

# Referring commune's resident to social welfare home as commune's direct responsibility – selected issues

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## **Abstract:**

**Aim:** The paper presents an analysis of the procedure involved in the legal situation pertaining to placing a commune's resident in a social welfare home. The aim of the paper is to analyze two key issues – firstly, who is the party to the proceedings for placement of the commune's resident in a social welfare home; secondly, the analysis of the aspect concerned with the proceedings for payment for the resident's stay in such facility.

**Research method:** The principal research method applied in the paper is the method of interpreting applicable legal norms.

**Findings:** The analysis conducted in the paper allowed one to ascertain that the party to the proceedings for determining the payment for care and accommodation in a social welfare home is the person required to participate in these costs, and as such, these are, apart from the commune's resident, the spouse, relatives in the ascending or descending line and the commune from which the person was referred to the social welfare home.

**Originality/value of the paper:** Despite being of utmost importance, both in practical and theoretical terms, the set of issues addressed in the paper has so far failed to become a focus of extensive research. The studies conducted are valid from the practical and theoretical point of view, in particular, in the light of the EU aging population.

**Research implications:** The paper may prove to be of considerable relevance for public administration bodies, as well as the decision-making practice of administrative courts.

**Key words:** *social welfare home, public administration, commune's direct responsibilities, a party to administrative proceedings.*

**JEL:** K11.

## **1. Introduction**

The issues surrounding the placement of commune's residents in a social welfare home (hereinafter referred to as d.p.s.) are nowadays of key importance, and it appears that they are bound to grow in relevance, especially considering Poland's aging population, as well as that of other countries of the European Union.

Placing a commune's resident in the residential social welfare home is the commune's direct responsibility of obligatory nature. The form of action on the part of the public administration aimed at fulfilling this responsibility is, first and foremost, an administrative decision, and as such it is a sovereign, unilateral, individual and specific act.

The form of administrative decision has been provided for with respect to the following: referring the commune's resident to the social welfare home, setting the fee for staying in the social welfare home and placement in a specific social welfare home.

Article 59 (1) of the Act of 12 March 2004 on Social Assistance (J.L., 2017, item 1769; hereinafter referred to as u.p.s.) states that the decision on referring a person to the social welfare home and on setting the fee for staying in this facility is taken by the commune body competent for the person concerned on the day on which this person is referred to the social welfare home. In Article 59 (3) u.p.s., the third administrative decision is indicated, i.e. the decision on the social welfare home placement which is taken by the commune's body in charge of the social welfare home or by the Head of the powiat (district) in charge of the social welfare home. For regional social welfare homes, this decision is, as a rule, taken by the Voivodship Marshall. If it is not possible to arrange the placement in a social welfare home because there is no vacancy, the person expecting to be placed in such facility is notified about being put on a waiting list and about the expected placement date.

In the paper, two key questions will be analyzed referring to the issues centered around the placement of the commune's resident in a social welfare home – firstly, the question of the party to the proceedings for placing the commune's resident in the social welfare home; secondly, the procedural aspect of the fee to be paid for staying in such facility.

## **2. Party to the proceedings for referring and placing a person in the social welfare home and setting the fee for stay in this facility**

The legal definition of a party to proceedings has been laid down in Article 28 of the Act of 14 June 1960 – Code of Administrative Procedure (J.L. 2017, item 1257; hereinafter referred to as “k.p.a.”). In the light of this provision, a party to proceedings is any person whose legal interests or responsibilities are the subject matter of the proceedings or who requires that the administrative authority intervenes in the matter of his/her legal interest or obligations. As Adamiak and Borkowski show, every entity who has legal interest or obligation which needs to be rendered more specific by means of the application of relevant law and of a competent administrative body, is a party to proceedings of the same procedural position. Every party to proceedings enjoys the same procedural rights and obligations and the same pertains to the authority in charge of the proceedings, as it is afforded the same scope of procedural rights and obligations in relation to all the parties. One would even be correct in saying that the authority may not differentiate this scope, for it would lead to flawed proceedings brought about by breaching the principal of equality of the parties (Adamiak, Borkowski, 2017: 232).

