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Models of association in trade unions of officers employed on an administrative legal basis in the Polish employment law system

Modele zrzeszania w związkach zawodowych funkcjonariuszy zatrudnionych na podstawie administracyjnoprawnej w systemie polskiego prawa zatrudnienia

Abstract
The article is devoted to models of trade union association of officers employed on an administrative basis. This mainly applies to officers of the Police, Border Guard, Prison Service and the Customs and Tax Service. The statutory changes of 2019 introduced mechanisms of qualitative pluralism to the organization of trade unions of these groups of officers.

Keywords
Trade unions, union pluralism, officers of the Police

Streszczenie
Artykuł jest poświęcony modelom zrzeszania się w związkach zawodowych funkcjonariuszy zatrudnionych na podstawie administracyjnoprawnej. Dotyczy to przede wszystkim funkcjonariuszy Policji, Straży Granicznej, Służby Więziennej oraz Służby Celno-Skarbowej. Zmiany ustawowe z 2019 roku wprowadziły mechanizmy pluralizmu kwalitatywnego do organizacji związków zawodowych tych grup zatrudnionych.

Słowa kluczowe
związki zawodowe, pluralizm związkowy, funkcjonariusze Policji

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Introduction

The central elements of the analysis of the issue of association in trade unions of officers who are employed on an administrative legal basis are the regulations adopted in the legal system. The general directive in this matter is established in Article 12 and 59, item 1 of the Constitution of the Republic of Poland. Both these norms guarantee the freedom of association in trade unions. At the same time, it should be emphasised that they do not foresee any limitations *expressis verbis* in the subjective aspect. Thus, one should conclude from the *lege non distinquente* argument that the freedom of association also applies to officers who are employed on an administrative legal basis. They have the status of employees according to the constitutional interpretation. This type of normative structure has been adopted in the legal doctrine and in the jurisprudence of the Constitutional Tribunal and its scope covers persons who perform paid work. This category of employees may also include officers who perform work on an administrative legal basis, as they fulfil the criteria that are specific for employees as defined in the Constitution.

The constitutional freedom of association under Article 12 and 59, item 1 of the Polish Constitution does not mean, however, that all categories of officers who are employed on an administrative legal basis have the possibility to enjoy it. The limitations in this matter are defined in the statutory standards decreed in official pragmatics. They were established by reference to international standards as stipulated in Article 59 item 4 of the Constitution of the Republic of Poland (cf.

grounds for the judgment of June 2 2016, K 1/13 OTK-A 2015/6/80). This norm constitutes an autonomous basis for the application of the limitations that are foreseen with respect to the freedom of association in trade unions (Florek, 2000, p. 3 ff.; Unterschütz, 2013, p. 21 ff.) This regulation implements to the national collective employment system the legal mechanisms that concern the association of various legal categories of public officers. *De lege lata* they have both a global and regional aspect, and this is the order in which they will be discussed in this study.

To commence the characteristics of the international legislation, I will state that the UN Human Rights Covenants do not regulate the issue of the freedom of association in trade unions of officers who are employed on an administrative legal basis. The central directive for this category of employees is established in Article 9 of Convention No. 87 of the ILO (Świątkowski, 2008, p. 1 ff.). It allows national laws or regulations to determine the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police. *A contrario*, it seems thus justified to state that this mechanism does not apply to other structures that employ officers (e.g. officers of the Prison Services, Customs Services, the State Firm Service). In this context, it is also worth noting that the analysed regulation allows, but does not oblige the state to determine restrictions related to the freedom of association in trade unions. It does not precisely define the level of interference with the right of association, either. Thus, from the *lege non distinquente* argument, I conclude that it may refer both to the subjective aspect (i.e. the officers who will not be entitled to this right) and the objective aspect (i.e. the functional and organisational limitations in trade unions).

