DE GRUYTER OPEN

International Conference KNOWLEDGE-BASED ORGANIZATION
Vol. XXI No 2 2015

THE PUBLIC ADMINISTRATOR-JUDICIAL STATUS OF THE MANAGEMENT CONTRACT

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***Abstract**: Public administrator is a new function, which was introduced into the Romanian legislation by Law no. 286/2006 amending and supplementing Law no. 215/2001; the contract management, under which public administrators carry out their responsibilities, is not defined either by legislation or by doctrine, because there are various opinions in the specialty literature ranging from its qualification as a labor contract to the civil nature of this legal relationship. In this article, we try to provide a basis for the contractual administrative view about the management contract concluded between a public administrator and the executive public authority within an administrative territorial unit.*

Keywords: public administrator, management contract, public authority, administrative territorial unit, appointment criteria and procedures.

Relatively new function in the organization of our post- revolutionary democracy, the public administrator was introduced by Law no. 286/2006, modifying and amending Law no. 215/2001.

The legal regime of this function was established by the entire Chapter VIII of the Public Administration Law no.215 / 2001.

Apparently convincing, these regulations refer to the legal nature of the appointment of the public administrator, namely the management contract.

It is easier to demonstrate what this assertion does not imply than what this function involves!

By way of developing this statement, one first portrays what this function of public administrator does not involve:

- a report of constitutional law-characteristic to elected officials, such as the mayor, the president of the county council, who operate under a power of attorney, between the legal person of public law and the person elected on that respective function;
- an employment relationship between the employer of the public administrator [mayor, county council president] and the public administrator [1];
- an administrative act between the head of the institution / public authority and the public administrator, the latter not having the status of civil servant and the act of appointing is not an authority administrative act under oath condition.

What does this function imply in terms of the legal relationship?

- the existence of a management contract cannot lead to the qualification of the contract as being possible, civil, economic or administrative.

In a civilest approach, one has the following opinion: " From the point of view of the legal status, it is considered that one treats a civil contract, of provision of public

DOI: 10.1515/kbo-2015-0083

services, which has the following characteristic features:

- it is an appointed contract, regulated as such by special provisions, respectively Government decision no. 527/2009;
- it *is a bilateral contract* having as parties the institution or public authority under which the decentralized public services work and the person who will hold the position of coordinating director or his deputy coordinator;
- sinalagmatic, the interdependence between the rights and the obligations of the management contract parties being obvious;
- commutative, the rights and the obligations of the parties being known by onerous title [public administrator completion ns.] the coordinating or deputy director following to be paid in accordance with the legal provisions established for budgetary institutions;
- by onerous title [public administrator completion ns.] the coordinating or deputy director following to be paid in accordance with the legal provisions established for budgetary institutions;
- it is a contract of successive performance, the coordinating or deputy director will act on the basis of the objectives and performance indicators, which are covered by the annex to the management contract." [2]

Trying to follow the law regulations raised in this matter, one discovered the GD no. 527/2009 which regulated the management providing for the decentralized public services of the ministries and for the other public administration organs from the administrative- territorial units.

This legislative act can not be applied in the case of the public administrators of territorial administrative units because this post is related to a territorial administrative unit, as there are no subordination relationships between them and the Government so as to allow the government to regulate the activity of administrative units and, on the other hand, the normative act in itself has no legal basis because GEO no.37/2009, based on which the aforementioned decision was adopted, was rejected by the Romanian Parliament!

Interesting to note is that this function has been created "at the level of towns and cities" and "at county level."[3]. In this context, the public administrator is not , in one' s opinion, part of the specialized structure of the county/ local council apparatus because these are only public local/ county authorities, and the public administrator is of the territorial administrative unit, as a legal person of public law as well as the secretary of the territorial administrative unit.

One considers it to be a negligence in the Article 77 of Law no.215 / 2001 in the sense of not including also the public administrator, in addition to other functions listed by the law, in the concept of "city hall" as organizational structure at local level.

In another type of approach, also "civilest", specifically one related to commercial law is the one given by the art. 1 from Law no. 66/1993, the law of management contract, which stipulates the following:

"The management contract is the agreement by which a legal person carrying out economic activity, as owner, entrusts to a manager the organization, directing and managing of its activity on the basis of measurable objectives and performance criteria, in return for payment."

