ADMINISTRATIVE COURT OF MONTENEGRO

No. *3789/17*

ON BEHALF OF MONTENEGRO

Council composed of judges Vojin Lazović, president of the council, Svetlana Radošević and Fadil Kardović, members of the council, together with the independent court officer Marina Nedović, court clerk, resolving the administrative dispute on the lawsuit brought by the claimant Vanja Ćalović-Marković from Podgorica, represented by Veselin Radulović, lawyer from Podgorica, against the defendant the Agency for Prevention of Corruption - Podgorica, for the annulment of the Decision, number UPI -02-01-57/26-2017 of May 29, 2018, after an oral hearing, held in the presence of the authorized representative of the claimant and the authorized representative of the defendant, Luka Anđelić, on July 17, 2018, adopted a

VERDICT

The lawsuit is adopted.

The Decision of the Agency for Prevention of Corruption, number UPI -02-01-57/26 2017 of May 29, 2018, is revoked.

The defendant is obliged to pay the fee for the costs of the dispute in the amount of €726.00 to the claimant, within 15 days from the date of receipt of the verdict.

Rationale

The disputed decision establishes that the claimant, as a public official, violated Article 7, paragraphs 1 and 2, and Article 8 of the Law on prevention of corruption in the manner closer stated in the text.

On May 25, 2017, the claimant filed a lawsuit to the court due to silence of the administration, since the defendant did not finish the procedure within the legal deadline after the concluded oral hearing held on April 3, 2017, nor the urgency of May 11, 2017. During the course of procedure due to silence of the administration, the defendant adopted the disputed decision to which the claimant, through the authorized representative, extended the lawsuit on June 4, 2018.

In the extended lawsuit and through the authorized representative at the hearing, in essence, it is stated that the disputed decision was made under violation of the rules of procedure, erroneous and incompletely established factual situation and the misapplication of the substantive law. The disputed decision was brought contrary to the Article 226, Paragraph 2, Item 6 of the Law on the general administrative procedure, in conjunction with Article 41, 35, Paragraph 2, 92, item 4 of the Law on Prevention of Corruption, because the decision was made by a person who does meet the conditions for deciding in this procedure, referring to the provision of Article 161 of the Law on Administrative Procedure, pointing to the verdict of this court no.247/15 and the position of the Constitutional Court of Montenegro in decision U-II *no.4/16* and *19/16* of January 30, 2018. The request for initiation of the case was filed by the Network for Affirmation of NGO - MANS, Podgorica, not Vuk Maraš, and the claimant was asked to declare whether or not she meets conditions being appointed a member of the Council of the Agency. The claimant was not given the opportunity to participate in the proceedings and make a statement on allegations and evidence regarding the reasons and evidence on the basis of which the disputed decision was brought, in what way was violated Article 226, Paragraph 2, Items 2 and 3 in conjunction with Article 135 of the Law on General Administrative Procedure and Article 34, Paragraph 1 of the Law on Prevention of Corruption, instead, lump reasons were stated that the claimant participated in the procedure and that the request for initiation of the procedure was not submitted to her, but an act UPI no.01-02-576/6 of March 21, 2017, and the defendant did not consider allegations from the written statement of the claimant. The disputed decision does not list decisive facts, which makes it incomprehensible, and the text of decision is contrary to the rationale, so it was adopted in violation of the provision of Article 226, Paragraph 2, Item 7 of the Law on General Administrative Procedure, and the defendant erroneously interpreted the presented evidence, while the claimant was not allowed to make a statement on those evidence. In the procedure for the adoption of the disputed decision, the defendant, ungroundedly and falsely stated that the claimant, pursuant to the Contract no. NEAR-TS 2015/370-248, realized a multiple monthly salary increase, because the contract with the EU delegation was concluded on 12/4/20, which is confirmed by the Annex of the employment contract of January 2015 and 2016. The budget of the project, which constitutes an integral part of the contract, was available to the claimant, and the contract was not signed by the claimant, but by NGO MANS. The claimant has never decided on the initiatives of NGO MANS conducted with the defndant, since it is not within the competence of the Council of the Agency for Prevention of Corruption in terms of Article 88 of the Law on Prevention of Corruption, and the claimant was obliged to provide an explanation of what this private interest consists, referring to the provisions of the contract, and the work of NGO MANS in the public interest and the achievement of the purpose of provisions of the Law on Prevention of Corruption and the Law on Financing of Political Entities and Election Campaigns. The defendant does not give clear reasons in what way the claimant performed her function by subordinating the public interest to the private one and caused a conflict of interest in the performance the function of the Council member, and the claimant did not participate as a public official in discussion and decision-making on any lawsuits of NGO MANS, while at the 30th session of the Council, she abandoned the session and did not take part in the adoption of the Council's conclusions, which is confirmed by the minutes of the 30th Council session. She is proposing for the Court to revoke the disputed decision. She is asking to compensate the court costs.

