

POLICY BRIEF

THE PHENOMENON OF ACTING POSITIONS WITHIN THE PUBLIC ADMINISTRATION

AUTHOR: NASER SHAMOLLI



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- Author: Naser Shamolli
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Introduction

The exercise of public authority granted by law based on democratic governance assumes the existence of certain predispositions which effectively ensure the protection of the public interest. The professionalism of public servants is one of the main requirements to exercise the public authority as best as possible and in the function of protecting the public interest while also guaranteeing the effective protection of the rights and legal interests of people. This means that in order to achieve a good standard of professionalism, it is necessary to ensure that the staff has a proven professionalism. This is achieved through the implementation of rules that ensure meritocracy in order to be trusted with the exercise of public authority through the definition of positions and strict responsibilities in all links of public institutions. Recently, there is a growing trend, not only in Kosovo but also in the region, that the regular positions that remain vacant are filled with acting position and which for a long time are not filled through the procedures of advancement or external recruitment. This approach, certainly simple and suitable for daily politics, but also for the officials close to him, has managed to ignore and seriously violate the principles and rules of meritocracy and professionalism. Almost all managerial positions, especially high-level management positions, have been held for years with acting positions to make it easier to achieve political goals, which in most cases are illegal and do not protect the public interest. Based on the simple mechanism of appointment and dismissal, the acting position can be appointed and dismissed within the day and without any procedure, and this fact made the use of this mechanism very attractive by politics, deliberately avoiding the rules and principles that ensure meritocracy. Knowing the nature and dimensions but also the effects of this phenomenon, the institute of acting as a regulation will be clarified below, but also the problems it has caused in practice, giving practical recommendations on how to solve this problem.

Acting position as regulation

The acting position is almost impossible to regulate because it is not a common rule that requires systematic regulation. This is due to the fact that any possible regulation for the acting officials is not ideal and leaves room and ambition for bypassing the rules related to recruitment based on the principles of meritocracy. This is the reason why such an institute becomes suitable for politicians. Starting from the most delicate category, which are the civil servants, this institute has gone through several stages of adjustment since the war. Before 2010, this issue was not regulated, while with the entry into force of the Law on the Civil Service of the Republic of Kosovo (LCSRK), a regulation was established for acting positions, which will be discussed in a little more detail since a similar proposal has been proposed by the Government this year with new Law on Public Officials, which is approved by the Assembly in December of 2022 and is now being reviewed by the Constitutional Court after several lawsuits from opposition parties. As for the regulation in the LCSRK for the acting positions, the general obligation is first established for civil servants who may be asked to temporarily perform tasks that are outside their normal functions, if this is necessary due to the general interest¹. From this regulation, one can first understand the discretion (the word "can") that institutions can ask civil servants to temporarily perform duties outside of ordinary work and for which they have created employment relationships for a specific position that is characteristic of the public sector. Discretion in the present case is limited due to the fact

¹ Article 29 of LCSRK,

that there are limits which must be strictly respected when civil servants are required to perform tasks outside their normal responsibilities. The first is that the performance of tasks outside of normal functions can only be done temporarily, which is indirectly regulated in another provision, which cannot be longer than 3 months in any case². No matter how artificial the setting of a deadline is, the purpose has been that the performance of duties outside of regular functions is an unusual situation and for the sake of continuity of functions, civil servants may be required to exercise such duties. The second is necessity, which means that not for all tasks, but only for those that are really necessary to exercise, civil servants can be asked to exercise other tasks outside of their regular tasks. Here are some factors that influence and that must be taken into account to consider a position as indispensable and which must be fulfilled, first of all take into account the nature but also the importance of the position in achieving the fulfillment of the general interest. The third concerns the fulfillment of the general interest, which is largely related to the necessity that was discussed earlier. Therefore, the request to the civil servant to deviate from regular and usual duties must always be justified by the fulfillment or protection of a general interest and situations where such a circumstance does not exist, it must be avoided.

Continuation of Article 29 of the LCSRK is the regulation provided in the Article 30 and which requires a little more detailed clarification. This article has several rules, first establishing the obligation that civil servants, by order of the superior, are obliged to temporarily replace a colleague who is absent or to fill a vacancy, if the usual activity of the institution would be hindered from the lack of civil servants³. The same as above in article 29, but now the obligation of the civil servant is established to replace a colleague who is absent or to fill a vacancy according to the superior's order. The provision is quite concrete because it already specifies the specific person (superior) that has to evaluate and decide on the replacement. This provision is quite broad in view of the superior's order and is not limited only to temporary absences (replacing an absent colleague) but also in cases where a vacancy must be filled which, as a rule, is not a temporary absence. As in Article 29, the replacement of a position should be done only when the position is necessary to be replaced, i.e., in circumstances where the usual activity of the institution would be hindered by the lack of an employee in that position.

