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Appointing the director of a cultural institution

Abstract

The act on organizing and conducting cultural activity of October 25, 1991, distinguishes state and local government cultural institutions. A special place in these institutions is held by the director who is the governing body. This article outlines the rules for appointing directors and undertakes to analyze the provisions constituting the basis for an employment relationship with them. Doubts have been raised about the legal nature of the act of appointing the director of a cultural institution. The article points out the differences in the appointment of the director depending on the type of cultural institution, i.e. depending on whether it is a state or local government institution. It has been indicated that a candidate for the position of a director may be selected through a competitive process. The article presents the basic principles of its conduct.

Key words: director, cultural institutions, appointment, employment relationship, act of appointment, competition

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The act on organizing and conducting cultural activity distinguishes state and local government cultural institutions¹. Organizational forms of cultural activity include, in particular: theaters, operas, operettas, philharmonics, orchestras, film institutions, cinemas, museums, libraries, cultural centers, art centers, art galleries, and research and documentation centers dealing with various fields of culture². The dissemination of culture may also be carried out in other forms³. However, for an entity to be considered to be carrying out cultural activities, it must meet the criteria set out in the act on organizing and conducting cultural activity. It is not sufficient to maintain, for example, only the external organizational form of cultural activity⁴. A cultural institution is such an entity whose mode and principles of functioning are specified by the act on organizing and conducting cultural activity and the statute, which is issued based on the act. The governing body in cultural institutions is the director⁵. They continuously undertake all factual and legal actions necessary for the proper functioning of the cultural institution. The director also represents the institution externally and makes all declarations of knowledge and will on its behalf in relations with external parties. Cultural institutions have legal personality and the director is their agency⁶.

Due to the division of cultural institutions into state and local government institutions through the act on organizing and conducting cultural activity, the procedure for appointing a director of a state cultural institution is distinguished from that of a local government institution. The organizer appoints and dismisses the director of the state cultural institution after obtaining the consent of the minister in charge of culture and national heritage protection. In the case of appointing the same person to the post of director of a state cultural institution for a consecutive period, the organizer consults the minister in charge of culture and national heritage protection⁷. This means that if the same person is appointed as director of a state cultural institution

1 Art. 8 and 9 of the act of October 25, 1991 on organizing and conducting cultural activity (Journal of Laws of 2020, item 194).

2 Art. 2 of the act on organizing and conducting cultural activity.

3 Judgment of the Supreme Administrative Court of May 17, 2011, II OSK 378/11, Legalis no. 388944.

4 Judgment of the Supreme Administrative Court of August 03, 2018, II FSK 2110/16, Legalis no. 1826329.

5 Art. 17 of the act on organizing and conducting cultural activity.

6 S. Gajewski, A. Jakubowski, *Ustawa o organizowaniu i prowadzeniu działalności kulturalnej. Komentarz*, Warszawa 2016, p. 107.

7 Art. 15 sec. 3 of the act on organizing and conducting cultural activity.

for a consecutive term, the minister's approval is not required. Their opinion is sufficient. The difference between consent and opinion is important. Consent must be positive, it means approval and acceptance is necessary. In contrast, an opinion is more informative and not necessarily approving⁸. In the case of the director of a local government cultural institution, the agency authorized to appoint the director should be determined based on the relevant laws governing the operation of local government. It is the organizer who has the power to appoint the director of the cultural institution. In the case of organizers of local government cultural institutions, it may be a commune, district, or province. In the case of a commune, the power to hire and dismiss managers of commune organizational units will be vested in the commune head (wójt), or mayor of the city⁹. Note, however, that this is not the same as remaining the director's employer. The employer of the director of a cultural institution will be the cultural institution. According to the Labor Code, the employer is an organizational unit, even if it does not have a legal personality, and a natural person, if they employ workers¹⁰. The provisions of Art. 3 of the Labor Code and 3¹ of the Labor Code are applicable here. These provisions define who can be an employer and who can represent an employer in employment law activities¹¹.