In written replies to the lawsuit and at the hearing through the authorized representative, the defendant disputed the allegations of the lawsuit stating that, upon the authorization of the Director of the Agency, the authorization was transferred to his assistant. The claimant was allowed to participate in the proceedings and was informed of all rights, and she used the possibility of a written statement of March 27, 2017 and oral hearing of April 03, 2017. Within Article 31, paragraph 2 of the Law on prevention of corruption, the defendant is authorized, in addition to the reasons from the submitted request, to establish the violations of this law by official duty, and therefore, the grounds of the lawsuit are unfounded in this regard. It adds that it is unclear why the court in its act from June 20, 2018 stated that the claimant extended the lawsuit because it confirmes that the defendant did not make a decision on the request by Vuk Maraš from September 16, 2016. The Administrative Court rendered the verdict no.534/17 by which it adopted and ordered to the defendant to decide on the request of the claimant. It adds that the claimant was an unauthorized person in this dispute and that the lawsuit for the silence of the administration should be rejected in terms of Article 22 of the Law on Administrative Procedure, since it does not interfere with the right of the claimant or her legal interest, bearing in mind that the administrative dispute due to silence of the administration is concluded with the verdict of this court and no.534/17 of November 08, 2017, and there is no room to apply Article 26 of the Law on Administrative Procedure, so the lawsuit of the claimant is ineffective. It proposes for the Court to revoke the lawsuit.

After the oral hearing, consideration of the case file, evaluation of allegations of the lawsuit and the response to the lawsuit, the Court found that it was founded.

In assessing the legality of the disputed Decision, the Court found that the Decision was rendered in violation of the rules of procedure provided for by Article 201 paragraph 1 of the Law on general administrative procedure, which provided that the introduction of the decision contained the name of the party and its legal representative or the proxy, and the provisions of Article 203 Paragraph 2 of the same law, which stipulates that the explanation of the decision contains a brief presentation of the parties' requests, established facts, reasons which were decisive in the evaluation of the evidence, material regulations and the reasons which, bearing in mind the established factual situation, refer to the solution as given in the text and Article 135 of the same law, which stipulates, inter alia, that a party has the right to participate in the examination procedure, present the facts that may influence the handling of administrative matters, while the authority must not make a decision before the party is provided the possibility to make statement on the facts and circumstances on which the decision should be based.

In the introduction of the disputed decision, the defendant refers to the request for initiating procedure submitted on September 16, 2016 by Vuk Maraš, in accordance with the reasons listed in the ruling of the Administrative Court of Montenegro number 534/17 of November 08, 2017 which, according to the court, is unclear, bearing in mind that the said request was submitted by the Network for Affirmation of NGO Sector - MANS - Podgorica, number 22998/09 of 15.09.2016. certified by their seal, with the signature of Vuk Maraš, as well as the verdict of this court and No. 534/17, filed by the attorney Veselin Radulović, where decision was made on the on the lawsuit by the Network for Affirmation of NGO Sector, and not by Vuk Maraš, in what way there was a violation of the rules of procedure from Article 201, paragraph 1 of the Law on General Administrative Procedure.

In the explanation of the disputed decision, and in connection with the participation of the claimant in the proceedings, the defendant refers to the provision of Article 34 of the Law on Prevention of Corruption and Article 8 of the Law on General Administrative Procedure, concluding that the claimant participated in the hearing held on April 3, 2017, stating evidence on the basis of which it found that the claimant, as a public official, violated the Law on Prevention of Corruption. However, according to the Court's assessment, stemming from the case file, it cannot be clearly established that the claimant, in terms of Articles 8, 135 and 226, Paragraph 2, Items 2 and 3 of the Law on prevention of corruption, was given the opportunity to state the relevant facts and circumstances, as well as the evidence on the basis of which the defendant adopted the disputed decision, because the minutes of the hearing held on April 3, 2017 do not state the evidence the defendant makes or the explanation of the clamant regarding them, as well as that the claimant was not submitted the request for the initiation of the case, but the act by the defendant to make a plea on it, and from the written statement of the claimant of March 17, 2017, it is confirmed that the request was not submitted to her and that the claimant is asked to make a statement on the request regarding non-fulfillment of the conditions for the election of the member of the defendant's Council.

