

EXCLUSIVE OR ALTERNATIVE COMPETENCE OF PREFECT INSTITUTION AND OF LOCAL/COUNTY COUNCIL TO DETERMINATE LOCAL/COUNTY COUNCILOR'S MANDATE CESSATION, BEFORE THE EXPIRE OF ITS NORMAL TERM, WHEN THE MEMBERSHIP OF POLITICAL PARTY ON WHOSE LIST HE WAS ELECTED WAS LOST

Eugenia IOVANAS, PhD.

Aurel Vlaicu University
Faculty of Humaniste Science-Public Administration
iovanaseugenia@yahoo.com

Abstract:

In order to determine whether there is an exclusive competence of prefect institution to ascertain local / county councilor's mandate cessation before the expiry of his normal term, in the event of membership loss related to political party or national minorities organization on whose list one was elected, under provisions of art. 12 par. 3 of the Law no. 393/2004 on the Statute of local elected representatives, or alternatively with those of Local / County Council under the conditions stipulated by art. 9 par. 3 and 4 of Law no. 393/2004, the interpretation of afore-mentioned law provisions rose to divergent opinions.

Keywords: *local elected, local council, prefect, mandate cessation, political party member, exclusive competence.*

On February, 10th, 2016 under Administrative Litigation summons, the applicant C.G. in contradiction with the defendant - Arad County Prefect Institution requested the annulment of Order no. 64 /February, 2nd, 2016 issued by Arad County Prefect, as unlawful. The application subject concerns the fact that the demandant has the legal right to continue performing as local councilor in the Local Council, respectively, deputy mayor with indemnity payment.

In his statement of reasons, the applicant asserted that he had served as local councilor and deputy mayor of Arad Social Democratic Party.

Order no. 64/February, 2nd, 2016 which stated ope legis cessation, before the expiry of counsel mandate normal term, is based on notificationno... February, 17th, 2016 issued by Arad county organization of the Social Democratic Party, without specifying Prefect address content.

The applicant states that he has not been excluded from the PSD and there is no ruling of exclusion from local organization he is part of, therefore the issued order is unlawful.

The complainant also pointed out that there is no report issued by the mayor and the secretary of the commune, accompanied by justificative documents, according to art. 12 par. 2 of Law no. 393/2004.

The defendant pointed out that through Address no. 17 /February, 2nd, 2016 of Arad County Organization of the Social Democratic Party, registered under no. 987 / February, 2nd, 2016, was informed about the complainant exclusion from Social Democratic Party, because of repeated inobservances. In this respect, the defendant issued Order no. 64 / February, 2nd, 2016, on the legal cessation of the councilor mandate.

Regarding the complainant's allegations on the necessity of finding report issuing, a report signed by mayor and secretary, the defendant considered that it confuses the situation with the termination of the mayor's term before the expiry of his normal term.

He also considered that the contested order was issued in compliance with the legal provisions.

On February, 2nd, 2016 through Address no. 17 (f.17) issued by Social Democratic Party and sent to defendant, the institution of Arad County Prefect was informed that to Mr. Costut Gligor - the complainant in question- was applied the sanction of exclusion from party for repeated inobservances of the PSD Statute. It was also stated that, according to provisions of art. 9 par. 2 letter h1 of Law no. 393/2004, the counsel warrant held by the plaintiff ceases ex lege before the normal expiry of the mandate. Consequently, Arad County Prefect was requested to take legal steps to vacate the position of counselor held by Mr. Costut Gligor by issuing an order, according to provisions of art. 12 par. 3 of Law no. 393/2004.

By Order no. 64 from February, 2nd 2016 issued by Arad County Prefect Institution (f.6), it was ascertained, ex lege cessation of councilor mandate before the expiry of normal term, regarding Mr. Costut Gligor from Cărand Local Council. Therefore, his place was declared vacant.

At the basis of issuing of this order, the provisions of art. 9 par. 2 letter H1; art. 12 par. 3 of Law no. 393/2004 and art. 26 par. 1 of Law no. 340/2004 were invoked.

According to legal provisions applicable in this case and regulated by art. 9 par. 2 letter. h1 of Law no. 393/2004: "The quality of a local councilor or a county councilor ceases, before the expiry of normal term, in the following cases: ... h ^ 1) loss of membership of political party or of national minority organization on whose list he was elected;"

In the present case, address no. 17 / February, 2nd, 2016 issued by PSD mentions that the applicant was excluded from this party, in which case his mandate of councilor ceases.

However, the cessation of local councilor status is established by local council where the concerned person was employee. In present case, the finding falls within the competence of the Cărand County Council - where the applicant held the position of local councilor from the PSD and, not within Competence of Arad County Prefect Institution.