According to the provisions of Art. 68 § 1 of the Labor Code, an employment relationship is established by way of appointment if a separate provision relative to the Labor Code so provides. In the case of the director of a cultural institution, such a basis is provided by the provision of Art. 15 sec. 7 of the act on organizing and conducting cultural activity. The act of appointment plays a dual role here. On the one hand, an employee is entrusted with a position, and on the other hand, this act is treated as a declaration of intent by the employer or the entity representing the employer to establish

8 I. Fischer et al., *Vademecum dyrektora instytucji kultury*, Warszawa 2021, p. 44.

9 Art. 30 sec. 2 item 5 of the Act of March 8, 1990, on Municipal Self-Government (Journal of Laws of 2021, item 1372). In the case of a district, the appropriate basis for this is Art. 32 sect. 2 item 5 of the Act of June 5, 1998, on district self-government (Journal of Laws of 2020, item 920), and in the case of a provincial self-government – art. 41 sec. 2 item 6 of the Act of June 5, 1998, on provincial self-government (Journal of Laws of 2020, item 1668).

10 Art. 3 of the Act of June 26, 1974 – Labour Code (Journal of Laws of 2020, item 1320). See also: supervisory decision of the Governor of the Wielkopolskie Province dated February 10, 2015, KN-I.4131.1.17.2015.22.

11 M. Włodarczyk, *Nawiązanie stosunku pracy z powołania* [in:] *Indywidualne prawo pracy. Pozaumowne stosunki pracy*, ed. Z. Górala, vol. 4, Warszawa 2017, p. 146.

an employment relationship¹². The act of appointment shall be in writing. As to the consequences of failure to observe the written form, the doctrine has not developed a uniform position. However, the prevailing view is that an appointment made in any other form than writing is invalid¹³. Employment relationships by appointment are characterized by less permanence than employment relationships by contract. The possibility of asserting a claim for declaring the termination ineffective and for reinstatement before an employment court is excluded here. Following the provisions of Art. 69 of the Labor Code, the employment relationship based on appointment is governed by the provisions concerning a contract of employment for an indefinite period, except for the provisions governing the procedure for terminating contracts of employment and the processing of disputes arising from the employment relationship in the part concerning the adjudication of the ineffectiveness of termination and reinstatement. However, according to Art. 70 § 1 of the Labor Code, an employee whose employment relationship was established based on an appointment may be dismissed from their post at any time by the body which appointed them¹⁴. This provision does not apply in the case of dismissal of the director of a cultural institution because the act on organizing and conducting cultural activity in the Art. 15 sec. 6 contains a closed catalogue of premises for dismissing the director of a cultural institution before the expiry of the period for which he was appointed¹⁵. The mode of establishing the employment relationship based on appointment may be preceded by a competition. This is already apparent from Art. 68¹ of the Labor Code. Thus, an entity employing under the provisions of the Labor Code has the right to hold a competition. This means that employment based on appointment requires an appropriate procedure to verify the qualifications of candidates for the position¹⁶. For the director of a cultural institution, the legislator in the act on organizing and conducting cultural activity has provided for a special recruitment procedure. In some situations, the director of a cultural institution is appointed only after consulting the trade unions operating in the institution and the professional

12 J. Stelina, *Przedmiot prawa pracy* [in:] *Część ogólna*, vol. 1, ed. K.W. Baran, Warszawa 2017, p. 142.

13 More on the subject M. Włodarczyk, *op. cit.*, p. 148–150.

14 J. Stelina, *op. cit.*, p. 142–143; for claims by a dismissed employee, see: W. Muszalski, *Stosunek pracy na podstawie powołania, wyboru, mianowania oraz spółdzielczej umowy o pracę* [in:] *Kodeks pracy. Komentarz*, eds. W. Muszalski, K. Walczak, Warszawa 2021, p. 197.