Identifying who is a party to the proceedings for placing a commune’s resident in d.p.s. requires that Article 54 (1) u.p.s. be cited. According to its wording, a person who is in need of a 24-hour care on account of old age, disease or disability, and who is neither capable of living on their own nor can he/she be provided with necessary care in the form of care services, is entitled to the right to be placed in the social welfare home. Hence the assumption should be that a party to the proceedings for referring and placing a person in the social welfare home and for setting the level of the fee for care and accommodation in such facility is the person referred to in Article 54 (1) u.p.s. Despite the fact that in Article 54(2) the legislator mentions legal representative of the person who is to be placed in d.p.s., one cannot consider a legal representative to be a party to the proceedings in question. The reason behind this is that legal representatives conduct legal actions not in their own name but in the name and on behalf of another entity who no longer has the capacity to perform acts in law.

Determining who is the party to the proceedings for referring persons to the social welfare home and placing them in a specific social welfare home raises far less doubt than is the case for indicating the group of parties to the proceedings for setting the amount of payment for stay in this kind of facility. In order to solve this problem, it is reasonable to refer to the views demonstrated

in the literature and case law pertaining to the concept of legal interest in the context of Article 28, k.p.a. J. Zimmermann stresses that it is the category of legal interest (and even more so of legal responsibility) that provided the underlying basis for the concept of a party to proceedings which in turn provided the basis for granting procedural protection to a certain group of entities (Zimmermann, 1996: 79). According an entity the status of a party to administrative proceedings was made contingent by the legislator on whether one of the two conditions was present, i.e. on the existence of legal interest or obligation. (Wróbel, [in:] Jaśkowska, Wróbel, 2000: 236).

The legal interest always arises from the provisions of substantive law (see, e.g. Zimmermann, 1996: 79-80; Klat-Wertelecka, 2001: 64; Kielkowski, 2004: 117; NSA [Supreme Administrative Court] ruling of 29 January 1991, IV SA 972/90, ONSA 1991, Nos 3-4, item. 52; NSA ruling of 29 May 2008, I OSK 826/07, [www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl); the ruling of WSA [Voivodship Administrative Court] of Łódź of 28 April 2010, II SA/Łd 148/10, ([www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl)). The provisions which are the source of legal interest establish the competence of the authority for ruling on a particular matter in the form of an administrative decision.

The administrative decision rules “solely on the rights and responsibilities of the parties and of persons who are directly interested in the manner in which the matter will be ruled on (see NSA ruling of 27 May 1988, IV SA 164/88, “Issues of the Rule of Law” 1988, No 10, Annex). According to Łętowski, the concept of legal interest applied in Article 28 k.p.a. fulfills two roles, namely, it provides the guarantee for the inviolability of the rule of law, on the one hand, while on the other hand, it protects administration from becoming involved in actions which are unnecessary and will bring no effects to anybody (Łętowski, 1990: 238-239).

Legal interest should be understood as an objective interest, that is, one which really exists in the light of applicable laws, which is justified, well-founded, legitimate and not merely presumed, existing in one's subjective belief. Rowiński sees the concept of legal interest as an objective and factually existing need of legal protection (Rowiński, 1971: 11). In literature, legal interest is afforded particular significance. It is pointed out that legal interest fulfills a crucial role in that it is the link between administrative procedural law and administrative substantive law, with this role being fulfilled while initiating proceedings as well as in their course (Klat-Wertelecka, 2001: 63). The concept of legal interest encompasses “the rights as well as responsibilities based on law” (Iserzon, [in:] Iserzon, Starościak, 1970: 88).

In the light of the views cited so far and Article 61(1) u.p.s., one ought to assume that a party to the proceedings for setting the fee for stay in a social welfare home is a person required to participate in this payment, which implies that, apart from the commune's resident, it is also the resident's spouse, relatives in the ascending and descending line and the commune which referred the resident to the social welfare home. This is on account of the fact that these persons have legal interest, that is, an interest which exists objectively, can be justified, is well-founded and legitimate. This is an interest which has its basis in the provisions of u.p.s. There should be no doubt that imposing an obligation on an entity in the form of having to participate in the costs of providing for the family member in d.p.s. impacts directly the entity's legal situation. Under such proceedings, the entities must be ensured that relevant procedural safeguards are in place which will allow them to protect their legal interest. Being accorded the status of a party to proceedings is equivalent to providing the entities with access to a range of procedural rights laid down in k.p.a. This is why according the status of a party to proceedings to the entities referred to in Article 61(1) u.p.s. is an issue of major importance from the theoretical and practical point of view.

