UDC

**Štemberger K.,** Master of Law,

Teaching Assistant and PhD Student,

Faculty of Law,

University of Ljubljana, Slovenia

THE EFFECTS OF SUBSTANTIAL PROVISION'S CHANGE ON THE DECISION-MAKING PROCESS IN THE ADMINISTRATIVE PROCEDURE IN THE REPUBLIC OF SLOVENIA

When administrative authorities are deciding in the administrative procedure on the first as well as on the second instance, they are often facing the question of which adequate substantive provision to apply. Bounded by the principle of legality, the administrative authorities have to use the provisions in force when deciding on the rights, obligations and legal interests of the parties. According to the interpretation of Article 6(1) of the Slovenian Administrative Procedure Act, set by the administrative theory and practice, this means that the authorities must use the provisions, which are in force when a first-instance decision is issued [1, P. 72]. However, it still remains disputed whether the administrative authorities are also bounded by the principle of legality when reconsidering the same matter in cases when the first-instance decision had been abolished in the appeal proceedings due to the substantive or procedural violations and the substantive provision, applied when accepting the first-instance decision, has changed in the meantime. This is not problematic in cases when the legislator clarifies this question in the transitional provisions of the new legal act. Nevertheless, since this does not happen very often, the administrative authorities usually face a big problem when reconsidering the remitted decision. Due to the non-uniform administrative and judicial case-law, it is not simple for them to determine, which provision to apply.

A part of Slovenian legal theory and older case-law argue that the administrative bodies, when reconsidering the administrative matter, have to apply provisions which were in force at the time of the adoption of the first-instance decision (which was later abolished) and not the amended provisions. Their position is supported by the argument that the principle of protection of the rights and legal interests of the party and the constitutional principle of the rule of law ensure that a party cannot lose a right due to the fact that the first instance body has unlawfully rejected their claim, but at the time of reconsidering the administrative matter the relevant provisions no longer apply or have been amended. The party’s legal position cannot deteriorate due to the unlawful or untimely conduct of the first instance administrative body [2, P. 58–59]. According to this view, the application of provisions that no longer apply at the time of reconsideration is not contrary to the principle of legality, but is based on it, since the principle of legality prevents unequal, arbitrary and biased decision-making of the administrative bodies and ensures the party with the right to equality and legal certainty. Furthermore, the application of amended provisions could also affect the party's right to an effective legal remedy: although the party succeeded with the legal remedy and the first-instance decision was abolished, they could not achieve the recognition of their rights, which could also even lead to complications with their legal position. The use of the previously applicable provisions is also explained by the effects of the newly issued decision. Since the new decision has *ex tunc* effect – i. e. it causes effects from the moment, in which the abolished decision would have come to effect – the reconsidered decision cannot be based on a provision, which at the time of the decision’s legal effect did not yet come into force, since this would cause legal effects to the period, prior to the provision’s entry into force, which is contrary to the prohibition of retroactivity [3, P. 135–145].

On the contrary, a part of the Slovenian legal theory and recent case-law are taking a position that the administrative authorities are bounded by the principle of legality when reconsidering the same matter and are therefore obliged to apply the provisions in force when deciding. Therefore, if the substantive provisions have changed in the meantime, the administrative authorities have to use the new, amended provisions when reconsidering the administrative matter. The application of the amended provisions is also justified by the effects of the abolition of the first-instance decision. Since the abolishment carries *ex tunc* effect, legal effects of a first-instance decision have also ceased to exist with its abolition. The matter is therefore returned to the state before the adoption of a first-instance decision. However, even according to this position, the administrative authorities are not absolutely bounded by the principle of legality, and consequently neither by the changed (new) substantive provisions. Exceptionally, the administrative authorities can decide on the basis of the provisions that are not in force anymore, if this derives from the legal act itself or from the nature of the administrative matter [4, P. 407].

The conclusion of this contribution is that the solution of the presented dilemma can be found in the field of nomotechnics. It is therefore on the legislator to also adopt transitional provisions, which regulate the question of which provision has to be applied in already initiated administrative procedures. If the legislator does not regulate this question, the administrative authorities have to use the changed substantial provisions because they are bounded by the principle of legality. The administrative authorities are not competent to assess on case-by-case basis, whether the application of a substantive provision should be regarded in relation to another point in time due to the specific nature of the administrative matter. In such cases, a party can lodge an application before the Administrative Court, in which they can claim that the application of an amended provision interfered with their legal position and it is therefore on the judicial authority to decide, whether the specific nature of the administrative matter and other circumstances of the case call for a departure from the principle of legality.

Literature

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