15 Art. 15 sec. 7 of the act on organizing and conducting cultural activity.

16 M. Włodarczyk, *op. cit.*, p. 153.

and creative associations appropriate to the type of activities carried out by the cultural institution. In other situations, however, the director of a cultural institution is appointed after a competition. The director of an institution that is not an art institution is appointed for a period of 3 to 7 years. However, for an artistic institution, the director is appointed for a period of 3 to 5 artistic seasons¹⁷. The director of a cultural institution is appointed by the organizer for a specified period, after consulting the trade unions operating in that cultural institution and the professional and creative associations competent with regard to the type of activity carried out by the institution. It is not necessary to consult trade unions and professional and creative associations when a candidate for director has been selected through a competition¹⁸. It may be reiterated, following the Supreme Administrative Court, that by introducing the obligation to consult trade unions and professional and creative associations, the legislator wished above all to create an opportunity for organizations that operate in the broadly defined field of culture to express their opinion on the appointment of a director of a cultural institution operating in the area of the institution's operation¹⁹. The term "creative association" includes both an association for creators as well as associations that lead and inspire creative activity²⁰. The legislator indicates the need for two opinions, i.e. the internal opinion, i.e. the opinion of trade unions that operate in a given cultural institution, and the opinion of professional and creative associations, which can be either internal or external²¹. If this will be an external opinion, the selection of the association should take into account the convergence of its activities with the activities of the cultural institution and the convergence of statutory objectives and tasks²². The legislature has made consultation mandatory here. In contrast, there is no obligation to obtain a favorable opinion, so the statutory obligation will be satisfied by the mere fact of consultation, regardless of whether the opinion is favorable or unfavorable. Consultation must be formal. The promoter should read and consider the opinion²³. As the Supreme Administrative Court noted in one of its rulings, the obligation

17 Art. 15 sec. 2 of the act on organizing and conducting cultural activity.

18 Art. 15 sec. 1 of the act on organizing and conducting cultural activity.

19 Judgment of the Supreme Administrative Court of August 8, 2012, II OSK 1295/12, Legalis no. 542998.

20 Judgment of the Supreme Court of October 15, 2014, I PK 43/14, LEX no. 1628906.

21 I. Fischer et al., op. cit., p. 42.

22 Ibidem, p. 43.

23 Ibidem.

to consult professional and creative associations appropriate to the type of activity conducted by an institution cannot be superficial²⁴. Furthermore, it is stipulated that only a complete omission by the promoter of the required consultation activities constitutes a material breach of the law. On the other hand, the consultation of selected professional and creative associations which are relevant to the type of activity pursued by an institution does not constitute a material breach of law resulting in the annulment of the contested order²⁵.

Following Art. 15 sec. 5 of the act on organizing and conducting cultural activity, before appointing the director, the organizer concludes a separate written contract with them, in which the parties define the organizational and financial conditions of the cultural institution's activity and the program of its operation. This means that the contract should set out, for example, an annual or longer-term action plan and any recovery programs or investments. The contract shall become effective on the date of appointment of the director. The refusal of a director candidate to enter into a contract shall result in their failure to be appointed to the position. The legislature did not provide for the termination of such a contract. The contract affects the legal position of the director, as the duties set out therein are shaped like those of an employee. If the director of the cultural institution ceases to perform the duties contained in the contract, they may be dismissed before the end of the period for which they were appointed. Failure to perform the obligations of the contract has analogous effects to failure to fulfill employment obligations²⁶. The appointed director of the cultural institution shall make the program of activities public within 7 days of their appointment on their subject page in the Public Information Bulletin or on the website of the cultural institution²⁷.

At this point, it is important to note the legal nature of the act of appointment of the director of the cultural institution. This act is treated as a public-legal act, because it is undertaken based on public law, to perform public tasks and use public funds, which leads to the conclusion that it falls within the jurisdiction of administrative courts. It is also assumed that the act of appointment has the

24 Judgment of the Supreme Administrative Court of October 14, 2020, II OSK 1535/20, LEX no. 3074625.

25 Judgment of the Supreme Administrative Court of January 28, 2020, II OSK 717/18, LEX no. 3043566.

26 On this topic similarly A. Rycak, M. Rycak, *Status prawny pracowników kultury* [in:] *Pragmatyki pracownicze*, vol. 11, eds. K.W. Baran, Z. Góral, Warszawa 2021.

