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Relationship Between the Act on Service Relationship of Members of Security Forces and the Code of Administrative Procedure

DVÚ 3/2: Vztah zákona o služebním poměru příslušníků bezpečnostních sborů a správního řádu (Relationship Between the Act on Service Relationship of Members of Security Forces and the Code of Administrative Procedure)

Introduction to the problem

In the Czech legal system, legal regulation of the service relationship of members of security forces can be found in Act No. 361/2003 Coll., on the service relationship of members of security forces, as amended (hereinafter referred to as the "Act on Service Relationship"). The act entered into force on 1 January 2007. In addition to unifying the service conditions of members of security forces, which currently include the Police of the Czech Republic, Fire Rescue Corps of the Czech Republic, Customs Administration of the Czech Republic, Prison Service of the Czech Republic, General Inspection of Security Corps, Security Information Service, and Office for Foreign Relations and Information, under the governance of a single act, the legislator also aimed at "suppressing contractual elements of the service relationship and establishing a traditional public-law relationship."[1]

The adoption of the Act on Service Relationship thus significantly strengthened the already existing public nature of the service of members of security forces and separated their employment from other employment relationships regulated by the Labour Code.

The statutory regulations consider employment and related relationships between natural persons performing service in the security corps and the Czech Republic as the other party to the service relationship. In the case of the service of members of the security forces, it is a specific type of a state employment (service) relationship, which is *"so complex and socio-economically important in its legal nature, that it will always stand somewhere at the boundary of private and public law from the point of view of the institutes used in its formulation.*[2] Thus, it is not surprising that the courts dealing with disputes arising from the service relationship in the past had to

[1] Cf. Důvodová zpráva k zákonu o služebním poměru (Poslanecká sněmovna, IV. volební období 2002-2006), tisk č. 256/0.

[2] Cf., e.g., KADLUBIEC, Vojtěch. Služební poměr – veřejnoprávní nebo soukromoprávní vztah? *Časopis pro právní vědu a praxi*. 2015, no. 4, pp. 410-413. ISSN 1210-9126; TOMEK, Petr. *Slovník služebního poměru*. 1st ed. Olomouc: Anag, 2009, p. 206. ISBN 978-80-7263-541-2.

resolve the issue of the legal concept of the service relationship first. The ruling of the High Court in Prague, file no. 6 A 58/94-16 of 30. 8. 1994 defined the legal regulation of the Service Relationship Act (at that time, Act No. 186/1992 Coll., on the service relationship of the members of the Police of the Czech Republic) and the nature of the employer in this relationship in such a way *that "this is not only a modification of the private employment relationship, but for some categories of public employees, especially state employees, it is a specific state employment relationship under public law."* Another decision, which was crucial for defining the legal concept of the service relationship, was the decision on the conflict of jurisdiction between the Municipal Court in Brno and the Regional Court in Brno, concerning the question who was competent to decide on the action against the decision of the director of the Police of the Czech Republic, whether a general or an administrative court. Special Senate of the Supreme Administrative Court pursuant to Act No. 131/2002 Coll., on deciding certain conflicts of competence, by resolution of 17. 8. 2005, ref. Konf 76/2004 and ref. Konf 49/2005, stated that the court in the administrative justice is supposed to decide on actions in matters of service relationship, because *"the service relationship of a member of the Police of the Czech Republic is to be considered as a relationship under public law, which can be subject to judicial review in terms of the legality of the action of service officers, but not discussed and decided by the court in the legal agenda without participation of the administrative authority (as would be the case under the fifth part of the Code of Civil Procedure)."* On the establishment of the service relationship, the court ruled that *"it arises by an act of power of a service officer and throughout its course it significantly differs from an employment relationship, which is, on the contrary, a typical relationship under private law, the participants of which have equal status."* The case law that followed respected and further developed this legal concept of service relationship.[1]

In view of the above, it can be stated that, from the point of view of dualism of law, the service of members of security forces traditionally belongs to the institutes of public law. One of the key features (aspects) of the prevailing public legal nature of the service relationship of members of security forces, apart from the nature of the employer, method of establishment, suppression of contractual freedom, limitation of certain rights of the member, retirement benefits, institute of disciplinary responsibility, etc., is also the existence of separate procedural and legal regulation for decision making in the matters of service relationship.