In this regard, Tribunal Instance summons legal provisions of art. 9 par. 3 - Law no. 393/2004 according to which: *"The legal completion of counsel mandate shall be determined by decision issued by local council, respectively, by county council, at mayor proposal or, as the case may be, of president of the county council proposal or of any counselor proposal.*

(4) In the cases provided for in paragraph (2) lit. C) - e) and h ^ 1), the council decision may be appealed by the counselor to the administrative litigation court within 10 days from the communication. The court will rule within no more than 30 days. In such a case, the prior procedure is no longer accomplished and the first instance decision is final and irrevocable. "

Otherwise, in present case there is no decision issued by Local Council which ascertain that Mr Costut Gligor's mandate has ceased.

Contrary to the above mentioned legal provisions, the defendant - Arad County Institution of the Prefect issued Order no. 64 / February, 2nd, 2016, in violation of these legal provisions.

The Tribunal also invokes the provisions of art. 30 related to provisions of art. 31 par. 5 of the Law no. 215/2001, according to which validation and invalidation of the local councilor mandates is done by the local councils.

In addition to the above, in present case file, Tribunal notes that no decision of expelling the plaintiff from PSD party was issued.

At the hearing of the case, the defendant representative asserted that, apart from the notification / address no. 17 / February, 2nd, 2016, there is no other act on whose basis Arad County Prefect Order no. 64 / February, 2nd, 2016 was issued, respectively, no party exclusion decision was given and communicated.

By court order No. 607 of March 23th, 2016, Arad Tribunal ordered the admissibility of the fiscal administrative summons filed by applicant- Costuț Gligor against defendant -Arad County Institution of Prefect, headquartered in Arad, Bdul Revoluției no. 75, Arad County, with the consequence of the annulment of Order no. 64 / February, 2nd, 2016 issued by Arad County Prefect.

By action filed, on April, 12th, 2016, the applicant, P. G.C. sued the defendant Prefect Institution - Arad County, requesting the annulment of order no. 296 / 06.04.2016 on ex lege local councilor mandate cessation, before normal term expiry.

The applicant also requested applicability of the above-mentioned order suspension, until the final and irrevocable settlement of the case, and his reinstatement in all rights conferred by local councilorship, in Zărand Commune's Local Council, respectively, Deputy Mayor of Zărand Commune, until legal mandate expiration, with retroactive payment of all unpaid salary rights, until effective reinstatement. The applicant showed that, in essence, his exclusion from party was unlawful and non-statutory, since March, 3rd, 2016, session was not legally convened, the decision of exclusion was not communicated to him, and Zărand City Hall address submitted was not motivated, signed and stamped.

At the same time, the applicant asserts that he did not commit any inobservances, which, according to Statute provisions, impose the sanction of exclusion from party, and the appeal has not yet been resolved by the end of the mandate. Therewith, the activity of local public administration authority, right before local elections, in absence of mayor and a deputy mayor (the executive authority) may be seriously disturbed.

The applicant considers contested order to be unlawful, since the status of local councilor ceases, in accordance to law provisions, before expiry of the mandate, only in the case of political party membership loss.

The applicant states that he has not lost his membership of U.N.P.R Party, either by resignation or by exclusion, neither by another party enrollment, as stipulated in the U.N.P.R. Statute. He also affirms that he has not been excluded from U.N.P.R and there is no ruling on exclusion from the local organization on his behalf.

Moreover, the cessation of the council's mandate is established by Local Council, as result of the mayor or any counselor motion. The council's decision may be appealed, by the counselor, in front of court, within 10 days of its communication.

In the present case, no decision on local councilor's mandate cessation issued by Cărand Local Council has been communicated to applicant. Furthermore, the applicant considers that Perfect order is unlawful for not being competent to declare local councilor mandate cessation.

The plaintiff mentions that Arad County Prefect, also, issued Order no. 64 / February, 2nd, 2016, which equally concluded ex lege cessation of local council mandate, before expiry of the normal period. The plaintiff appealed this order in front of court. Thus, Civil Adjudgement no. 607 / March, 23 nd, 2016 issued by Arad Court, in file no. 575/108/2016, stated the annulment of unlawful order.

The complainant considers that there should be a decision issued by Cărand Local Council, after mayor proposal, which establishes both ex lege cessation of local councilor mandate and invalidation of local councilor mandate.

The defendant's injunction -Arad County Prefect's Institution - requested the action dismissal, indicating, on one hand, that regarding the request to suspend order execution it was not motivated from the perspective of the well-justified case and of imminent damage, according to art. 14 par. 1) Law no. 554/2004. On the other hand, as regards case substance, the defendant pointed out that he only had noticed a state of affairs, sanctioned by power of the law, in the circumstances in which the applicant lost his membership of the political party on whose list he was elected.