However, the question that arises is whether the entities indicated will always (automatically) be accorded the status of a party to proceedings for determining the obligation to participate in the costs of stay in d.p.s. This issue is problematic for several reasons. Firstly, according to Article 61(1) u.p.s., if the resident of the care home pays the entire amount, his/her spouse, relatives in the descending and ascending line and the commune are not required to participate in the costs. Secondly, one should bear in mind that with respect to identifying the persons required to participate in these costs, the order of this participation is defined statutorily in Article 61(1) u.p.s. The public administration body must therefore conduct the proceedings for bringing evidence aimed at deciding whether a particular entity is capable of sharing the costs of stay in d.p.s., according to the order laid down in Article 61(1) u.p.s., and therefore it pertains in the first place to the resident of the social welfare home; and in the case of minors, to their legal representative, and next to the spouse, and relatives in descending and ascending line.

However, it appears that all the entities indicated by the legislator in the content of Article 61(1) u.p.s. have the status of a party to the proceedings for determining the obligation of paying for d.p.s. This view is founded on the legal definition itself of a party to proceedings included in Article 28 k.p.a. Moreover, one should keep in mind that "the only condition for an entity to be accorded the status of a party to administrative proceedings is whether the entity has legal interest

or obligation on the basis of which the entity <<requires that the authority should act>> or to which <<the proceeding refers>>” (Wróbel, [in:] Jaśkowska, Wróbel, 2016: 237).

In the light of the above, one has to recognize that the entities mentioned are clearly the entities whose legal interest or obligation are what the proceedings are concerned with, hence they have the right to participate actively in the proceedings. This view is supported by Article 61 u.p.s. in which only the order of persons required to bear the costs is indicated; it does not yet mean that this obligation has been individualized, since for this to occur, an administrative decision has to be taken.

Also, one has to take into consideration that making payments does not burden simultaneously all those who are subject to bearing the costs mentioned in Article 61(1) u.p.s., with this obligation being placed on them in line with the order set by the legislator. The substitute nature of the payment made by the commune results from Article 61(3) u.p.s. according to which the commune, from which the person concerned has been referred to a social welfare home, makes payment as a substitute if the persons required to pay in the first place fail to fulfill this obligation. The commune is entitled to reimbursement of the sums incurred in this respect. The procedure employed in this case is laid down in the provisions of Articles 103(2) and 104 u.p.s. Pursuant to Article 103 u.p.s., director of the social welfare home sets the amount to be paid by those required to pay for stay of the entitled person by means of an agreement. The amounts subject to reimbursement and the date of repayment is set by an administration decision. Obtaining this repayment proceeds in the course of enforcement procedure in administration.

The view stated confirms the stance presented in the decision of NSA made on 8 December 2016 in which it was indicated that the addressees of the decision setting the payment amount may be both the person referred to the social welfare home and persons from the group of entities listed in Article 61(1) points 2 and 3 u.p.s., i.e. the spouse, relatives in descending and ascending line and the commune (see the NSA's decision of 8 December 2016, I OSK 1131/15, [www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl)). In the decisions taken pursuant to Article 59 (1) u.p.s., the obligation is made specific in that the amount of payment is set, the persons required to bear the costs from the group mentioned in Article 61 (1), points 2 and 3 u.p.s. are identified, along with the portions of payment allocated to them and possible payment exemption, in accordance with Article 64 u.p.s. The persons required to make this payment should know the content of the obligation with which

they have been burdened so as to be able to fulfill this obligation, but also to undertake steps to protect themselves against the situation when this obligation becomes definitive.