The regulation of decision making in the matters of service relationship was originally formed as a standalone regulation, completely independent of the Code of Administrative Procedure, although the legislator was inspired by it in many ways. Until 2006, it was undoubtedly possible to characterise the procedure in matters of service relationship as a sui generis public (administrative) procedure, in which the Code of Administrative Procedure did not apply, not even in subsidiary terms. Although the

[1] More in the ruling by the Supreme Administrative Court file no. 6 As 29/2003-97 of 30. 10. 2003, published in the Collection of Decisions of the Supreme Administrative Court under No. 415/2004: "*The Act No. 186/1992 Coll., in its provision of Section 155 uses application of the Labour Code to some institutes of the service relationship; these are mostly matters that are not decisive for the essence of the service relationship (for example, generally legal institutes, such as legal acts, legal capacities, representation, securing rights and obligations, recording time, etc.)."*

Service Relationship Act did not explicitly regulate the exclusion of the application of the Code of Administrative Procedure, it was based on the provisions of Section 2(a) of Act No. 71/1967 Coll., on administrative proceedings (hereinafter referred to as the "previous Administrative Code"), according to which: *"the provisions of this act shall not apply to the procedure in which administrative bodies decide on the legal relationships of organizations, workers or officers, if these relationships are related to their subordination to the authority which decides on the matter, or to the procedure in which administrative bodies decide on the legal relationships of organizations in the management of their economic activity.*" Finally, the concept of proceedings in matters of service relationships as a sui generis procedure also corresponded to the nature of the rights and obligations at issue in the proceedings. The fact that the legislation governing the service relationship is of a cogent (public law) nature and that the rights and obligations are decided by the officer in a formalised procedure, modifies the nature of the status of entities, but does not change its very essence much. The rights and obligations that are decided during these proceedings (in particular, issues related to the establishment, change, or termination of service), perhaps with the exception of the decision making and conduct of proceedings on actions that bear characteristics of an offence, are significantly different from the typical relations under administrative law.

However, the adoption of the current administrative code - Act No. 500/2004 Coll. (hereinafter referred to as the "Code of Administrative Procedure") - has brought about a break in the view of the character and nature of the proceedings in matters of service relationship, in particular with regard to the fundamental change in the subject of its regulation, or in the manner of setting its material scope of application. The provision based on which the subsidiary use of the Code of Administrative Procedure in proceedings in matters of service relationship has been excluded so far is no longer part of it or has undergone significant changes. According to the provisions of §1(3), 'newly', the Code of Administrative Procedure "does not apply to legal acts carried out by administrative bodies and to relationships between the authorities of the same territorial self-governing unit in the exercise of independent competence." In this respect, it should be noted that the case law, taking into account the public nature of the service relationship, has concluded that acts in matters of service relationship cannot be considered as acts under labour law, or as legal acts or acting in the field of private law. Commentary literature contains similar conclusions.[1] Therefore, when assessing the mutual relationship between the Act on Service Relationship and the Code of Administrative Procedure, it is not possible to consider the exclusion of the scope of application in proceedings in matters of service relationship under the cited Section 1(3) of the Code of Administrative Procedure. On the contrary, according to the provisions of Section 1(2) of the Code of Administrative Procedure (principle of subsidiarity), the Code Administrative Procedure shall apply wherever no other

[1] POTĚŠIL, Lukáš, HEJČ, David, RIGEL, Filip, and David MAREK. *Správní řád. Komentář.* 1st ed. Praha: C. H. Beck, 2015, ISBN 978-80-7400-598-5, commentary on Section 1(3); p. 15: "*However, it is desirable to add that, apart from the subject matter of the Code of Administrative Procedure, there are also internal relationships in public administration based on the relations of seniority and subordination, including the adoption of internal normative acts and internal individual acts. However, an exception can be found in the case of service relationships. This is due to their specific public nature…"*

regulation is provided for the respective procedure. On the basis of the common and transitional provisions of the Code of Administrative Procedure (Section 177 and Section 180), in contrast to the situation prevailing under the previous Administrative Code, the position of the existing regulations, which not only did not explicitly refer to the application of the Code of Administrative Procedure, but even explicitly excluded its application, was significantly weakened. In this context, we can even talk about breaking the application rule *lex specialis derogat legi generali.*[1] These two provisions of the Code of Administrative Procedure constitute, in essence, an indirect amendment to all existing laws (*lex posterior derogat legi priori*). By embedding them, the legislator created a space for all procedures and acts of administrative authorities that occur in the exercise of public administration to be subject to the Code of Administrative Procedure regardless of the origin of their legal regulation.

