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AGENCIES AND OFFICIALS, AFFECTING DECISIONS ON DISMISSAL OF A PROSECUTOR IN UKRAINE

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Abstract. An independent prosecutor's office is a guarantee of observance of laws and public order in any state, including Ukraine. A clearly defined and transparent procedure for dismissal of a prosecutor from his/her office is, in particular, a component part of the prosecution agencies independence. Based on the results of systematic processing of laws and regulations as well as judicial practice, the scientific paper outlines the range of agencies and officials, with the participation of which the decision to dismiss a prosecutor from his/her office is made. The author established which subjects have a direct influence and which have an indirect influence on staff issues at the Prosecutor's Office of Ukraine. The role of each subject in dismissal of a prosecutor from his/her office is detailed and the consequences of such subjects' influence are analyzed.

Key words: head of the prosecutor's office, Supreme council of justice, court, body, conducting disciplinary proceedings, staff commission, medical board.

Introduction. Taking into account the relevance of staff issues in the prosecution authorities of Ukraine as well as mass dismissals that have been taking place in the state lately, in particular, in order to change the leadership and renew the team in the field, we consider it necessary to find out the range of subjects who have an impact on the decision to dismiss prosecutors of various levels, and to analyze the weight of their participation in such decisions. The mentioned issue has not been sufficiently researched in the world scientific literature, in this regard, the primary task is to address and study statutory instruments, governing the specified problem.

Main points. According to Article 131¹ of the Constitution of Ukraine, in Ukraine there is a prosecutor's office, organized and existing under the laws of Ukraine (Constitution of Ukraine). That is why only laws of Ukraine may determine the conditions, grounds and procedure for dismissal of prosecutors, and any other statutory instruments concerning these issues may be adopted only for the purpose of implementation of the laws of Ukraine and must not contradict them.

According to Part 2 of Article 51 of the Law of Ukraine "On the prosecutor's office of Ukraine" the persons who are entitled to decide on dismissal of a prosecutor from his/her office according to this Law are as follows: 1) Prosecutor General – concerning prosecutors at the Prosecutor General's Office; 1-1) head of the Specialized Anti-Corruption Prosecutor's Office – concerning prosecutors at the Specialized Anti-Corruption Prosecutor's Office; 2) head of a regional prosecutor's office – concerning prosecutors at an appropriate regional prosecutor's office and prosecutors of the county prosecutor's offices, located within the administrative unit under the territorial jurisdiction of the respective regional prosecutor's office (Law No. 1697-VII).

The Prosecutor's office of Ukraine is headed by the Prosecutor General, who is appointed to and dismissed from his/her office by the President of Ukraine upon consent of the Verkhovna Rada of Ukraine. The Prosecutor General can be early dismissed from his/her office only in the cases and on the grounds determined by this Constitution and the laws (Constitution of Ukraine).

As aforesaid there are two subjects directly involved in dismissal of the Prosecutor General: the Verkhovna Rada of Ukraine and President of Ukraine. However, early dismissal of the Prosecutor General as well as all other prosecutors can take place only on the grounds provided for by the appli-

cable legislation of Ukraine. Therefore, let us examine each of them separately, paying attention to the bodies and officials whose decision determines whether a certain prosecutor retains his/her position.

According to Article 52 of the Law of Ukraine “On the prosecutor’s office of Ukraine” a prosecutor may be dismissed if he/she cannot exercise his/her powers for health reasons and has a medical opinion submitted by a medical board, generated by the central executive authority, implementing the state health policy, or by a valid court decision, recognizing the prosecutor partially or fully incapable (Law No. 1697-VII).

Having recognized that a prosecutor’s health does not allow performing his/her duties for a long time or permanently, an appropriate body, carrying out disciplinary proceedings, shall file a motion to dismiss the prosecutor from his/her office to the person authorized by this Law to decide on prosecutor’s dismissal (Law No. 1697-VII).

The similar requirement for police officers to meet the medical criteria for the job is in place. Thus, each medical specialist shall record in the Medical Review Act the anamnestic and objective data that substantiate the diagnosis, the degree of manifestation of functional disorders, stage, form of the disease, give his/her own opinion on the fitness of the person for service in accordance with the column and article of the List of diseases, taking into account the Explanation concerning application of the List of diseases, indicate the date of the medical review and certify the record with his/her own signature (order of the MIA of Ukraine No. 285).

In other words, one of the main tasks of the MPB is to determine by health, physical development, and for certain types of service activities – by individual psychophysiological characteristics, the suitability of candidates for police service, candidates for admission to higher educational institutions of the MIA with specific conditions of study, which carry out the training of police officers (hereinafter referred to as the educational institutions), applicants for higher education of educational institutions, suitability for further police service in case of transfer, service abroad on secondment (order of the MIA of Ukraine No. 285).