The next provision regulates more specifically the absence in high-level management positions such as general secretary or equivalent positions, which are replaced by the highest-ranking civil servant in accordance with the rules defined in the law on administrative procedure⁴. In addition to being deficient, this provision is also confusing and very imprecise, which has been misinterpreted and misused in practice. It is flawed due to the fact that the references made to "the highest rank" and "to the Law on general administrative procedure" are not correct. Since there is no legal definition of who is the highest rank when the highest rank is assumed to be the General Secretary himself, it is usually interpreted that the replacement can be made with middle management employees (directors of departments) who are most often applied in practice. The reference in the Law on the general procedure is another problem because the regulation there was for the effect of the administrative procedure and for a concrete issue, but those provisions no longer exist from 2017, while the new law does not regulate such a situation.

Another issue that should be addressed is related to the legal consequences that can be caused if the civil servant does not accept to fill the vacant position. Refusal to replace a civil servant, who is absent in emergency cases, is considered an obstacle to administrative activity and is subject to disciplinary

² Para. 4 article 30 of LCSRK

³ Para.1 article 30 of LCSRK

⁴ Para.2 article 30 of LCSRK

measures⁵. This provision is even more confusing because the consequences are related to a violation such as "obstructing administrative activity" which is actually very broad and is not defined in the civil service legislation as a disciplinary violation. This legal loophole leaves a great possibility of interpretation and into discretion of the daily policy to misuse the mechanism of the acting positions for other purposes than those defined in the law, that is, the acceptance of the exercise of duties under the threat of a disciplinary measure.

The last regulation for acting positions in the LCSRK concerns the time restriction, i.e. how long an employee can perform a task. In these cases of remaining a vacant position in the civil service, the acting position cannot be appointed for longer than three (3) months⁶. At first glance, everything looks fine, but in practice, this type of restriction has presented quite a problem, being widely interpreted and misused in the public administration (which will be discussed below).

The Law of Public Officials (LPO), which is also currently applicable law, taking into account the problems identified in practice and the abuses brought about by the regulation for the acting positions, deliberately allows such regulation with the sole purpose of pushing public institutions to legally fill vacant positions in the civil service based on the principles and rules of meritocracy. Based on the problems caused earlier by the LCSRK, the LPO foresees the obligation of the institutions according to which the entry into force of this law constitutes a legal cause for the termination of employment relations with temporary public officials. The acting positions return to the workplace⁷.

The new draft law on public officials (DLPO), on the other hand, restores the regulation for acting positions. NewLPO is a copy of the regulation made earlier by LCSRK but which regulates by whom the acting positions are appointed and opens the circle of which civil servants can be appointed where the acting position can be appointed the highest official of the next category, depending on the position that is appointed, from any organizational unit within the institution. The last sentence is quite problematic due to the fact that it expands the circle of appointment of persons who can be appointed as AP (acting position) by giving unlimited discretion in the appointment of civil servants regardless of whether they are in the same structure or not (eg AP i a division leader position can also be assigned to someone who leads a division in another department). This apart from making no sense gives great opportunity for misuse.

More problematic is the regulation regarding the determination of the duration of the exercise of a task. DLPO as a term for holding a position with AP foresees a term of 6 months, but with the possibility of extension for another 6 months. Setting a deadline of 6 months is quite artificial, but also an incentive for these positions to be postponed until the maximum, i.e. up to 6 months, regardless of whether or not there is a need for a position to be held for 6 months. Postponing the deadline for another 6 months without any restrictions but at the full discretion of the supervisor is an opportunity for this deadline to be extended and in time to become a rule, which exists even today based on the statistics provided below.

⁵ Para.3. article 30 of LCSRK

⁶ Para.4. article 30 of LCSRK

⁷ Para. 10, article 83 of LPO.

The connection of exceeding with illegality⁸ is absurd in itself but also with consequences for the platforms, fundamentally shaking the principle of legality and the rule of law⁹.

In the absence of regulation for the acting positions in the LPO, an "invention" was found in Law No. 06/L-113 on the Organization and Functioning of the State Administration and Independent Agencies (LOFSAIA) where, through broad interpretations, a "legal basis" has been created for the acting but now with another instrument, that of the substitute. Substitutes in LOFSAIA are arranged for the temporary absences of the position of General Secretary, Head of Departments and Head of Divisions¹⁰. This adjustment is common and very normal in cases of temporary absences (annual vacations, short illnesses and other similar absences) and comes as a necessity of the continuity of the exercise of duties in the public sector and the roles that each of the positions have as in the aspect of daily management as well as in the provision of services to citizens and businesses, but in no case can it be (mis)used for long-term shortages intentionally caused by the public bodies themselves.