27 Art. 15 sec. 5a of the act on organizing and conducting cultural activity.

character of an act within the scope of the labor law, because, although it is made unilaterally, it does not lead to the establishment of an administrative-legal relationship, but it is the source of the employment relationship and it constitutes an act of the employer²⁸. The Supreme Administrative Court, in one of its rulings, accepts the dual nature of acts of appointment to the position of director of a cultural institution, stating that on the one hand they are subject to the control of an administrative court, and on the other hand there is the possibility of subjecting potential disputes to the control of labor courts²⁹. However, in another ruling, it states that when appointing a director of a cultural institution, which is an act equivalent to establishing an employment relationship that does not exist without the appointment, a local government agency makes a unilateral act within the framework of the employment relationship and not an act of public administration. Therefore, in the opinion of the Supreme Administrative Court, the labor court is authorized to review such an act of appointment, and the cognition of the administrative court is excluded³⁰. Already these two positions of the Supreme Administrative Court present discrepancies as to the legal nature of the act of appointment. They boil down primarily to the problem of determining which court remains competent – an administrative or a common court and to what extent, as to which claims. As outlined above, there are different positions in the jurisprudence of administrative courts on this issue. In presenting the legal nature of the act of appointment, when analyzing it, it is also worth referring to the case law on the act of dismissal, which has an analogous legal nature to the act of appointment. In this regard, the Supreme Court expressed its opinion that the case for claims arising out of the wrongful dismissal of the director of a cultural center is a case for claims under the employment relationship, and the purpose of the proceedings before the common court is to settle a civil case, which has its beginning in an act of an administrative authority constituting an action under employment law aimed at terminating the employment relationship, and not to exercise control over the activities of public administration within the meaning of Art. 184 of the Polish Constitution of April 2, 1997³¹. The

28 S. Gajewski, A. Jakubowski, *op. cit.*, p. 80-81.

29 Judgment of the Supreme Administrative Court of January 31, 2012, II OSK 2526/11, *Legalis* no. 531011; similarly: The Supreme Administrative Court in its decision of July 7, 2015, II OSK 1672/15, *Legalis* no. 1315318.

30 Decision of the Supreme Administrative Court of April 4, 2012, I OSK 2250/11, *Legalis* no. 1107200.

31 Judgment of the Supreme Court of October 15, 2014, I PK 43/14, *Lex* no. 1628906.

act of appointment is to establish an employment relationship. Admittedly, it is carried out by a public administration agency, but it does not act here in an administrative matter. In addition, it is worth noting that if it were to be assumed that the dismissed director is entitled to a judicial procedure before an administrative court, this could result in a violation of the principle of legal certainty from a broad perspective. A ruling by an administrative court that the act of dismissal was invalid would have to lead to the conclusion that the director of the cultural institution was never dismissed, which in practice would cause further problems. At the same time, dismissal and appointment are the actions of the employer employing the employee, therefore the competent court to hear any dispute over the appointment (or dismissal) of the director of a cultural institution, according to Art. 262 § 1 of the Labor Code, will be the labor court³². It seems that at this stage, given the existing divergence of positions, the legislator must intervene by taking appropriate solutions that would unequivocally resolve the emerging disputable issues affecting the legal nature of the act of appointment (dismissal).

Next, it is necessary to address issues related to the competition for the position of director of a cultural institution. The candidate for this position may be selected through a competitive process³³. The competition may be held at either a state or local government cultural institution. However, in relation to local government institutions, the legislator included specific solutions in this regard and adopted an act implementing the law on competition³⁴. The legislator has adopted the optionality of the competitive procedure for the appointment of the director of a cultural institution. However, it reserved an exception in this regard, assuming that in local government cultural institutions specified in the regulation, the selection of a candidate for the post of director takes place by competition³⁵. However, the minister in charge of culture and national heritage protection may agree to appoint a candidate indicated by the organizer for the position of director without holding

32 S. Gajewski, A. Jakubowski, *op. cit.* More on this subject A. Rycak, M. Rycak, *op. cit.*

33 Art. 16 sec. 1 of the act on organizing and conducting cultural activity.

34 Regulation of the Minister of Culture and National Heritage of April 12, 2019 on the competition for the candidate for the post of director of a cultural institution (*Journal of Laws of 2019, item 724*).