To continue the analysis on a regional plane, I would like to state that European regulations only briefly refer to the right of association in trade unions of officers who are employed on an administrative legal basis. Article 11, item 2 *in fine* of the Convention for the Protection of Human Rights and Fundamental Freedoms states that it is acceptable to impose lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State. However, the Commission, in its jurisprudence, emphasises that such restrictions cannot be imposed in an arbitrary manner (Decision of January 20 1987, Council of Civil Service Unions, the United Kingdom, complaint No. 11603/85 DR50/228). Moreover, in the verdict of October 2 2014, in the case of Matelly (France), the European Court of Human Rights pointed out that Article 11, item 2 of the European Convention for Human Rights does not mean challenging the right of association in themselves (LEX No. 1508874). Mechanisms that are similar in their essence for officers are foreseen in the European Social Charter, which refers to the national legislation in issues related to the police and the armed forces, while the EU law does not regulate these issues in any way.

Further analysis of the freedom (right) of officers employed on an administrative legal basis association in trade unions should be conducted on the basis of national legislation of a statutory rank (Włodarczyk, 2014, p. 410 ff.). This is what determines the trade union status of this category of employees. The starting point for further discussion will be the statement that this matter is highly differentiated. Some of the officers are deprived of the right of association in trade unions, while others enjoy these rights.

No right of association in trade unions

Let me start the analysis with the first group. It includes officers of the Central Bureau of Investigation, the State Protection Service, the Internal Security Agency, the Intelligence Agency, the Marshal's Guard, professional soldiers and the services of Military Intelligence and Counterintelligence. This list is of an enumerative nature and, in the light of Article 12 and 59, item 1 of the Constitution it cannot be interpreted broadly. All the categories of officers listed hereinabove are deprived of the right of association by virtue of statutory norms. In the model approach, the regulations take two main forms: one, pursuant to which the officers of the Central Anticorruption Bureau, the Internal Security Agency, the State Protection Service, and the Marshal's Guard cannot associate in trade unions, and the second one, pursuant to which professional soldiers and officers of the Military Intelligence and Counterintelligence Services must not form or associate in trade unions. The second option seems excessively elaborate, because if officers are not permitted to associate in trade unions, they are obviously forbidden to form trade unions as well. Here, the legislatory activity violates the directive *entia non sunt multiplicana praeter necce*ssitatem.

In this normative context, the problem arises whether the regulations of official pragmatics that deprive the officers of the services listed above of the right of association are compliant with international standards. It is doubtless that they refer to individuals who are employed in widely understood police or armed services. It should be noted that these officers perform, as stipulated in Article 1, item 2 of Convention No. 151 of ILO, duties of a highly confidential nature. However, this does not change the fact that international legislation, by which I mean, in particular, Article 9 of Convention No. 87 of the ILO and Article 11, item 2 of the European Convention for Human Rights, only accepts imposing restrictions on the right to association, not the complete deprivation of such right. In this sense, the norms of the official pragmatics referenced above are not compliant with international standards.

Right of association in trade unions

On the other hand, a different model of the right of association in trade unions is applicable to the officers

of the Police, the Border Service, the Prison Service, the Tax and Customs Service, and the State Fire Service (Szpila, 2008, p. 135 ff.). In the Polish legal system, all these categories of employees have the right of association in trade unions. However, this does not mean that this subjective scope is *de lege lata* free from differentiation mechanisms. In the general theoretical approach, one may distinguish the pluralist and the monistic model in reference to officers employed on an administrative legal basis. The latter used to function in the collective employment law system until 2019. Until that time, officers of the Border Service and the Prison Service could associate only in sector trade unions. As a result, the officers did not have a full right of association: they could only decide freely whether they wished to join the already existing trade union organisation. The model of qualitative pluralism was introduced to a wider extent by the Act of 2019, although earlier it had already been applied to members of the State Fire Service. *De lege lata*, officers of the Police may associate in various trade unions that represent the rights and interests of officers, also those that are "civilian" organisations.

Pluralistic model implemented in 2019

Analysing the problems of the pluralist model, it is worth addressing the issue of its normative formula in the collective employment law system. The starting point will be the statement that it is not uniform in that matter, although in their basic versions, the provisions of official pragmatics are similar in terms of content. They state that the officers, respectively, of the Police, Border Service, Prison Service, Tax and Customs Service and members of the State Fire Service have the right to associate in trade unions. However, Article 222 of the Act on the Tax and Customs Service and Article 34 of the Act on Prison Service refer, to the full extent, to the Act on Trade Unions, while Article 67 of the Act on the Police and Article 72 of the Act on Border Service introduce a clause stating that the Act is applicable, although with certain modifications as foreseen in the official pragmatics. This regulation is compatible with the directive established in Article 2, item 6 of the Act on Trade Unions, which, apart from the adequacy clause, stipulates that this issue is subject to certain restrictions resulting from separate acts, i.e. official pragmatics. These restrictions refer mainly to organisational and competence issues that are connected to the functioning of trade union organisations. In some cases, they affect the status of an officer in the trade union, without limiting his or her freedom of association.