The notice of Arad County National Union for Romania Progress, regarding the exclusion of the applicant from the members of this political party was addressed to Arad

Prefect Institution. In this respect, on April, 6th, 2016, Arad County Prefect issued Order no. 296/2016, regarding ex lege mandate cessation, before expiry of the normal term mandate, as local councilor in the Zărand Local Council. By summons formulated in contradiction with Arad County Prefect, the applicant requested the court to abate Order no. 296, issued by the Prefect of Arad County on April, 6th, 2016.

At the same time, the applicant requested the court to suspend applicability of this order, until final settlement of the case, and to be reinstated in all right, which he benefits as local councilor and Zărand commune Deputy Mayor, retroactive payment of all salary rights.

Regarding present case under discussion, the jurisprudential exam reveals the two diverging opinions, which is why we believe that the following aspects should be mentioned.

First of all, it should be noted, regarding summons on suspension of the contested order that the application for suspension of any administrative act, art. 15 of Law no. 554/2004, is admissible to the extent that requirements of art. 14 on Law on Administrative Litigation are fulfilled.

This is also the solution for judicial practice unification, adopted in the plenum, by the judges of the High Court of Cassation and Justice, the High Court of Cassation and Justice, related to which Supreme Court has invariably issued case decisions (for example Decision No. 2367 Of June, 21th, 2006, published in case-law 2006 II, pp. 227-229).

However, in present case, no claim was made, no support was given and much less, it was proved that there was a well-founded case, justifying the fact of taking this measure. The assertion with a high degree of generality, that implementation of contested administrative act will create an imminent damage, both to applicant and to institution where he belongs, namely City Hall Zărand, is not capable of requirements fulfillment, those imposed by legislator, as long as above mentioned requirements must be met cumulatively and not alternatively.

In any case, the notion of imminent damage is defined by art. 2 par. 1) letter ș) of Law no. 554/2004 and represents the future and foreseeable material damage or, as the case may be, the foreseeable disturbance of public authority or of public service

functioning; in this case, it can not be a serious disturbance of Zărand Local Council activity, since deputy mayor of Zărand commune is delegated. Therefore, this petition will be dismissed.

On the other hand, it is mentioned that according to art. 9 par. 2) letter h1 of Law no. 393/2004 on the statute of local elected representatives, as subsequently amended and supplemented, the status of local councilor or county councilor lawfully ceases, before expiry of normal term, in case of political party or of national minority organization membership loss, when comes to afore-mentioned organisation lists, on which the councilor was elected.

According to par. 4) of the same law, in cases provided for in paragraph 2), letters c) - e) and h1), the council decision may be appealed by counselor to administrative court, within 10 days from its communication. The court shall pronounce within maximum 30 days, in this case, the preliminary procedure being no longer carried out, and the decision of first instance is final and irrevocable.

Last but not least, according to art. 12 par. 3) of the same law, in case provided by art. 9 par. 2) letter h1), within 30 days from notification sent to political party or to organization of citizens belonging to national minorities, on whose list local councilor or county councilor was elected, the prefect decides, by order, mandate cessation of local or county councilor, before the expiration of its normal duration, and declares vacant the place of local or county councilor.

That being so, it is unequivocally clear, that the court can be invested only within the limits envisaged by the legislator, that is, to verify lawfulness of the order which declared ex lege mandate cessation, before the expiry of normal period of office, held by the so-called PG - local councilor of Zărand Local Council.

Having said these, we consider that in situation of issuing the order to cease the mandate of local elected, the law was applied by Arad County Prefect, in a pure and simple manner, taking into consideration and adequately valorizing Arad County Organization of the National Union for the Progress of Romania no. 1/2016 notification, registered at Arad County Prefect Institution, under no. 2503 / March, 14th, 2016, along with the provisions of art. 9 par. 2 letter h1) and par. 4, respectively art. 12 par. 3 of Law

no. 383/2004, on Statute of local elected representatives, with subsequent amendments and completions, 2503 / March, 15th, 2016 of Legal and Administrative Litigation Service.

In other words, in particular, mandate cessation intervenes by law virtue, the Prefect merely ascertaining a state of affairs which concerns the applicant, findings being done on the basis of notification issued by political party on whose list the applicant was elected, i.e Notification to Arad County Organization of the National Union for the Progress of Romania no. 1/2016, registered at Arad County Prefect Institution under no. 2503 / March, 14th, 2016.