Analyzing the foregoing, we understand that it is the medical board and the court that will make the decisions, which is a direct ground for the decision of the authorized head to dismiss a certain prosecutor. However, unlike the bodies of the Ministry of Internal Affairs, for which a separate regulation is adopted and the procedure for determination of incompatibility with the position for health reasons is detailed, dismissal from the prosecutor’s office is limited only to the above mentioned provision.

Article 53 of the Law of Ukraine “On the prosecutor’s office of Ukraine” states that a prosecutor shall be dismissed for violation of the requirements of compatibility upon the motion of the Supreme Council of Justice that shall be sent to the person authorized by this Law to decide on prosecutor’s dismissal (Law No. 1697-VII).

According to Article 1 of the Law of Ukraine “On the Supreme Council of Justice” the Supreme Council of Justice is a collective independent constitutional body of public authority and judicial governance which functions in Ukraine on a permanent basis to guarantee the independence of the judiciary and its functioning on the grounds of responsibility, accountability before the society, to guarantee establishing of an honest and highly professional judicial corps in compliance with the provisions of the Constitution and the laws of Ukraine, as well as with the professional ethics in the functioning of judges and prosecutors (Law No. 1798-VIII).

The Supreme Council of Justice shall have the powers, in particular, to adopt a decision on violations of incompatibility requirements by a prosecutor, review complaints against the decisions of relevant bodies to bring a disciplinary sanction against a prosecutor (Law No. 1798-VIII).

The Supreme Council of Justice shall commence and hear cases regarding violation by prosecutors of the incompatibility requirements for their positions with regard to the activities or the status established by the Constitution and the laws of Ukraine (incompatibility cases). The incompatibility cases can be initiated upon a request of any person aware of the relevant facts. The incompatibility

cases shall be reviewed at a session of the Supreme Council of Justice. Following the hearing on an incompatibility case the Supreme Council of Justice may adopt a decision on a recognition of the violation by the prosecutor of the requirements on incompatibility of his/her position with regard to other activities or the status and a submission, in accordance with the procedures established by the law, of a motion as to his/her dismissal or an absence of any violation by the prosecutor of any requirements on incompatibility of their position with regard to other activities or the status (Law No. 1798-VIII).

Given the above, it is the Supreme Council of Justice that decides whether a prosecutor has violated the incompatibility requirements, because after making the relevant submission to the head of the prosecutor's office, the latter only has to issue an order of dismissal.

Articles 54 and 56 of the Law of Ukraine “On the prosecutor’s office of Ukraine” state that the court that issued the judgment finding the prosecutor guilty of administrative corruption offenses, or issued the guilty verdict against the prosecutor, shall inform the person authorized by this Law to decide on prosecutor’s dismissal after entry into force of such a judgment or verdict. Moreover, entry into force of a court decision on recognition of the prosecutor’s assets or assets, acquired at his/her instruction by any other persons, or in any other cases, provided for by Article 290 of the Civil Procedure Code of Ukraine, as unreasonable and on their forfeiture to the state is a ground for prosecutor’s dismissal (Law No. 1697-VII).

Similarly to the previous ground for dismissal, the court decision in the outlined cases implicitly entails prosecutor’s dismissal, despite the fact that the court decision itself is subject to appeal. In other words, only after the above mentioned court decisions have been cancelled, the order to dismiss a prosecutor can be cancelled, and the order itself cannot be cancelled separately from the court decision.

The court is the body, whose decisions are obligatory for implementation and must be taken into account by the heads, authorized by law, when making decisions about dismissal of prosecutors, however, the court only makes a decision on bringing a prosecutor to responsibility the prosecutor, while other subjects, having an indirect impact on implementation of the provisions of Articles 54 and 56 of the Law, initiate these issues.

For example, one of the main tasks of the General Inspectorate is to send to the bodies authorized to draw up protocols on administrative corruption offenses, materials, containing information about commission of corruption-related offenses by employees of the prosecutor’s office, and to ensure participation in court cases on administrative offenses under Articles 172-4 – 172-9 of the Code of Administrative Offences against employees of the prosecutor’s office (order of the PGO No. 230).

The aforementioned code assigns the authority with regard to the drawing up of protocols on administrative corruption offenses committed by prosecutors to the National Agency for the Prevention of Corruption (CUAO).

In other words, the General Inspectorate collects materials, the NAPC draws up a protocol, and the court adopts the final decision, on the basis of which the head of an appropriate level issues an order of dismissal.