It follows from the above that, in order for the scope of application of the commentary on the Code of Administrative Procedure to be completely excluded in the proceedings in matters of service relationship, the amendment to the Act on Service Relationship would have to contain its own complex modification of all relevant procedures, including the definition of basic principles. In view of the fact that this is not the case, the Code of Administrative Procedure should also be applied in subsidiary terms, in accordance with the principle of subsidiarity, to the extent that the respective procedural institute is not specifically regulated. Judicial jurisprudence comes to the same conclusion, e.g., according to the decision of the Supreme Administrative Court no. 6 As 62/2014 - 69: *"the Act on Service Relationship is a special act regulating administrative proceedings in matters of service relationship, in which the rights and obligations of the participants are decided pursuant to Section 170 of the Act. In these proceedings, the officer acts in the position of an administrative body under Section 1(1) of the Code of Administrative Procedure and Section 2(1) of Act No. 361/2003 Coll., although the security corps is responsible for the execution of such a decision pursuant to Section 1(3) of the respective Act. The Act on Service Relationship does not contain a provision referring to the application of the Code of Administrative Procedure or general provisions on administrative proceedings, nor does it contain a provision excluding its application…"*

The question of the extent to which, and in which situations, the Code of Administrative Procedure should be used as subsidiary in proceedings in matters of service relationship has become one of the most debated topics in the last ten years in the decision making of service officers, as evidenced by the relatively plentiful jurisprudence.

The aim of this paper, therefore, is to characterise the current concept of proceedings in matters of service relationship and to assess the advantages and disadvantages of the subsidiary use in the respective procedural (decision making) regimen and, on this basis, to define the general de lege ferenda considerations regarding the possible future direction of the legislation. The timing of the topic is supported by the fact that the working group for the amendment of the Act on the Service Relationship started its activities in May 2022.

[1] Cf. POTĚŠIL, Lukáš, HEJČ, David, RIGEL, Filip, and David MAREK. *Správní řád. Komentář*. 1st ed. Praha: C. H. Beck, 2015, p. 767.

I. Essential characteristics of the proceedings in matters of service relationship

The legal regulation in the twelfth part of the Act on the Service Relationship described as "proceedings in matters of service relationship" stipulates in Section 170 that *"the rights and obligations of the parties shall be decided in proceedings in matters of service relationship."* This conceives a specific procedural regimen, which results in an act of applying substantive law in a specific situation to a specific person, i.e., a decision.

The decision of the officer undoubtedly has all the features of an individual administrative act. The officer as a service body unilaterally, i.e., in an executive manner, with respect to a particular case, establishes, changes or revokes the rights or obligations of an explicitly defined person (typically a member of security forces) or, in respect of a particular case, declares that such a person has or has not any rights or obligations. After all, the Act on the Service Relationship itself states, almost in the same way as the Code of Administrative Procedure, that the decision must not only be in accordance with the law, but that it must also be issued by the relevant officer, it must be specific in content, it must have the prescribed particulars, and it must be in writing.

Service officers, as service bodies in proceedings in matters of service relationship, undoubtedly exercise competence in the field of public administration, namely in the field of civil service relations, and, therefore, when deciding on the rights and obligations of the parties in matters of service relationship, they have the status of an administrative body pursuant to the provisions of Section 1(1) of the Code of Administrative Procedure.

The purpose of the formalised decision-making process and its outcome, including the establishment of various procedural guarantees, procedural rights and remedies, is to ensure the necessary level of protection of subjective rights and obligations of members of security forces as parties resulting from the service relationship under public law. Therefore, in principle, it is not possible for the case to be decided without conducting the proceedings or for the proceedings to end otherwise than by a decision - for example, by a letter, statement, or other communication.