Implementation problems

The appointment of civil servants as acting positions has been quite attractive for politicians in managerial positions and especially in high-level management positions, which is the most sensitive level and closest to the political level in the hierarchical aspect. This situation becomes more complex when from a justifiable need not to disconnect from the exercise of public authority, it turns into a process of mutual interest between politicians and also the candidate to take the position of the acting position. This is as a result of the fragile legal mechanism that exists for the determination of acting position in vacant positions, which can be done without any rules or procedures. Another factor is the relationship between the political level and the person who is appointed as an acting position when, in addition to political preferences, "listening" to the "boss" (minister, collegial body as a political appointee) is expressed, who prefer that especially positions at the level of top managers to keep them acting. Acting positions at the senior management level then take care to appoint as acting positions in middle and lower management positions (head of department and head of division) persons who are close to politics and if there is none, they prefer to remain in the position free.

Acting positions are not a concerning issue only in Kosovo. For example, in Serbia, evidence shows that the percentage of acting positions in senior management positions is extremely high (60%), which implies that merit-based recruitment is not implemented in practice. This clearly shows that either the legal provisions are not respected, or other ways are found to circumvent merit-based recruitment¹¹.

⁸ Para. 5 article 35 of DLPO.

⁹ The Public Authority is given on the basis of the law to the public body which has the obligation to implement it, and in no case should such situations be created by conditioning the illegality with deadlines, the exceeding of which is done by the public bodies themselves, while the consequences are borne by the persons (physical and legal)

¹⁰ Pargraf 5 article 18, paragraph 4 article 19, paragraph 3 article 20 I LOFASHAP.

¹¹ Analysis of the Professionalisation of the Senior Civil Service and the Way Forward for the Western Balkans, paper No.55, SIGMA/OECD, 2018, fq. 61, link: <https://www.oecd-ilibrary.org/docserver/8535b60b-en.pdf?expires=1670094311&id=id&accname=guest&checksum=BEDC561E5ACB3C8B160E91FC0548E0EE>

Acting positions usually do not have job stability, as they can be fired at any time without reason. So, misuse of the right to appoint acting senior civil servants not only undermines the professionalization of the civil service, it can result in excessive dependence on political superiors and disruption of public administration operations¹².

Another issue identified is the length of time vacant positions are held with acting positions. As it has been said above, the origin of this problem is related to the entry into force of LCSRK in 2010, where almost all positions at the senior management level were vacant and were held by acting position for almost 2 years since the declaration of independence in 2008. What a coincidence even with the change of governments! Even at that time, there was a delay in filling the vacant positions, but eventually the recruitment process started in 2011 and almost all high-level management positions were filled with civil servants selected through a regular recruitment process. The long duration of the acting role begins to be widely interpreted, assessing that the term set in the LCSRK of 3 months is considered a term for the person and not an objective term, where as a result, different persons were kept for up to 3 months as acting actors and then replaced one by another, multiplying the 3 month term. The other category was when the duration of 3 months was intentionally exceeded and the same civil servants were kept for years as acting without any concern that this is against the law (according to the declaration of some civil servants, there are cases that some are held as acting for 7 years).

Holding the positions for many years with acting had consequences both for the institutions and for the individual. For the institutions – mainly because they have failed to fulfill their legal obligations so that these positions are filled in a regular manner and obviously this was done on purpose for the reasons we explained above. For the individual, the reason for the undefined status and especially the dilemmas that arose when expressing the actions taken after exceeding the deadline and the issue of counting or not the managerial experience during further career advancement.

In recent years, another problem is evident, when the vacant positions in some cases also have the position of the substitute as a regular position (deputy general director) where even in these cases it is not allowed to exercise the duty in the position left vacant by the substitute but are appointed civil servants who are lower in hierarchy than them.

The current situation

The issue of acting positions has been updated again from the year 2019/2020 where there were changes in both the legal¹³ and political¹⁴ framework. The legal changes were accompanied by an interruption in implementation, especially after the constitutionality assessment of the Law on Public Officials and the Law on Salaries in the Public Sector, and this whole legal situation became suitable for making ad-hoc solutions and appointing acting positions, a situation which is still actual. The political changes in 2020 also brought changes at the senior management level, where after the changes in the

¹² Ibid, fq. 72

¹³ In February 2019, the new package for public administration was approved, where 3 new laws were approved: the Law on the organization and operation of the state administration and independent agencies, the Law on public officials and the Law on salaries.