Article 55 of the Law of Ukraine “On the prosecutor’s office of Ukraine” provides for dismissal of a prosecutor, concerning whom there are circumstances of direct subordination to a close relative, from his/her office by the person authorized by this Law to decide on dismissal of a prosecutor, on motion of the relevant body, carrying out disciplinary proceedings against prosecutors. Upon the recommendation of the same body, the prosecutor shall be also dismissed if his/her citizenship of Ukraine is ceased or if he/she acquires the citizenship of another state in accordance with Part 1 of Article 57 of the Law of Ukraine “On the prosecutor’s office of Ukraine”. In addition, in cases, provided for by law, such motion shall be made by the relevant body, carrying out disciplinary proceedings, in case of liquidation or reorganization of the prosecutor’s office or in case of reduction of the number of prosecutors of a certain prosecutor’s office (Law No. 1697-VII).

The body, carrying out disciplinary proceedings against prosecutors of the Prosecutor General's Office of Ukraine (Office of the Prosecutor General), Specialized Anti-Corruption Prosecutor's Office, regional prosecutor's offices, county (local) prosecutor's offices, and military prosecutor's offices, is the staff commission, generated in accordance with the Procedure for staff commission activities, which was approved by the order of the Prosecutor General (order of the PGO No. 233).

Only in case of dismissal of a prosecutor from his/her office due to submission of a resignation notice by the latter or if the prosecutor cannot continue in the temporarily vacant position, the decision to dismiss is made directly by the authorized head of the prosecutor's office and no other persons or bodies can have a direct legal impact on his/her decision.

The provisions, specified in the Law of Ukraine "On the prosecutor's office of Ukraine", regarding dismissal of a prosecutor from his/her position are detailed in the order of the PGO, approving the Regulations on organization of staff activities in the prosecution authorities.

Thus, a prosecutor from his/her office is dismissed according to the order of the head of the prosecutor's office, defined in Part 2 of Article 51 of the mentioned Law, on the grounds and in accordance with the procedure provided by this Law, subject to the guarantees established by the labor legislation (order of the PGO No. 351).

Dismissal of a prosecutor on the grounds, set forth in paragraphs 1, 4, 6, 8, 9 of Part 1 of Article 51 of the Law, shall be carried out by the head of the prosecutor's office upon the request of the Qualification and Disciplinary Commission of Prosecutors, and on the grounds, set forth in paragraph 2 of Part 1 of Article 51 of the Law, – upon the request of the Supreme Council of Justice (order of the PGO No. 351).

The Qualification and Disciplinary Commission of Prosecutors ceased to exist and operate, but a new body was created. The Grand Chamber of the Supreme Court in its decision dated 13.01.2021, No. 9901/374/19 notes that after the entry into force of the Law of Ukraine "On amendments to certain legislative acts of Ukraine on priority measures of the prosecution reform", the functions and powers of the Qualification and Disciplinary Commission of Prosecutors, being an authorized subject, are entrusted to another body, namely the staff commission for consideration of disciplinary complaints concerning commission of disciplinary offense by a prosecutor and disciplinary proceedings regarding prosecutors (Resolution in case No. 9901/374/19). The Supreme Court confirmed the legal status of the staff commission and noted that since termination of the powers of the CDCP and creation of the staff commission, the latter acquired the relevant powers of the body, carrying out disciplinary proceedings against prosecutors, and the relevant legal capacity (Decision in case No. 640/25962/20).

A prosecutor of the Specialized Anti-Corruption Prosecutor's Office from the administrative position, stipulated by paragraphs 1-5 of Part 3 of Article 39 of the Law shall be dismissed upon the recommendation of the Council of Prosecutors of Ukraine and only on the grounds, provided for by Part 1 of Article 51 of the Law. Similarly, the decision on dismissal of a prosecutor from the administrative position, stipulated by paragraphs 2, 3, 6-8, 11 of Part 1 of Article 39 of the Law, according to paragraph 3 of Part 1 of Article 41 of the Law shall be adopted by the Prosecutor General upon a respective recommendation of the Council of Prosecutors of Ukraine (order of the PGO No. 351).

In the above mentioned cases there is an indirect impact of such a body as the Council of Prosecutors of Ukraine on staff issues in the prosecution authorities of Ukraine, namely during dismissal of prosecutors, as the latter makes only its recommendations, which do not oblige the authorized persons to take final decisions in the form of dismissal of persons.

However, there are also cases of a direct impact of the Council of Prosecutors of Ukraine on the fate of prosecutors, performing administrative functions. Thus, the decision on dismissal of a prosecutor from the administrative position, provided for by paragraphs 4, 5, 9, 10, 12-15 of Part 1 of Article 39 of the Law, according to paragraph 3 of Part 1 of Article 41 of the Law, shall be adopted by the authorized head of the prosecutor's office if there is a decision of the Prosecutor Council of

Ukraine on establishment of the facts of improper performance of the prosecutor's official duties, established for the respective administrative position (order of the PGO No. 351).