In this context, however, it should also be noted that not all proceedings under the Act on Service Relationship are proceedings in matters of service relationship. The Act on Service Relationship, in the provisions of Section 171, contains an exhaustive list of those proceedings that are not covered by the provisions of the twelfth part - proceedings in matters of service relationship. It includes:

- admission procedure,
- service evaluation,
- secondment on a business trip,
- secondment for a study stay,
- secondment for a curative stay,
- standby order,
- scheduling of weekly duty periods,
- overtime order,

- determining the start of leave and termination of leave,
- granting of leave with the provision of income, and
- granting of the stabilisation premium.

It can be seen that these are, as a rule, cases where the decision is exclusively related to the manner and conditions of performing the service in the sense of determining the time and place of performance of the service or where the decision has the nature of an order of the superior.[1] The explanatory memorandum to the Act on the Service Relationship ultimately excludes these institutes from the power of the courts to review them. However, even the fact that the designated institutes are excluded from the procedure in service matters does not mean that they cannot be subject to judicial review, as envisaged in the explanatory memorandum. As an example, we can mention the order to serve overtime pursuant to the provisions of Section 54 of the Act on Service Relationship, where the Supreme Administrative Court stated that *"the administrative courts defined the conditions for the order to serve overtime consisting in the important interest of the service and the resulting assumption of exceptionality of overtime service in the context of judicial review of decisions of service officers issued in the proceedings on service relationship, which concerned the claims of members of security forces resulting from the allegedly illegal overtime service. Such decisions of the administrative authority undoubtedly constitute acts of administrative authority in the sense of Section 65(1) of the Code of Administrative Procedure, which are subject to judicial review. In this context, the court must then assess compliance with those conditions for ordering overtime, which it cannot do without knowing the specific reason which prompted the superior to take such a measure."*[2] It can be concluded that, although some of the institutes defined by law are excluded from the service proceedings, this does not mean that they cannot be subject to judicial review at a later date in subsequent proceedings where claims arising from these orders are asserted. Even in such cases, the service officer is obliged to issue orders in accordance with the law in such a way that the legitimacy, reasonability, and legality of these orders can be reviewed in the future.

It follows from the above that, except in the cases specified in the provisions of Section 171 of the Act on Service Relationship, service officers decide on the rights and obligations arising from the service relationship in formalised proceedings, which can be described as a special type of administrative proceedings.

II. Relationship between the Act on Service Relationship and the Code of Administrative Procedure - general background

In general, the legal regulation of administrative proceedings can be found both in the Code of Administrative Procedure as a general (common) legal regulation and in specific regulations containing specific rules for the given type of procedure. The relationship of speciality and subsidiarity between the Code of Administrative Procedure and special legislation applies pursuant to Section 1(2) of the Code of Administrative Procedure. The general regulation shall apply only in so far as the

[1] Cf. TOMEK, Petr. *Zákon o služebním poměru příslušníků bezpečnostních sborů s komentářem a poznámkami.* 1st edition. Olomouc: ANAG, 2007. ISBN 978-80-7263-385-2.
[2] Rozsudek Nejvyššího správního soudu sp. zn. 4 Ads 11/2013 ze dne 23. května 2013.

special regulation does not provide otherwise. The jurisprudence of the Supreme Administrative Court assumes that, unless a special act excludes the application of the Code of Administrative Procedure, the latter shall be used to resolve issues not expressly mentioned in the special act. The Code of Administrative Procedure shall apply in subsidiary terms, even if the specific regulation does not explicitly refer to the Code of Administrative Procedure.[1] On the other hand, in a situation where the special legal regulation directly excludes the application of the Code of Administrative Procedure, but at the same time does not contain a regulation that corresponds to the basic principles of action of administrative bodies, the basic principles set out in Sections 2 to 8 of the Code of Administrative Procedure shall apply.[2]

Therefore, in the relationship between the Code of Administrative Procedure and the Act on Service Relationship, the Act on Service Relationship is the special legal regulation governing proceedings in matters of service relationship. Contrary to the example of the state service legislation,[3] it does not contain a provision that would regulate its relationship to the Code of Administrative Procedure or general regulations on administrative proceedings. However, it does not contain a provision that would exclude the application of the Code of Administrative Procedure, either. Therefore, in the light of the above, it can be concluded that, in subsidiary terms, the Code of Administrative Procedure applies wherever the Act on the Service Relationship does not provide for any other procedure.