Even a brief analysis of this definition can evidence the fact that this interpretation cannot be given to the management contract related to the public administrator for the reason that the "employer", respectively a part to the contract is a legal entity which conducts economic activity, as owner, which the territorial administrative unit is not [being legal person of public right], and the object of the contract cannot be the organization and management of its activity!

Is the management contract an administrative contract? Let's review a few features of the administrative contract:

- contract parties – one of the parties is obligatorily an authority of the public administration;
- the object – satisfying a public interest;
- judicial inequality of parties- given the fact that one of the parties is obligatorily a public authority, the priority is represented by the public interest to the detriment of the private interest, the freedom of will of the authority is limited by the law, one is in a situation such as the management contract.

In order for a document to be considered administrative contract, a series of **conditions** must be fulfilled:

- „existence of an agreement at will between an authority of public administration and a private person;
- the agreement at will must aim the creation of some legal obligations regarding the provision of services for remuneration;
- the performance is a consequence of the operation of a public service;
- the parties, by an express clause, by type of contract, by the type of collaboration or any manifestation of will, to agree to be applied the system of public law;
- inequality of contract parties;
- extensive interpretation of the contract in favor of the administration, the private person having the obligation to sacrifice its own interests for the accomplishment of the administration public interest, but subject to the right of compensation;
- the right for the administrative authority to take enforcement action unilaterally , because it retains, alongside the quality of a party to a contract, and that of state authority, public power, so it is not necessary to resort to the courts in order to obtain execution or termination of the contract;
- applying the theory of unpredictability, according to which a particular person appears as a collaborator of the government which, in turn, should support the private person[4]."

Proceeding with the analysis of this opinion, let's see the **legal regime applicable to administrative contracts**:

- It is considered that to this contracts both administrative law and civil law regulations are applied.
- In what concerns the **administrative law regulations**, which is the administrative legal regime applicable to such contracts, retain the following conditions:

1. the written form which these contracts must have;
2. the contracts are concluded *intuitu personae*, which means that contracts can not be transmitted to other persons than in the conditions in which the law allows for this to be possible;
3. the competence of litigation arising between the contracting parties lies with the courts of common law, but more and more authors, among which one counts, argue that such disputes should be resolved by administrative courts.

The rules of civil law applicable to the management contract are the ones mentioned by the civilest conception, aforementioned.

In defining administrative contracts [5], it is left the possibility to*:" by means of special laws can be provided and other categories of administrative contracts subject to jurisdiction of administrative courts"*. In this context one considers Law no.215/2001 [even if an organic law] as being a special law in the acceptance of administrative law because this legal basis is the only one which somewhat regulates the legal physiognomy of the public administrator.

In one's opinion, it is imposed, as lex ferenda, a special legal regulation just as a special law of the cultural management contract operates in the field of cultural

institutes, regulating, in detail, all aspects related to this domain[6].As an aside on this issue, one mentions the lack of qualification of the legal nature of the cultural management contract, this entering abruptly in determining the parties, the duration and its object, without clearing whose type this contract belongs to!

As additional arguments in favor of the legal nature of the management contract of the public administrator, as belonging to the category of administrative contracts one brings the following:

- the establishing of the public administrator post exclusively depends on the local deliberative authority will [local/ county council];
- the lawfulness of establishing such a post is exclusively supported by Law no. 215/2001;
- the appointment, removal from function is made by the mayor / county council president;
- criteria, procedures and specific duties are established by the public deliberative authority [local/county council].

All these aspects are related to will and competence of public authorities and are based on administrative acts of authority.

The management contract occurs only after the performance of these mandatory administrative procedures, **imperative**, and the **norm** which supports the existence of this agreement is **permissive** and allows the public authority, if they want, to delegate the fulfillment of responsibilities for coordination of the specialized apparatus or some public services of local / county interest.

The same permissive rule is also encountered in the case in which the mayor/ president of the county council delegates to the public administrator, under the law, the quality of main credit officer.

