104 § 1 of the Code of Administrative Procedure by the explicit legal regulation each of the official experiences. In order to underline that these administrative decision were located in so individual area of social relations (relation of official subservience of the subordinate towards the superior) that they have a separate generic⁷ name: personal order.

The arguments contained in the hearing made it possible to isolate the specific characteristics of the administrative (decision) acts influencing the service relationship in the uniformed services, i.e. personal orders. The internal systematics of the dissertation complies with those features. The decisions issued in cases regarding the service relationship of the officers deserve particular attention due to the fact that in an independent, one-sided manner (substantially without the will of the other part of the relationship) they establish, shape the content and terminate the service relationship. Traditionally understood employment relationship loses in this case the feature of a relationship based on consensus; it does not include the will of the officer, which is replaced by the service interest, being a variation of the social interest. The will of the officer is subjugated to the will of the body that maintains the public safety and order. Moreover, the service relationships in the uniformed services do not have the combined

⁶The basis for issuing such act are, respectively: 1) art. 28 paragraph 1 of the Act from 6th April 1990 on Police, Dz.U. from 2015, item 355 as amended, 2) art. 23 paragraph 1 of the Act from 16th March 2001 on Government Protection Bureau, Dz.U. from 2004 No. 163, item 1712 as amended, 3) art. 48 paragraph 1 of the Act from 24th May 2002 on Internal Security Agency, Intelligence Agency, Dz.U. from 2010, No. 29, item 154 as amended, 4) art. 52 paragraph 1 of the Act from 9th June 2006 on Central Anti-Corruption Bureau, Dz.U. from 2012 4., item 621 as amended, 5) art. 34 paragraph 1 of the Act from 12th October 1990 on Border Guard, Dz.U. from 2011, No. 116, item 675 as amended, 6) art. 31 of the Act from 24th August 1991 on State Fire Service, Dz.U. from 2009, No. 12, item 68 as amended, 7) art. 78 paragraph 1 of the Act from 27th August 2009 on Customs Service, Dz.U. No. 168, item 1323 as amended, 8) art. 40 paragraph 1 of the Act from 9th April 2010 on Prison Service, Dz.U. from 2010, No. 79, item 523 as amended, 9) art. 9 paragraph 4 of the Act from 11th September 2003 on professional military service, Dz.U. from 2010, No. 90, item 593 as amended, 10) art. 7 paragraph 1 of the Act from 9th June 2006 on service of the officers of Military Counterintelligence Service and the Military Intelligence Service, Dz.U. from 2014, item 1106 as amended.

⁷The practise of using the synonyms of the term "administrative decisions" is known in the Polish legislation. Especially, one may indicate here on: terms: payment order (to denote the tax decision in terms of local taxes), disciplinary decision (to denote the decision published in the field of disciplinary responsibility), certificate of disability (to denote the decisions issued in cases frailty of the body), concessions (to denote the decisions made in the field of economic activity), licenses (to denote the decisions in the field of professional activity), authorisations, permits and approvals (as the decisions made in the field of regulated citizen activity).

advantage. For it is not that to a certain degree the personal status of the officer under the organisation structure of the public administration body is shaped by the administrative decision, and some of the powers and responsibilities - by agreement. On the contrary, the totality of the rights and duties results from administrative decision. The agreement as a form of operation of the body, as a rule, has no place there. This method of adjustment is thus a peculiar form of interference of State in to the employment relationship.

The issues of administrative decisions shaping the service relationships in the uniformed services as it is highlighted in the dissertation premises, have not yet been the topic of monographic publications in the area of science of law. There were some general analysis of the attachment character that link the officer with the employing body, in personal, disciplinary respect and in terms of the rights to official premises⁸, however, the act itself, based on which the officer is employed and performs service, was not evaluated. The issues of personal decisions issued towards the uniformed services officers were discussed in studies regarding much more broad subject, especially concerning the internal area of activity of the administration,⁹ relations between the labour law and administration law¹⁰ and the official orders issued in the executive instruments of the public administration bodies¹¹. The notions concerning the personal decisions (orders) were discussed mainly in articles dealing with individual institutions functioning in the particular uniformed services (usually in periodicals issued by the appropriate ministries for the administration department the service is located in), but also - uniquely - in the textbooks on labour law and social insurances¹². For these reasons, the notion of personal order in the uniformed services deserves to be made a subject of separate, detailed studies.