The existing legislation establishes a double adequacy clause of the application of the Act on Trade Unions with respect to the rights of association of the officers of the Police, Border Service, Tax and Customs Service, and members of the State Fire Service. On the one hand, it is foreseen by official pragmatics, while on the other by Article 2, item 6 of the Act on Trade Unions, this means, *a completudine*, that the provisions of the Act on Trade Unions should be applied taking into consideration the differences that result from the nature of the administrative law relationships that are the basis for the performance of work by officers. This includes, first of all, the broadening interpretation that refers both to the subjective and objective aspects. In my opinion, it would also be acceptable to apply the Act on Trade Unions directly, without any modifications. This conclusion is justified by the *a fortiori* argument in the *a maiori ad minus* version.

To sum up the discussion on the freedom of association of officers who are employed on an administrative legal basis, it seems justified to state that this category includes a wide group of people who are deprived of the right of association in trade unions, which gives rise not only to axiological, but also normative objections. The Polish legislation in that matter seems disproportionately restrictive in the light of international regulations. On the other hand, those officers who may exercise the right of association have a status similar to that of employees, which should be noted with approval. Qualitative pluralism in the trade union movement with respect to this category of employees meets the universal and regional standards foreseen by international laws. Still, it may generate certain difficulties in its consequences. What I mean is the fact that entities that employ officers and public authorities will be able to use or even play on the particularities that exist in the trade union movement in order to antagonise it on various planes of the social dialogue in uniformed services.

The element of the normative framework of qualitative pluralism that is becoming increasingly important is forming trade unions by officers of the Police, Border Service, Prison Service, Tax and Customs Service, and of the State Fire Service. In this matter, the general mechanisms under the Act on Trade Unions are applied (Tomaszewska, 2002, p. 232 ff., and the literature referenced therein). The starting point for further discussion will be the claim, based on the provisions of Article 2 of Convention No. 87 of the ILO, pursuant to which the persons entitled shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation, also, *lege non distinquente*, that of professional authorities.

Pursuant to the directive of Article 12 of the Act on Trade Unions, a trade union is formed under a resolution on the formation of trade union, adopted by at least 10 entitled individuals. *De lege lata*, in the structures of uniformed services, this means 10 officers of the Police, Border Service, Prison Service, Tax and Customs Service, or firemen of the State Fire Service. In this context, it should be analysed whether it is acceptable to form trade unions of a heterogeneous nature, which would associate officers of various services. In my opinion, within the framework of constitutional freedom of association stipulated in

Article 12 and 59, item 2 of the Constitution, it is acceptable. Moreover, in the light of the binding legislation it seems permissible to form heterogeneous trade unions, whose members are persons entitled under Article 2, item 6 of the Act on Trade Unions, and civilian employees of the services, and even persons who are employed in the structures of the services based on civil law contracts. This interpretation is based on the directive *in dubio pro libertatae* to the aforementioned constitutional norms.

The divergence from the full right to coalition model is stipulated in Article 67, item 2(3) of the Act on the Police, Article 72, item 2 of the Act on the Border Service, and Article 34, item 2 of the Act on the Prison Service. These standards explicitly foresee that, respectively, officers of the Police, Border Service, and the Prison Service, may be members of inter-company trade union organisations whose scope of activities covers only the units of the given service. Thus, it should be assumed *a contrario* that such officers cannot be members of inter-company organisations that include employers from outside the given service.

The association resolution that establishes a trade union organisation may be adopted by ten officers. This group seems relatively small, which may, in consequence, result in the atomisation of the trade union movement in service structures. In some cases, it may even hinder the effective operation of service structures. The officers being founders of a trade union are obliged to adopt a statute of the union and to appoint a founding committee. This matter is governed by general normative standards decreed in the Act on Trade Unions. The statute of the organisation should fulfil the requirements foreseen in Article 13 of the Act on Trade Unions. It is extremely important that it should provide a precise determination of the subjective and territorial scope of the given organisation. Apart from that, it should define the structure of the organisation and the competences of its governing bodies.