### **3. Payment for stay in a social welfare home**

A fee is charged for staying in a social welfare home in the amount that is equal to the average monthly costs of care and accommodation. Persons required to bear these costs and the order according to which they are obligated to make this payment is laid down in Article 61(1) u.p.s., stating that those required to pay for stay in d.p.s are the persons listed in the following order: 1) home's resident; 2) spouse; relatives in descending line before those in ascending line; 3) the commune from which the person has been referred to a social welfare home. However, it should be noted that the persons indicated above, as well as the commune, are not required to cover this payment if the home's resident pays in full for his/her stay in d.p.s.

In literature, it is indicated that in setting the fee level, resulting from Article 59(1) u.p.s based on an administrative decision, the duty on the part of the public authority extends to setting not only the overall monthly payment but also the person or persons required to bear these expenses (see Nitecki, 2013: 53, and Maciejko [in:] Maciejko, Zaborniak, 2013: 303 and literature cited there).

The principle of an order in which this obligation is to be performed means that in a situation when the person placed in d.p.s. is not capable of bearing the full cost of staying in the facility, the obligation in this regard lies first with the spouse followed by relatives in the descending line, next those in the ascending line and then the commune. The obligation of making payments by a specific person or persons from the group of entities required to do so under Article 61(1)(2) u.p.s. is established by the administrative decision concerned with setting the payment for stay in d.p.s, referred to Article 59 (1) of this act.

The obligation of payment provided for in Article 61 (1) u.p.s. must, however, be made specific and individualized for each person expected to bear the costs of stay in d.p.s. It seems that this act of specifying the obligation should proceed by means of a decision taken based on Article 59 (1) u.p.s. by defining the amount to be paid for the resident's stay in d.p.s., by indicating the person (persons) required to bear these costs and finally by determining the amounts allocated to

them (see in particular NSA ruling of 16 June 2016, I OSK 1016/15, LEX No 2106401; NSA ruling of 30 October 2012, I OSK 653/12, LEX No 1792349).

In the context of Article 59(1) u.p.s. what ought to be considered a desirable situation is when the ruling on referring a person to d.p.s. and setting the amount to be paid could be made by one decision. However, if determining the payment referred to in this provision proceeds in a separate decision, one should see it as concurrent determination of a person or persons required to bear the costs and their amount in relation to every of those persons. It is the authorities conducting the proceedings that face the responsibility to examine the reasons for bearing the costs of stay in d.p.s. by all the persons who are required to do so by law (in the set out order) and to decide as to what portion of payment is allocated to them. There is no possibility to further divide the proceedings and issue a separate decision in terms of identifying the person (persons) required to pay for stay without setting the amount to be paid by a particular person.

In this respect – in relation to a specific person (persons) – there is one proceeding conducted with one decision being taken aimed at individualizing the obligation and specifying the amount to be paid. This is important so far as, pursuant to Article 60(1) u.p.s., there is a fee charged for staying in d.p.s in the amount equal to average monthly costs of care and accommodation for the resident, and the subject who is ultimately required to bear the costs – in the amount that is equal to the difference between the average cost of care and accommodation in d.p.s and payments made by the home's resident, their spouse, relatives in descending and ascending line, and should they fail to cover the whole payment – it is the commune from which the resident was referred to d.p.s. If the persons fail to fulfill their payment obligation, it is also the commune that makes this payment on a substitute basis, whereby it has the right to seek to recover at a later date the costs thus incurred.

Considering the mutual coherence and transparency of the rulings, it is desirable for the case involving payment for care and accommodation of a person placed in d.p.s. , to be wholly regulated by one administrative act, which is amended according to the circumstances surrounding the facts of the case, and not by entirely separate rulings for every entity that is required to participate in this payment. Otherwise independent rulings pertaining to the same subject matter of the proceedings begin to function independently of one another in the legal circulation, which involves greater risk if only regarding the scope of their regulations as it may be partly overlapping or diverging. This aspect is particularly important considering the order according to which the payment for stay in

d.p.s is to be made, as provided for by Article 61(1) u.p.s, since it affects the obligation as well as the amount of payment in relation to the entities whose obligation in this respect is further down the line.