The procedural differences between the Act on Service Relationship and the general regulations in the Code of Administrative Procedure are quite large. For example, the Act on Service Relationship contains a different regulation in the area of filing, where the Act on Service Relationship stipulates that if the filing is not in a qualified form, it must be completed within 3 days, unlike the Code of Administrative Procedure, where the deadline is 5 days. Similarly, the period within which an appeal must be decided on is 90 days under the Act on Service Relationship, while under the Code of Administrative Procedure it is 30 days, or 60 days, respectively. Further differences can be found in the regulation of extraordinary remedies, when the Act on Service Relationship sets a deadline for submitting an application for renewal of the proceedings within 4 years, while the Code of Administrative Procedure provides for a three-year deadline. Similarly, in the case of review proceedings, it is possible to initiate proceedings within a maximum of 4 years, but according to the Code of

[1] Rozsudek Nejvyššího správního soudu sp. zn. 3 Ads 79/2011 ze dne 21. září 2011, rozsudek Nejvyššího správního soudu sp. zn. 4 Ads 153/2011 ze dne 30. dubna 2012, rozsudek Nejvyššího správního soudu sp. zn. 3 Ads 117/2012 ze dne 22. ledna 2014, rozsudek Nejvyššího správního soudu sp. zn. 6 As 62/2014 ze dne 4. února 2015.

[2] Rozsudek Nejvyššího správního soudu sp. zn. 3 Ads 133/2012 ze dne 27. listopadu 2013.

[3] Cf.: Section 160 of Act No. 234/2014 Coll., on Civil Service, as amended, explicitly formulates the subsidiarity of the Code of Administrative Procedure for proceedings in matters of service relationship: *"Unless otherwise provided by the act, the procedure in service matters shall be governed by the Code of Administrative Procedure."* Similarly, Section 144 of Act No. 221/1991 Coll., on Professional Soldiers, as amended, provides an exhaustive list of those provisions of the Code of Administrative Procedure that do not apply to proceedings in matters of service relationship, therefore, the other provisions of the Code of Administrative Procedure shall apply in subsidiary terms: *"Sections 10 to 12, Section 14, Section 33(2)(c), Section 79(5), Title XI of the second part and Section 175 of the Code of Administrative Procedure do not apply to proceedings in service matters."*

Administrative Procedure within a maximum of 1 year. It is also possible to point out purely exclusive institutes, which cannot be regulated by the Code of Administrative Procedure - e.g., the institute of the advisory commission, the obligation to reimburse the costs of proceedings to the successful appellant, delivery on duty.

On the other hand, a number of provisions identical or almost identical to the provisions contained in the Code of Administrative Procedure can be found in the Act on Service Relationship that appear rather redundant from the point of view of their application respecting the principle of subsidiarity. An example can be found in the regulation of the rights of the parties, initiation or termination of proceedings, requirements for the decision, etc.

Likewise, it can be pointed out that many procedural institutes regulated by the Code of Administrative Procedure (e.g., the futility of decisions, measures against inactivity, means of insurance) are not regulated by the Act on Service Relationship at all or are regulated only very briefly (e.g., the means of evidence are only listed).

It follows from the foregoing that the following situations can be distinguished when dealing with the issue of the subsidiary application of the Code of Administrative Procedure in the proceedings in matters of service relationship:

1) In the case of application of deviating and purely exclusive procedural institutes, the procedure is performed exclusively in accordance with the Act on Service Relationship. There is no space for the application of the Code of Administrative Procedure here.
2) In the case of an overlapping (identical) provision, it must first be determined whether the provision applied constitutes a comprehensive modification of the procedure in question. If this is the case, the procedure is again exclusively governed by the Act on Service Relationship. However, if this is not the case, the administrative rules must be applied to the extent not expressly provided for in the Act on Service Relationship, based on the principle of subsidiarity.
3) In a situation where a procedural institute contained in the Code of Administrative Procedure is not regulated by the Act on Service Relationship, it is true that the relevant institute can be, or must be used in subsidiary terms, but only if its use cannot be excluded from the system of the law by the nature of the matter.