In practice, the issue of subjective restrictions of the freedom of association is important. *De lege lata* it seems acceptable, provided that it is not aimed at discrimination. The statute should also contain provisions that prevent holding management positions in the trade union organisation by persons who hold their positions in the structures of the given service based on appointment. I also do not see any normative barriers that would prevent the subjective scope of such limitations from being even broader than that stipulated in official pragmatics. This view is based on the constitutional principle of self-governance of trade unions.

During the analysis of the status of trade unions of officers employed on an administrative legal basis, it is worth focusing for a while on the mechanisms of their registration. Let me start from the claim that in the Polish collective labour law system this matter is governed by general mechanisms. It is still obligatory to register a trade union, but only after it has been established. Before that, the officers are not obliged to obtain any permissions, also from their service authorities, which corresponds to the directive formulated in Article 2 of Convention No. 87 of the ILO, pursuant to which workers have the right to establish organisations without previous authorisation. Thus, neither the public authorities nor service administration bodies may interfere with this process to any extent. Actions that consist in obstructing the forming of a legal trade union organisation are penalised as a crime under Article 35, item 1(1) of the Act on Trade Unions. (Baran, 1998, p. 279 ff.).

The trade union is entered into the National Court Register pursuant to a decision. The trade union acquires legal personality on the date of registration. Starting from that date, it has the right to act and may exercise all the statutory competences.

Another issue that should be analysed during the discussion of the problems of registration of trade unions associating officers is their structure. In this matter, too, mechanisms of the commonly binding collective employment law are functioning *de lege lata*, although with certain divergences foreseen in the official pragmatics (cf. Baran, 2002, p. 170 and the literature referenced therein). As a result, a variety of trade union structures being independent entities or functioning as elements of regional or even national trade unions may function in the employment relationships. As this issue is not regulated by the binding standards of trade union law, the principle *in dubio pro libertatae* should be applied, focusing on the freedom of association. On the basic level, trade union organisations of officers may take the form of intra- or inter-company trade union organisation (Hajn, 2012). The first form may include only one organisational unit of the given service structure (e.g. an organisational unit of the Police, the Border Service or the Prison Service). An inter--company trade union organisation is equivalent in organisational terms. This is a structure, whose scope includes at least two employers as defined in Article11 item 2 of the Act on Trade Unions. It should be noted here that the provisions of Article 67, item 2(3) of the Act on the Police, Article 72, item 2(3) of the Act on the Border Service, and Article 34, item 2(3) of the Act on the Prison Service provide a directive stating that an officer may be the member of only such inter-company trade union organisations whose scope covers only the organisational entities of the given service. In my opinion, this mechanism is an unjustified restriction of the right of association of officers, which is contrary to the essence of trade union pluralism on the plane of a workplace.

Analysing the subjective composition of the trade union movement in services where the functioning of trade unions is permitted, one should note the possibility of differentiation of these structures in subjective terms.

Basic level trade union associations may associate not only the officers of the Police, Border Service, Prison Service, Tax and Customs Service or of the State Fire Service, but also other individuals who are employed in the service structures. As a result, apart from homogenous trade unions that associate only officers, it is also possible to establish and maintain heterogeneous organisations that will associate also other employees, not only officers. Here, I refer first of all to "civilian" employees of services and persons who perform work based on civil law contracts (Grzebyk & Pisarczyk, 2019, p. 85 ff.). In this aspect, the subjective scope may be defined precisely in the statute of the organisation. However, it cannot introduce criteria that would foresee unequal treatment as defined in Article 3 of the Act on Trade Unions (Baran, 2002, p. 46 ff.; and, in general, Tomaszewska, 2018, p. 155 ff.).

Conclusion

In conclusion, the right of association of officers who are employed on an administrative legal basis is highly differentiated in the Polish employment law system. The new regulations adopted in this respect in the official pragmatics of 2019 introduce the model of qualitative pluralism to a wide extent, which should be noted with approval. Another question is, however, to what extent the officers will benefit from it.

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