¹⁴ In February 2020, the Kurti 1 Government came to power, which continues to govern today but in a different form and structure, known as the Kurti 2 Government.

structure of the Government, i.e. the merger of several ministries, the general secretaries were illegally placed on the surplus list and acting positions were appointed in their place.

In the table below you can see the status of acting positions in the current ministries:

Ministry	Position [General Secretary]	Position [Department Director]	Position [Head of Division]
Prime-minister office ¹⁵	Acting position since year 2021	1 Acting position dhe 17 regular positions ¹⁶	5 Acting position 32 regular positions 7 vacant positions
Ministry of Foreign Affairs	Acting position since year 2020	0 Acting position 9 regular positions 4 vacant positions	0 Acting position 22 regular positions 17 vacant positions
The Justice Ministry	Acting position since year 2021	1 Acting position 7 regular positions	4 Acting position 21 regular positions
Ministry of health	Regular Position	2 Acting position 4 regular positions	5 Acting position 20 regular positions
Ministry of Education, Science, Technology and Innovation	Acting position since year 2020	3 Acting position 2 regular positions	10 Acting position 15 regular positions
Ministry of Culture, Youth and Sports	Acting position since year 2020	1 Acting position 7 regular positions	2 Acting position 20 regular positions
Ministry of Local Government Administration	Acting position since year 2021	1 Acting position 4 regular positions	6 Acting position 10 regular positions
Ministry of Environment, Spatial Planning and Infrastructure	Acting position since year 2022	4 Acting position 15 regular positions	11 Acting position 35 regular positions 2 vacant positions

¹⁵ In the case of OPM and other ministries that joined, the numbering was done taking into account the ministry that joined it.

¹⁶ Regular position means the position held by a civil servant elected in accordance with the law.

Ministry of Agriculture, Forestry and Rural Development	Regular Position	2 Acting position 8 regular positions	5 Acting position 29 regular positions
Defense Ministry	Acting position since year 2021	2 Acting position 18 regular positions	3 Acting position 38 regular positions
Ministry of Internal Affairs	Regular Position	6 Acting position 4 regular positions	14 Acting position and 30 regular positions
Ministry of Industry, Enterprise and Trade	Acting position since year 2020	1 Acting position 7 regular positions	4 Acting position and 17 regular positions
Ministry of Economy	Acting position since year 2020	2 Acting position 4 regular positions	7 Acting position and 18 regular positions
Ministry for Communities and Returns	Acting position	0 Acting position 4 regular positions	0 Acting position and 12 regular positions
Ministr for Regional Development	Acting position since year 2020	0 Acting position 4 regular positions	0 Acting position and 4 regular positions

The chaotic situation is best shown in the table above, where only in the Prime Minister's Office and the ministries, out of 15 high-level management positions, only 2 positions are held by civil servants elected in accordance with the legal provisions, while the other 13 positions are which are held with Acting position. The duration of holding positions with Acting Position is on average 3 years, that is, since the beginning of 2020. Another fact is evident when the recruitment procedures are prolonged or repeated several times in a row. This happens especially if the preferred political candidates do not apply or are recommended, usually through broad interpretations discretion is given to the Government not to choose any of the successful candidates. Even though this is not allowed with the LPO or at the end of the process, i.e., before the appointment to the entire Government the procedure is cancelled on the grounds of exceeding the deadlines even though there is no general deadline in the LPO and that the cause of exceeding the deadlines is the negligence of the institutions themselves. This situation certainly undermines the legal security of the candidates and also demotivates them to apply and go through all the recruitment processes and in the end the whole process is cancelled. Such an approach certainly lowers the expectations of potential candidates and day by day the number of candidates for senior management positions is smaller.

The trend of acting positions also continues in middle and lower management positions. From the table above it can be seen that a significant number of the positions of Department Directors and Division Heads are held with Acting positions.

Recommendations

The existence of such a dangerous phenomenon in the public sector is undermining the principles and meritocracy itself, therefore the Group for Legal and Political Studies presents these recommendations based on the above analysis:

- Apply the LPO and immediately terminate the employment relationship of the acting positions and return them to their regular positions,
- Vacant positions to be filled initially with employees identified as redundant due to restructuring who can be placed immediately if they belong to the same category,
- If there are no redundant employees, immediately announce the vacant positions and fill them as soon as possible with civil servants based on recruitment procedures that ensure meritocracy,
- To establish a system of early identification of the end of the mandate for the senior management level and the middle and lower management levels so that the competitions are announced at an early stage and positions do not remain vacant for a long time,
- The law does not allow the institute of acting positions to reduce the incentives of the political level to hold managerial positions for a long time with Acting Official,