One observes from this last formulation of the law, on the one hand the consensual nature of certain regulations, and the overlap across these consensus regulations of legal regulations, over the will of the parties, or just this expression is actually the definition of the administrative contract [consensual clauses and clauses of regulation].

Starting from establishing the legal status of the management contract of the public administrator, one can forward some considerations on its status and the relationship it has with the public authorities.

One has seen that the essence element in creating this function, as with any other public service, is the general interest.

If the general interest of the territorial administrative unit demands the appearance of this function then this is established, and, as a consequence, if the public interest requires, this function disappears.

If, in the case of creating this function one saw clear administrative procedures involving both deliberative and executive authorities, in the case of termination of this contract the law does not establish any procedure.

In this case occurs, in one's opinion, the argument of symmetry of legal documents, *mutuus consesus mutuus disensus*, i.e. it is necessary a parallel and concurrent involvement of the public authorities in such a situation. It rises the question of the importance of the management contract and its terms in dialogue with administrative acts!

If at conclusion of the contract the rule is clear, the administrative act is the one which creates the foundation of the function existence and sets the rules of the game, in case of termination of the management contract ahead of schedule, by mutual agreement between the parties through an administrative act, which would be the legal solution?

In fact, in this situation, one should analyze the force of the contract in relation to the force of the administrative act. To be more specific, what if, by a decision of the local / county council it is removed the public administrator position from the

organizational chart ahead of schedule in the management contract? Is it possible? What are the legal consequences?

If one accepts the legal nature of the management contract as an administrative contract then the administrative act which is the basis of the contract and which sets the criteria, procedures and specific tasks then one could accept the idea that this foundation to disappear, i.e. more specifically that the post disappear from organizational chart.

In this context the management contract would no longer have reason to exist.

If one makes an analysis in terms of the will underlying any contract, then it can be seen that the parties / or part of the management contract do not want / does not want termination ahead of schedule.

Which would be the legal solution? In one's opinion one has to return permanently to the level of principles and through this prism to make any legal analysis. The principle supporting the existence and exercise of this function is solely the general interest. If the public interest requires a certain behavior, then the public administration, which serves the general interest, must act accordingly.

In other words, in case of exceptional it may happen such a situation and it would be legal only if the general interest reports this scenario, any kind of legal artifice would be arbitrary and censored, as such by the court of contentious, which is the only one to pronounce in such a situation.

This type of reasoning is based on the status of this function and the special position that the legislator has given it.

As previously mentioned, the public administrator is of the territorial administrative unit, serving, in fact, two public authorities, even if the management contract is concluded only between two parties [mayor/ president of the county council and the public administrator]. At the level of the territorial administrative unit there are also the local/ county council as deliberative authorities which support, by their documents, the foundation of the contract and set the rule of the game. Therefore, starting from here, and the attitude of the public administrator must be consistent with this reality. Beyond the functions and public authorities, the general interest is the one which gives substance to the existence of this public office as expressing the will of citizens to the serve of which the public authorities operate and act.

Conclusions

One of the main objectives declared by the governments which succeeded in the last period was the modernization of the Romanian public administration and, for achieving this goal, various actions have been taken, from legislative changes (see Law no. 286/2006 amending Law no. 215/2001, Law no. 340/2004, The Law of the Prefecture, encouraging decentralization by Law no. 195/2006) to projects for encouraging change, particularly at local level. Thus, inspired by the American model of the city manager, it was targeted the promotion of the public administrator function, function which was institutionalized by Law no. 286/2006. This law aims to increase professionalism at the level of local public administration in Romania and to provide the separation of the political from the administrative.

The reason for choosing this topic was the high potential for generating a reform of this function, the public administrator having the possibility to be, if the job creation is not vitiated by other interests, a good source of expertise, information and professionalism at local level.

In light of this analysis of the legal nature of the public administrator management contract, one concludes that it meets all the characteristics of an administrative contract which is based on an administrative authority act adopted or issued by a public authority. It is also imposed to issue a normative act subsidiary to the organic norm which supports the existence of this public function, which clearly defines its legal nature and all previous features,

simultaneous and posterior to the conclusion and performance of the management contract, contract which supports the functioning of this public office, relatively new, introduced in the system of the public positions in Romania.

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