Another important question is to determine what the source of obligation to pay for resident's care and accommodation in the social welfare home is in relation to a specific person: is it the act itself, the administrative decision or the civil law agreement, referred to in Article 103 (2) u.p.s. With respect to the obligation to bear the costs of stay in a social welfare home by the persons mentioned in Article 61(1) point 2 u.p.s , two stances are reflected in the case law of administrative courts. According to the first one, the obligation provided for in Article 61 (1) u.p.s. of making payments for care and accommodation in a social welfare home must be specified and individualized in relation to every person who is supposed to bear such costs. This specification should proceed, as a rule, by means of a decision taken pursuant to Article 59 (1) u.p.s. Thus, bearing the costs as a substitute measure by the commune, which is referred to in Article 61 (3) u.p.s., may take place only when the persons required to pay by means of a decision or who agreed to pay based on a relevant agreement fail to fulfill this obligation. Consequently, even well-documented refusal to conclude the agreement referred to in Article 103 (2) u.p.s. cannot constitute a sole basis for taking the decision about the obligation of repayment of the substitute payment to the benefit of the commune (see NSA ruling of 13 September 2013, I OSK 2726/12, LEX No 1557243; NSA ruling of 30 October 2012, I OSK 653/12, LEX No 1792349; NSA ruling of 9 June 2010., I OSK 204/10, LEX No 643299).

According to the second view, concluding the agreement referred to in Article 103 (2) u.p.s. serves merely to set the amount of payment for resident's stay in the social welfare home, while the obligation itself of payment results from the act and not from the agreement. Thus, if the obligation on the part of the family members of the person placed in the social welfare home to pay the relevant costs results directly from the Act on Social Assistance, then in the situation in which the persons required to bear the costs evade this obligation, the commune, which paid the expenses on a substitute basis, may enforce their recovery under the administrative procedure. The proper way for the commune to enforce this repayment is to take a decision based on Article 104 (3) in conjunction with Article 61 (3) u.p.s. ( see in particular NSA ruling of 15 January 2010, I OSK 1171/09, [www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl); NSA ruling of 14 September 2011., I OSK 666/11, [www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl)).

In the light of the views expressed in the case law, one should advocate the first stance, namely that the obligation to bear the costs of stay of a family member (spouse, relative in descending and ascending line) in a social welfare home must be specified and individualized in relation to every person who is to pay the fees. This specification, should proceed, as a rule, by means of a decision taken pursuant to Article 59 (1) u.p.s. This is because the assumption should be that the administrative decision is the most adequate form for public administration to impose on an entity the obligation to participate in the costs of providing care and accommodation for a d.p.s. resident.

#### **4. Conclusions**

The procedure for placing an individual in a social welfare home is an administrative proceeding. It is, however, characterized by certain individual features. What needs to be noted in first place is that in order to place a person in a social welfare home, several administrative decisions must be taken. In other words, the proceedings concerned with this subject matter consist of three stages, whereby each stage ought to be completed by an administrative decision.

Considering the subject matter aspect, the issues surrounding the commune's responsibilities in terms of granting social assistance to the commune's resident in the form of the social welfare home placement encompass three elements – the first one involves referring a person to a social welfare home, the second is concerned with the ruling on placing this person in the specific home, the third one refers to paying the fees for care and accommodation provided by the social welfare home. It therefore appears that the stay of the commune's resident in the social welfare home should be preceded by three administrative decisions taken regarding referring the person to a social welfare home, placing the person in such facility and the third decision setting the amount to be paid for stay in the social welfare home.

If we are faced with three different administrative decisions – and pursuant to Article 104 k.p.a . each decision essentially resolves (rules on) a separate matter – this implies that there are three administrative cases, and thus – three administrative proceedings that end with one of the mentioned administrative decisions being taken. Under each of the administrative proceedings, their scope in terms of the subject matter needs to be defined. From the point of view of safeguarding individual rights, what gains on key importance is the proper identification of parties

to proceedings, especially in the context of participating in the costs of the resident's stay in d.p.s. In the light of the analysis presented in the paper, the final assertion should be that a party to the proceedings for setting the amount of payment for stay in a social welfare home is the person required to participate in these costs, that is, apart from the commune's resident, it is the spouse, relatives in descending line, relatives in ascending line and the commune from which the person has been referred to the social welfare home.

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