Based on the case law, from the point of view of the application in practice, the most problematic situations referred to in point 2 can subsequently be described (for instance, a party to the proceedings may waive the appeal, a party to the disciplinary proceedings may request suspension of the proceedings, invalidation of delivery, or may request oral hearing to be public). As a result of the fact that the legislator was inspired by the previous Administrative Code when creating Part XII part of the Act on Service Relationship, in most of the procedural provisions, their wording overlaps with the wording of the corresponding, but usually much more elaborate, provision of the Code of Administrative Procedure. Compared to the Code of Administrative Procedure, the question will usually arise how to interpret the ‘legislator’s silence’, to put it simply. An illustrative example of the complexity of the assessment of this issue can be the case law related, for instance, to the institute of renewal of proceedings, where the courts interpreted the ‘legislator’s silence’ in parts of the legislation in favour of subsidiarity of the Code of Administrative Procedure on the one hand, and as a special regulation on the other. For illustration, the ruling of the

Municipal Court in Prague, file no. 10 Ad 20/2014 – 31-37: *"The court considers that the regulation of the institute of renewal of proceedings in Act No. 361/2003 Coll. cannot be considered to be so comprehensive as to exclude, in a situation where Act No. 361/2003 Coll., although it provides for proceeding for the authorisation of the renewal, it does not contain an explicit regulation of jurisdiction to decide on this application, the application of the general provision of Section 100(2), the last clause, of the Code of Administrative Procedure, pursuant to which the administrative authority, which decided on the case at the last stage, is competent to decide on the application for the authorisation of the renewal."* Or, the ruling of the Regional Court in Ústí nad Labem, file no. 15 Ca 222/2008 - 68: *"Since the Act on Service Relationship does not contain a provision on how to proceed in the event that the reason for the renewal of proceedings is not given, it is necessary to proceed in the sense of the provisions of Section 100(6) of the Code of Administrative Procedure and issue a decision rejecting the application for the renewal of proceedings. In this case, the defendant did not pay sufficient attention to the question whether the renewal of proceedings was allowed in accordance with the submitted application or not*." On the other hand, the ruling of the Supreme Administrative Court, file no. 1 As 425/2017 - 26: *"This special regulation (as opposed to the general regulation of renewal of proceedings pursuant to Section 100 of the Code Administrative Procedure) does not provide for the possibility of the renewal of proceedings ex officio. In addition, it should be considered as a comprehensive regulation that does allow, albeit only supporting, application of the general regulation on the possibility of initiating the renewal proceedings by the office initiative...*", or, the ruling of the Supreme Administrative Court of 23 January 2013, file no. 3 Ads 51/2012-48: *"The Institute of renewal is defined somewhat differently from the general regulation under Section 100 of the Code of Administrative Procedure by a special regulation pursuant to Section 192 of the Act on Service Relationship. In particular, it does not expressly contain a specific reason for the renewal of proceedings, consisting in the annulment of the decision constituting the basis for the decision to be reopened (Section 100(1)(b) of the Code of Administrative Procedure). In the Act on Service Relationship, it is possible to choose a solution for similar situations by means of a review procedure pursuant to Section 193 of the Act on Service Relationship. The defendant was unable to use the institute for the renewal of proceedings and the procedure under Section 193 of the cited Act was thus an eligible means to achieve the renewal of proceedings."*

The outlined issue can be summarized in such a way that when resolving the issues raised, it is necessary, pursuant to Section 1(2) of the Code of Administrative Procedure, to take into account the nature of the case in conjunction with the sufficiency/precision of the regulation of the applied procedural institute in the Act on Service Relationship, or the case law in the cases that are not entirely clear at first glance. However, as is often the case, opinions on the solution of these issues are constantly evolving, and therefore, service officers must pay increased attention to the case law. This statement can be demonstrated, for example, on the interpretation of the provisions of Section 211 of the Act on Service Relationship (recording time), when, according to the ruling of the Regional Court in Prague, ref. 45 A 14/2013 - 26, "*in the autonomous regulation of time periods under Act No. 361/2003 Coll., on the service relationship of members of security forces, the usual rule does not apply that if the last day of the period falls on a Saturday, Sunday or holiday, the last day of the period shall be the closest following working day*." However, a few years later, the Regional Court

in Pilsen concludes the opposite in its ruling ref. 57 A 27/2016, according to which: *"If the Act on Service Relationship does not stipulate what should happen in the event that the last day of the period falls on a Saturday, Sunday or holiday, it is necessary to look for the rule for this case in the general standard governing administrative proceedings, i.e., the Code of Administrative Procedure.*