Dismissal of a prosecutor from his/her office is also considered by the Law of Ukraine "On the prosecutor's office of Ukraine" as a form of disciplinary sanction, which may result from bringing a prosecutor to disciplinary responsibility (Law No. 1697-VII).

According to Article 43 of the above mentioned Law grounds for bringing a prosecutor to disciplinary responsibility can be as follows: 1) a failure to perform or improper performance of official duties; 2) an unreasonable delay in consideration of an application; 3) a disclosure of secrets protected by law which became known to the prosecutor while exercising his/her powers; 4) a violation of the legal procedures for submission of the declaration of the person, authorized to provide public or local services; 5) actions which discredit the prosecutor and may raise doubts on his/her objectivity, impartiality and independence and on integrity and incorruptibility of the prosecutor's office; 6) a regular (two or more times within one year) or one gross violation of prosecutorial ethics; 7) a violation of disciplinary rules; 8) an intervention or any other influence of a prosecutor in cases or in the manner other than established by the law related to the official activities of another prosecutor, staff members, officials or judges, including through public statements about their decisions, actions or omissions in the absence of signs of an administrative or criminal offense; 9) a public statement violating the presumption of innocence (Law No. 1697-VII).

The opinion on the presence or absence of any prosecutor's misconduct shall be considered at the meeting of an appropriate body, carrying out disciplinary proceedings (Law No. 1697-VII).

The conclusion on the presence or absence of a disciplinary offence of a prosecutor shall be considered on the principles of competitiveness. At the meeting of the staff commission the explanations of the member of the staff commission who verified the disciplinary complaint, the person who filed the disciplinary complaint and/or his/her representative, the prosecutor in respect of whom the disciplinary proceedings are conducted and/or his/her representative, the employee of the General Inspection, as well as other persons, if necessary, shall be heard (order of the PGO No. 266).

As a result of disciplinary proceedings, it can be decided that a prosecutor (except for the Prosecutor General) can no longer hold the office if: 1) the disciplinary offense committed by the prosecutor has the nature of a gross violation; 2) the prosecutor committed a disciplinary offense acting in the capacity of a prosecutor while having a record of disciplinary liability (Law No. 1697-VII).

In addition, please note that a copy of the decision to open disciplinary proceedings shall be sent to the head of the prosecutor's office, authorized to make a decision to dismiss a prosecutor from his/her office, within the time limits, established by law, with an explanation that the said prosecutor's resignation cannot be accepted until the disciplinary proceedings are completed (order of the PGO No. 233).

Thus, the facts of dismissal of prosecutors based on the results of disciplinary proceedings against a prosecutor and bringing of the latter to responsibility in the form of dismissal from his/her office are caused exclusively by staff commissions, whose decision is an unconditional ground for the head to issue an order to dismiss a particular employee of the prosecutor's office.

In addition to the subjects, clearly outlined in laws and bylaws and involved in making a decision on dismissal of a prosecutor, some legal provisions can provide an opportunity to affect staff issues to any person. Thus, during the latest attestation of prosecutors in Ukraine, during the interview and decision-making by the staff commission, information, received from any individuals and legal entities (in particular, anonymously), which is not subject to additional official confirmation, could be taken into account. In addition, with regard to the decision on incompatibility issues, proceedings may be initiated upon request of any person who is aware of the relevant facts. The impact of an unlimited number of persons on resolution of staff issues in the prosecution service is quite debatable and ambiguous.

Thus, for example, the decision of the County Administrative Court of Kyiv dated 10.07.2020 in case No. 640/24896/19 states that collection and use of personal data about the plaintiff and an uncertain number of people constitute an interference with the right to respect private life for the purpose of Article 8 of the Convention, meanwhile the defendant has not proved the need in excessive interference with the guaranteed rights of the plaintiff as well as the role of an uncertain number of people in qualification inspection of the person who is subject to attestation (Decision in case No. 640/24896/19).

Conclusion. In view of the foregoing we can summarize that orders to dismiss prosecutors are issued by the heads of prosecutor's offices at the relevant levels and the decision concerning the Prosecutor General – by the President of Ukraine upon consent of the Verkhovna Rada of Ukraine. However, the Supreme Council of Justice, Council of Prosecutors of Ukraine, medical boards, generated by the central executive authority, implementing the state health policy, court, General Inspectorate, NACP, body, carrying out disciplinary proceedings (staff commissions), any other persons, who have information about misconduct of a prosecutor, have a direct or indirect impact on such a decision of the above mentioned subjects. The specified diversity of bodies and persons, who eventually affect the decision to dismiss a prosecutor from his/her office, demonstrates, on the one hand, that an unbiased decision can be adopted as a result of comprehensive examination of all the case files and grounds for dismissal, and, on the other hand, creates a real threat of an external pressure and violation of the principle of independence in the activities of each individual prosecutor.

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