The main research thesis of the dissertation is based on the premise that the personal order is an administrative decision in the meaning of the Code of Administrative Proceedings, which is at the same time a specific type of official order issued under the official subservience between the superior (service manager) and subordinate. Such specificity results from the fact that

in as a result of its issuing the officer is included into service or removed outside the organisational frameworks of the public administration body. Thus, a personal order marks the

⁸ P. Szustakiewicz, *Stosunki służbowe funkcjonariuszy służb mundurowych i żołnierzy zawodowych jako sprawa administracyjna* [Service relationships of the uniformed services officers and the professional soldiers as an administrative issue], Warsaw 2012, p. 333.

⁹ I. Lipowicz, *Pojęcie sfery wewnętrznej administracji państwowej* [A notion of internal area of the state administration], Katowice 1991, p. 144.

¹⁰ T. Zieliński, *Stosunek prawa pracy do prawa administracyjnego* [A relation between the labour law and administrative law], Warsaw 1977, p. 262.

¹¹ J. Łętowski, *Polecenie służbowe w administracji* [Official order in administration], Warsaw 1972, p. 272.

¹² A. Kisielewicz, *Zarys prawa pracy i ubezpieczeń społecznych* [An outline of the labour law and social insurances], Przemyśl 2004, p. 54-60.

time frames of the official ruling, service discipline, disciplinary responsibility and dependency on the internal regulations of the management. Those are the reasons the order with legal effects presented in the dissertation deserved to be administrative decision; especially in order to open a way of instance and administrative court control for the order addressee to prevent the service managers from being arbitrary in imposing duties on a citizen in a manner that it is done on an officer, that is in the internal operation area of the administration.

The specific thesis of dissertation elaborate the presented main thesis.

In terms of secondary notions, an attention was placed on the legal regimen, in which the service relationship is created in the state uniformed services. Despite the name suggesting the act of appointment from the area of labour law, defined in art. 76 of the Labour Code, the act of appointment of an officer in the uniformed services has no employee or private law quality. It is an administrative decision that high-handedly includes the citizen in a group of people entitled to take actions on behalf of the State (position holder of the government administration body or an officer authorised by such body). The legal base for that decision is, contained in the official experience, a regulation of the administrative law regarding the appointment on the position a person who obtained a positive result in the qualification procedure (administrative proceedings concluded with an order of appropriate qualification committee). The act of appointment for an officer issued under the administrative service relationship is not controlled by the labour courts (common court) as it includes the control carried out in the course of administration instances as well as court and administration control. In case of the act of appointment for an officer, despite forming a relation of official subordination in the public administration (art. 5 § 3 point 3 of the Code of Administrative Proceedings), regulations of the Code of Administrative Proceedings will be applied as – according to the final part of art. 5 § 3 point 2 of the Code of Administrative Proceedings – separate articles (official experiences) „provide otherwise”. A person that obtained a positive result in the service qualification procedure is the person, who obtained a claim to issuing decision appointing for an officer. As it is described by the official experiences, "appointed for an officer..." is a person, who obtained a positive result in qualification procedure. In this case there are some legal regulations, which repeal the exclusion from the administrative courts cognitions of cases concluded with negative decisions in terms of appointment for a position in public administration bodies in the meaning of art. 5 point 3 of the Law on Proceedings before Administrative Courts.