III. Advantages and disadvantages of the application of the Code of Administrative Procedure in proceedings in matters of service relationship

To a large extent, it is possible to agree with the previous concept of proceedings in matters of service relationship as proceedings sui generis, although we do not belong among its supporters, as it has the nature of the social relationship that it regulates, and conforms to the historical connection between the legal regulations of service and employment relationships. As already stated, in matters of service relationship, a completely different set of rights and obligations than in ordinary administrative proceedings is subject to decisions (perhaps with the exception of proceedings in the case of offences). In this respect, it cannot be overlooked that the Act on Service Relationship contains substantive provisions that are almost identical to the provisions of the Labour Code - for example, the regulation of service hours, rest periods, provision of service income, compensation for damages, etc. All this significantly speaks in favour of the chosen concept.

However, the problem arises when we ask whether the regulation of proceedings in matters of service relationship is really sufficiently elaborate and comprehensive to meet the current requirements arising from the basic principles of the democratic rule of law and therefore can be conceived as completely separate.

Specifically, it is a requirement of the predictability of the law, its clarity and internal consistency. It can be argued that without clarity and certainty of the rules, the basic characteristics of the law are not fulfilled, and thus the requirements of the formal rule of law are not met. Therefore, any legal regulation must respect the general principles of law, such as trust in law, legal certainty, and predictability of legal acts that structure the legal system of the democratic rule of law, or are derived from it. It is also necessary to base the content requirements on legal norms, because in a material rule of law based on the idea of justice, fundamental rights constitute the correction of both the content of legal norms and their interpretation and application.[1]

Even a brief glance at the legislation shows that it is short-spoken, fragmentary, and incomplete. A number of procedural institutes are regulated very vaguely - for example, means of evidence are presented only briefly without adjusting other circumstances necessary for their use in actual practice, some important institutes are not provided for at all (e.g., deadlines for issuing decisions from official duties). Therefore, we focus on procedures where it is not clear which guidance the service officer should follow in their implementation.

In order to overcome this procedural vacuum, in a situation where the application of the Code of Administrative Procedure would be excluded, there would be nothing left but the use of an analogy, while such an analogous procedure would probably most

[1] Cf. Nález Ústavního soudu ČR, sp. zn. II. ÚS 2048/09 of 2. 11. 2009.

often be in accordance with the Code of Administrative Procedure. At the moment, however, let us ask a different question, which is absolutely essential for the purposes of this paper, namely whether it is possible and permissible to essentially create a modification of a separate type of proceedings in its entirety (completeness) using an analogy. There is no other answer but negative,[1] and yet this would necessarily have to happen in the application in practice, otherwise, in many cases the service officer would not be able to conduct the proceedings and decide at all.

In the context of the right to a fair trial, it can be stated that the legal regulation of proceedings in service matters contained in Part XII of the Act on Service Relationship bears the seal of the time of its creation and, in the light of the current requirements and demands on the quality of the legal regulation, is no longer fully compliant.

The undisputed advantage of the current concept is that it has undoubtedly contributed significantly to strengthening the protection of subjective rights of members of security forces as parties to the proceedings in service matters, since it has filled gaps and shortcomings in the procedural part of the law and thus provided answers to a wide range of issues so far.

Substantial formalisation of the procedure can then be described as a disadvantage (although it is a question of whether this is not rather a general trend of the current time, as it applies to all types of proceedings without distinction), which, of course, entails higher requirements for the quality of regulation and puts increased demands on the organizational, technical and personnel securing of the agenda concerned with a direct impact on the quality of decision-making. Moreover, the above seems to be somewhat contradictory to the primary mission, purpose and manner of management and functioning of the security forces, when the decision should be primarily a quick, simple and effective response to the given situation. It must also be acknowledged that the conduct of a formalised administrative procedure in its entirety is not entirely appropriate in all relevant decision-making situations. The idea of a service officer conducting a formalised procedure (initiation of proceedings, evidence, decisions), e.g., when awarding remuneration, may cause a smile in practice. On the other hand, it can also be mentioned that an appeal against a decision on remuneration is not as exceptional as it might seem at first sight.