We fully appreciate the fact that provisions of art. 9 par. 4 of the Law no. 393/2004, regarding term of filing the complaint and term in which the court takes a final decision, must be taken into account, even if reference is made to decision of the local council, since, following the amendment of this normative act by Law no. 115/2015, the legislator proceeded to correlate art. 9 par. 4 with art. 12 par. 3 newly introduced legal provisions which expressly set forth:

Except the situation provided in art. 9 paragraph (2) ..letter h index 1, in cases of mandate termination, before the expiry of the normal term, the local council or the county council, as the case may be, adopts in the first extraordinary session, at mayor proposal, or, respectively of president of the county council proposal, a decision to take note of the situation and declare vacant the place of counselor, in discussion.

Therefore, the regard on prefect's lack of competence in issuing of the order for the termination of the mandate is unfounded, having regard clear and unequivocal provisions of art. 12 paragraph 3 of the Law no.393 / 2004. stating that, in case provided by art. 9 par. (2) letter h ^ 1), within 30 days from notification date sent to political party or organization of the citizens belonging to the national minorities on whose list the local councilor or the county councilor was elected, the Prefect finds by local or county councilor order mandate termination, before expiry of his normal duration and declare vacant the place of the local or county councilor.

Regarding the issue of local councilor actual exclusion from the party, we consider that examination of its legality entirely exceeds the limitations of investing the court seised with finding legal cessation mandate of local councilor, before the expiry of its normal duration,

In our opinion, neither the decision to withdraw political support nor the sanction of exclusion from political party, where local councilor hold membership, are not an administrative act, according to Law no. 554/2004 on the Administrative Litigation provisions.

Statutory procedures legality verification rests with the competence of bodies with jurisdictional powers within the political party, in so much as, exclusion contestation ruling rests with the domestic judicial structure competent to solve dispute over the political decision to exclude the party.

Last but not least, in support of arguments put forward, the case-law invoked with reference to Decisions no. 1167 / December, 11th, 2007, no. 915 / October, 18th, 2007, nr. 461 / November, 8th, 2011 and no. 273 / February, 2nd, 2009 unequivocally pronounced by Constitutional Court of Romania, proves to be relevant. Thus, introduction of local councilor mandate termination due to loss of party membership on whose list one was elected, is a consequence of Constitution provisions -art. 8 par. 2- of the, according to which political parties contribute to defining and expressing the political will of citizens.

It is the electorate who grants his vote to a person, in order to carry out a public office, at local government level, in consideration of party's political program of which one belongs at election time. The same political program the elected person is to promote during his office term at county /local level. If the local elected one is no longer a member of the party on whose lists he was elected, it means that he no longer fulfills the conditions of representativeness and legitimacy necessary for the accomplishment of political program for which voters opted. Therefore, it is no longer justified to keep one in public office. The legal provisions in the matter, referring to art. 9 par. 2 letter h1) of Law no. 393/2004, have the purpose of preventing the political migration of local elected representatives from one political party to another, ensuring stability within the local public administration, expressing the political configuration, as it results from the will of the electorate.

The local or county councilor's mandate cessation occurs with loss of party membership on whose lists one was elected, regardless of the reason that led to status loss. In the event that, as result of membership loss, the local political mandate would remain, the political composition of the local council would be altered by elected

representatives will, which is not allowed. If local or county councilor loses membership party status, irrespective of the cause, this entails the revocation of his mandate before legal expiry. Preserving the status of local or county councilor, in the hypothesis that one no longer belongs to party on whose list he was originally elected, would be equivalent to converting that mandate into an independent mandate or possibly belonging to another political party, in which the councilor was subsequently enrolled.

Or, under the current electoral system, which provides ballot for local and county councilors election, this hypothesis can not be accepted, as the current term of office no longer corresponds to initial will of the electorate, who gave his vote to a candidate in consideration of party that he represented at that time.

In this respect, the Constitutional Court has ruled that local or county councilor mandate cessation, lawfully takes place with the party membership loss on whose lists one was elected, regardless of the reason that led to loss of this status.

The Court noted that accepting the fact that a local councilor who, during the exercise of his mandate, leaves the party on whose list he has been elected and uphold his status as local elected, would change the political configuration of the local council, configuration established just as result of citizens' vote.

Bibliographical references;

Law no. 393/2004, on the status of local elected officials, published in the Official Monitor no. Decision no. 1.167/December 11th, 2007, issued by Constitutional Court, published in Romania Official Monitor, Part I, no. 4/January 3rd, 2008, Decision no. 915/ October 18th, 2007, issued by Constitutional Court, published in Romania Official Monitor, Part I, no. 77/November 14th, 2007, - Decision no. 273/ February 24th, 2009, issued by Constitutional Court, published in Romania Official Monitor,, Part I, no. 243/April 13th, 2009, Civil Adjudgement no. 607 dated March 23th, 2016, issued by Arad Tribunal in File No. 575/108/2016 Civil Adjudgementno. 1171/May 17th, 2016, pronounced by the Arad Tribunal in File No. ... final and irrevocable.