35 Art. 16 sec. 2 of the act on organizing and conducting cultural activity. See the Regulation of the Minister of Culture and National Heritage of July 30, 2015, on the list of local government cultural institutions in which the selection of a candidate for the post of director is carried out through a competition (*Journal of Laws 2015, item 1298*).

a competition. In the case of appointing the same person as director for the next term, the organizer shall consult the minister in charge of culture and national heritage protection³⁶. When the organizer applies to the minister responsible for culture and national heritage protection for permission to appoint the director of a cultural institution without holding a competition, the organizer is obliged to justify the application, with particular emphasis on the reasons for applying such a procedure and to provide information about the education, competencies, and professional experience of the candidate for the position of director³⁷. It is reasonable for trade unions and professional and creative associations to be consulted before seeking the Minister's approval. These opinions should be attached to the application submitted to the minister. Incidentally, it should be noted that these opinions should not be obtained subsequently, i.e. after applying or even after obtaining the minister's approval. It is hard to imagine the purposefulness of an action in which the organizer applies for permission without attaching any opinions to the application, and the minister gives their permission despite their absence. And then after subsequently (sequentially) attaching the opinions and reviewing them, the minister, despite their earlier approval, nevertheless decides not to appoint the person as a director based on these subsequent opinions³⁸. Therefore, to avoid such proceedings, the opinions should be attached to the application, so that the minister could become acquainted with them already at the preliminary stage (before making the decision). The minister in charge of culture and national heritage protection examines the organizer's application within 30 days of its receipt, guided by the specificity of the institution and the education, competence, and experience of the candidate for the post of the director of the institution³⁹. Failure by the minister responsible for culture and national heritage protection to grant the application results in the candidate not being appointed as director of the institution⁴⁰. The competition for the post of director of a cultural institution is announced by the organizer⁴¹. Before announcing the competition, the organizer announces to the public the intention to announce a competition, which includes in particular the

36 Art. 16 sec. 3 of the act on organizing and conducting cultural activity.

37 Art. 16 sec. 3a of the act on organizing and conducting cultural activity.

38 I. Fischer et al., *op. cit.*, p. 47.

39 Art. 16 sec. 3b of the act on organizing and conducting cultural activity.

40 Art. 16 sec. 3c of the act on organizing and conducting cultural activity.

41 Para. 2 of the Regulation on the competition for the candidate for the post of director of a cultural institution.

date of commencement and the expected date of completing the competition procedure⁴². Taking into account the organizational and legal form, the scope of activities and the current situation of the cultural institution which is the subject of the competition for the director, the organizer determines in the competition notice at least the name, seat and address of the cultural institution, a description of the qualifications required from a candidate for the position of the director of the cultural institution, the skills and competencies of the candidate for the position of the director of the cultural institution and the tasks to be performed by the director with respect to the day-to-day functioning and development of the cultural institution, and specifies the requirement for the candidates to submit a program for the execution of tasks within the scope of the day-to-day functioning and development of the cultural institution, a list of documents required from the candidates, information on the manner in which the organizer makes documents and information available concerning the organizational and financial conditions of the cultural institution, including its financial and material plans for the periods following the results of the competition, if a material plan is prepared in the given cultural institution, and other general information on the activities of the cultural institution⁴³. In addition, the announcement shall indicate the place and deadline for the submission of the offers, which shall not be shorter than 30 days from the date of making the competition announcement public, as well as the deadline for the consideration of the submitted offers⁴⁴. It should be noted that the legislature does not indicate the criteria to be met by a candidate for the position of director. These are self-defined by the organizer⁴⁵. These criteria must not be discriminatory. The prohibition of discrimination in employment provided by the Labor Code also applies at the stage of competition proceedings. This means that a person against whom the prohibition of discrimination is violated may seek damages under sec. 18^{3d} of the Labor Code⁴⁶. To conduct the competition, the organizer appoints

42 Art. 16 sec. 3d of the act on organizing and conducting cultural activity.

43 Art. 16 sec. 3e of the act on organizing and conducting cultural activity.

44 Ibidem.

45 Thus e.g.: Provincial Administrative Court in Białystok in the judgment of December 12, 2019, II SA/Bk 704/19, LEX no. 2764688; the same in the judgment of November 26, 2020, II SA/Bk 695/20, LEX no. 3097983.