Conclusion

The Ministry of the Interior and the security forces of the Czech Republic are currently in a different situation than in 2006, when, thanks to the entry into force of the Code of Administrative Procedure (see above), they were basically faced with the complete and finished thing. The commencement of the work of the working group on the amendment to the Act on Service Relationship opens the way for discussion on the future direction of legislation. Although the focus will undoubtedly be more on substantive-legal regulation, procedural issues, i.e., modification of Part XII should not be omitted. In principle, there are two ways forward in this respect.

The first one is a return to the original concept (exclusion of the Code of Administrative Procedure), which would, however, entail creating a truly separate comprehensive legal regulation, including the formulation of basic principles. It can be

[1] Cf. Nález Ústavního soudu ČR, sp. zn. PL ÚS 21/04 of 26. 4. 2005.

imagined that such an effort would only result in a regulation that would overlap with the wording of the Code of Administrative Procedure in the vast majority, or would formulate it using other words and define only certain deviations.

Therefore, it seems to be an easier way to bridge the existing procedural vacuum by sticking to the existing concept, however, hand in hand with it, the relationship with the Code of Administrative Procedure must be explicitly declared and defined, all overlapping provisions removed, and in the Act on Service Relationship it would be desirable to precisely formulate only the necessary deviations from the general regulation of administrative procedure.

In view of the purpose and function of the subsidiary application of the Code of Administrative Procedure in the proceedings in service matters (filling gaps, ensuring the necessary level of protection of subjective rights), it may be recommended that the list of exclusionary regimens (Section 171) is not further extended, on the other hand, taking into account the complications associated with conducting a formalised procedure, the scope of accelerated proceedings should be defined, wherein issuing the decision may be the first act in the proceedings (e.g., a procedure for probationary period dismissal, a procedure for granting remuneration). After all, the Act on Civil Service could provide inspiration in this respect.

Although the concept of combining a specific regulation and a general one is more difficult to apply in practice, it is a rational approach and, in our opinion, undoubtedly more appropriate than drawing up a completely new complex procedural regulation. From the constitutional point of view, it is fundamentally at the discretion of the legislator, which forms of administrative proceedings will be regulated by the Code of Administrative Procedure and which administrative proceedings will be regulated in a specific way, therefore, the motto for the amendment to Part XII need not necessarily be the attempt to exclude the Code of Administrative Procedure altogether, but more importantly the definition of differences.

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S U M M A R Y

This paper deals with relationship between the Act on Service Relationship of Members of Security Forces and the Code of Administrative Procedure. Opinions on the subsidiary application of the Code of Administrative Procedure in the proceedings in matters of employment of members of the security forces have undergone extensive development where jurisprudence has played an important role. The statement that the Code of Administrative Procedure will be applied in subsidiary terms to proceedings in service matters has raised further questions of scope of its application, in particular, to those provisions of the Code of Administrative Procedure which are not regulated by the Act on Service Relationship of Members of Security Forces at all or are regulated only partially and not as comprehensively as in the Code of Administrative Procedure.

Keywords: Code of Administrative Procedure, members of security forces, service relationship, proceedings in service matters, subsidiarity.

R E S U M É

FIALA, Zdeněk, MLEZIVOVÁ, Kristýna: VZTAH ZÁKONA O SLUŽEBNÍM POMĚRU PŘÍSLUŠNÍKŮ BEZPEČNOSTNÍCH SBORŮ A SPRÁVNÍHO ŘÁDU

Tento článek pojednává o vztahu zákona o služebním poměru příslušníků bezpečnostních sborů a správního řádu. Názory na subsidiární použití správního řádu v řízeních ve věcech služebního poměru příslušníků bezpečnostních sborů prošly rozsáhlým vývojem, kde významnou roli představovala judikatura. Konstatování, že na řízení ve věcech služebního poměru bude subsidiárně aplikován správní řád, otevřelo další otázky rozsahu jeho použití zejména u těch ustanovení správního řádu, která zákon o služebním poměru příslušníků bezpečnostních sborů neupravuje vůbec nebo je upravuje pouze částečně, nikoli komplexně jako ve správním řádu.

Klíčová slova: Správní řád, příslušníci bezpečnostních sborů, služební poměr, řízení ve věcech služebního poměru, subsidiarita.