The acts forming the official assignment of an officer are also the personal orders appointing for an official rank. In the part of the dissertation devoted to such type of orders there

is an attempt to evaluate the reasons of the legislature for controlling some of the acts in terms of lawfulness, providing them with a personal order status (administrative decision), which refers to personal orders issued by the official superiors, and other acts with the same subject (provisions of the Polish President) are not included in such control. The change of properties of the body issuing the appointment act from the body located in the service to the constitutional body, does not provide answers to the question whether such exclusion is rational. The issue of personal orders in the subject of appointment for an official rank also creates other important questions connected with the existence or non-existence of the material service relationship (linking the body with the officer) in case of people having their service ranks appointed indefinitely and using them after the appointment for the position is cancelled (release from service), i.e. when the relation with the superior body is reflected only in the name of the rank with an addition of "retired", "reserve" or "in reserve". A problem that requires attention was also posthumous issuing personal orders appointing for a higher service rank. The construction of those regulation indicates that the legal effect of the personal order, as an exception, was formed *ex tunc*. The adjudicating body retracts to the moment of death of the officer with appointing the rank. Unsolved in the doctrine remains the issue whether such decision should be delivered, or announced in the meaning of the Code of Administrative Proceedings regulations.

One of the results of attributing to the personal orders a status of administrative decision is the allowance for their judicial control. Personal orders that indicate the time frames of service relationship (appointment for an officer or release from service) are the orders put through examination during proceedings, and then through the control of administrative court. They decide on having the status of an officer and locating the citizen in the service instrument, based on subordination and service discipline. From those respects it was evaluated whether in case of personal orders issued between the appointment and the release from the service the judicial control is permitted. A thesis was formulated that the status of administrative decision, and so the decisions of the administrative control, is given only to those personal orders that modify important (constitutional) elements of the service relationship, and due to that, they may decide on the continuation of the will (respectively, on its termination) for further service. The administrative court will thus be appropriate to adjudicate on the complaint regarding the final order to change the content of the service relationship; its cognition is excluded where the acts issued by the service superior (may be called personal orders) do not cause a permanent "change" of the service relationship and are indeed official orders that modify the reality of providing service only temporarily or to an insignificant degree. Of key importance in this regard was decoding the meaning of the statutory term "change of service relationship." In cases of

changing, similarly to appointment and release from service, the personal order is controlled by the court as it is the administrative decision.

Other issue discussed in a part of the dissertation concerning the administrative court cognition in cases connected with employment based on the administrative service relationship is the appearance of legal protection present in some cases of judicial and administrative complaints regarding the personal orders. A range of personal orders is described as binding decision and the premises for their issuing is the act of particular content in the internal area of the body activity. Especially, issuing for an officer a service opinion including evaluation on unsuitability for service, according with the dominating view, not being administrative decision, creates a duty for the service superior to issue the personal order of the release from service. Even though this order is controlled by the court, the correctness of the motive resulting in issue of negative opinion is not examined in the court proceeding. When examining the grounds for issuing the order the court determined only whether it was based on previously presented opinion; it disregards that the opinion itself is not controlled by the court. This created a necessity to formulate and expand another specific thesis, according to which in order to provide the officer the right to trial in cases, in which the related personal order fully depends on the direction of the internal act, such act (service opinion) must also be controlled by the court and be provided with a status of personal order (administrative decision) controlled by the administrative court. In other case, the release of the officer from service happens without the right to judicial control.

The internal taxonomy of the dissertation includes: introduction, six chapters (I. Theoretical approach to personal order, II. Personal order of appointment of an officer, III. Personal order concerning appointment for the service rank, IV. Personal orders changing the service relationship, V. Elimination of the personal order results in normal procedure, VI. Affecting the final personal orders in extraordinary procedure) and conclusions. Each chapter (apart from the sixth) is finished with a summary of the text portion covered in it. The conclusion part contains the final conclusions and postulates, resulting from the specific arguments, formulated *de lege ferenda*.

The dissertation was based on the dogmatic method. The source of the arguments was the analysis of the normative material and current works of the doctrine and judicature, especially of Supreme Administrative Court and provincial administrative courts, formed against the background of legal regulations in the decision area that are personal orders. The study results included in the dissertation aim mainly at removal of contradictions appearing in the course of interpretation of legal provisions that shape the service relationship in the military formations. Dissertation was developed using literature and rulings, included in the relevant lists, of

Constitutional Tribunal, Supreme Court, Supreme Administrative Court, provincial administrative courts and - to a limited extent - courts of general jurisdiction.

Outside the scope of the dissertation were left the issues of normative solutions in the sphere of service relationships existing in other countries and comparative analysis in this area. The reason for that was the assumed volume of the dissertation.

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