46 A. Rycak, M. Rycak, op. cit.

a competition committee⁴⁷. The committee, among other things, determines the detailed criteria for the evaluation of the participants in the competition, conducts the competition proceedings for the candidate for the post of the director of the cultural institution, settles the competition for the candidate for the post of the director of the cultural institution, and then draws up the final minutes of the competition and submits the results of the competition along with its documentation to the organizer⁴⁸. In situations indicated by the legislator, the competition may not be resolved, e.g. when the jury finds that no offer meets the conditions specified in the competition announcement⁴⁹. If a competition is not held in a local government cultural institution where the appointment of the director had to be preceded by a competition, the organizer immediately announces another competition, unless they apply to the minister responsible for culture and national heritage protection for permission to appoint the director without a competition⁵⁰. At the same time, it is worth noting that the person who wins the competition has no claim to an employment relationship with them⁵¹.

Bibliography

- Fischer I. i in., *Vademecum dyrektora instytucji kultury*, Warszawa 2021.
- Gajewski S., Jakubowski A., *Ustawa o organizowaniu i prowadzeniu działalności kulturalnej. Komentarz*, Warszawa 2016.
- Muszalski W., *Stosunek pracy na podstawie powołania, wyboru, mianowania oraz spółdzielczej umowy o pracę* [in:] *Kodeks pracy. Komentarz*, eds. W. Muszalski, K. Walczak, Warszawa 2021.
- Rycak A., Rycak M., *Status prawny pracowników kultury* [in:] *Pragmatyki pracownicze*, vol. 11, eds. K.W. Barana, Z. Góral, Warszawa 2021.
- Stelina J., *Przedmiot prawa pracy* [in:] *Część ogólna*, vol. 1, ed. K.W. Baran, Warszawa 2017.
- Włodarczyk M., *Nawiązanie stosunku pracy z powołania* [in:] *Indywidualne prawo pracy. Pozaumowne stosunki pracy*, ed. Z. Góral, vol. 4, Warszawa 2017, p. 146.

47 The composition of the commission is defined in Art. 16 sec. 4, 5 of the act on organizing and conducting cultural activity.

48 Art. 16 sec. 5a of the act on organizing and conducting cultural activity.

49 Art. 16 sec. 11 of the act on organizing and conducting cultural activity.

50 Art. 16 sec. 13 of the act on organizing and conducting cultural activity.

51 A. Rycak, M. Rycak, op. cit.

Powołanie dyrektora instytucji kultury

Streszczenie

Ustawa o organizowaniu i prowadzeniu działalności kulturalnej z 25 października 1991 roku wyróżnia państwowe i samorządowe instytucje kultury. Szczególne miejsce w tych instytucjach zajmuje dyrektor będący organem zarządzającym. W artykule przedstawiono zasady powoływania na stanowisko dyrektora. Podjęto analizę przepisów stanowiących podstawę nawiązania z nim stosunku pracy. Zwrócono uwagę na wątpliwości dotyczące charakteru prawnego aktu powołania dyrektora instytucji kultury. W artykule wskazano różnice w powołaniu dyrektora w zależności od rodzaju instytucji kultury, tj. w zależności od tego, czy jest to państwowa czy samorządowa instytucja. Wskazano, że kandydat na stanowisko dyrektora może zostać wyłoniony w drodze konkursu. W artykule przedstawiono podstawowe zasady jego przeprowadzania.

Słowa kluczowe: dyrektor, instytucje kultury, powołanie, stosunek pracy, akt powołania, konkurs