In the explanation of the disputed Decision, the defendant concludes that on the basis of the official records, it found that the claimant, as a member of the Council of the Agency for Prevention of Corruption, which has the status of a public official, had a salary in NGO MANS in the amount of € 1,837.00 for the period January - December 2016, and the net amount of € 1,990.03 for 2017, and that in relation to the employment contract of the claimant with MANS, as an employer number 602/01 of January 18, 2006, earned a gross salary in the amount of € 140.00, and according to annex of the same contract from 13.01.2017, increased the gross amount of € 2,741.03, making a connection with the contract NEAR TS 2015 / 370-248 of 12/4/2015 concluded between NGO MANS, signed by the claimant as its executive director, and the European Union delegation in Podgorica, in the amount of 149.000,00 €, for the purpose of monitoring of the parliamentary elections in 2016 and the undertaken obligations from the said contract.

According to the Court, the reasons given and the conclusion of the defendant listed in the explanation are unclear and contradictory, as it is determined from the case file that the claimant, based on the employment contract and the annex to employment contract, regarding the offer of the employer from 28.01.2015 in paragraph 1 of Article 5 of the basic annex to the contract, which relates to the earnings of the claimant, had an increased salary to the gross amount of € 3,309.45 for the period January - December 2015 and that it is reduced by €2.741,98 for 2016, which confirms that the salary of the claimant have been increased before the conclusion of the contract with the EU Delegation in Podgorica of 4/12/2015, and bearing in mind that the said contract with the European Union and obligations stemming from it do not indicate the salary of the claimant, it rather states rights and obligations of the parties for the implementation of the election process for 2016.

There are unclear reasons given in the explanation of the disputed decision that the claimant, as a public official, violated Article 7, paragraphs 1 and 2, and Article 8 of the Law on Prevention of Corruption by participating in discussions at 29th and 30th Session of the Council for the Prevention of Corruption, were decisions were made on requests submitted b NGO MANS, where she expressed a critical attitude towards the treatment of those requests by the defendant, by which she put herself in a position "to make decision on her matters", and was personally motivated to put her personal interest in front of the public, because from the minutes of the 29th session of the Council of the Agency, it was determined that on the agenda, as well as during the agenda, no items regarding MANS’ requests were highlighted or discussed. Also, at the 30th session of the Council, there were no concrete discussions on the submitted requests - initiatives of the Network for Affirmation of NGO Sector, because the claimant, Vanja Ćalović, did not attend this item of the agenda, and having in mind the Article 88 of the Law on Prevention of Corruption, regulating competencies of the Agency Council, in what way a violation of the rules of procedure has been committed.

For these reasons, and bearing in mind the provision of Article 41 of the Law on Prevention of Corruption, in relation to the application of the rules of administrative procedure, the Court finds that the disputed decision is in violation of the rules of the administrative procedure with the impact on the resolution, which is why it is illegal, thus, the Court adopted the lawsuit and revoked the disputed decision.

The Court considered the allegations of the lawsuit alleging that the disputed decision was signed by an unauthorized person, the assistant director of the defendant and that its introduction did not state the authorization to be signed by him, but it did not accept the allegations because the case file contains Decision on transferring the authorization for signing acts of the defendant, number 01-999 of March 21, 2017, in which the powers are transferred to the Assistant Director to sign Decisions on violation of the provisions of this Law.

The court considered the allegations of the defendant in response to the lawsuit, that on the request of Vuk Maraš for the silence of the administration, the verdict of this court no. 534/17 of 08.11.2017 was rendered and that the motion - extended lawsuit from 04.06.2018 should be rejected and denied its alteration, but the Court did not accept the allegations because it is about the protection of rights or legal interests of the claimant (Article 37 of the LAP in relation to Article 10 of the LAD) and the claimant was recognized right of the party and confirmed at the hearing with the defendant of 03.04.2017, and during the course of this procedure, the defendant adopted the disputed Decision to which the claimant extended the lawsuit and that it is not about the same parties in the administrative court proceedings, bearing in mind the principle of the economy and efficiency of the proceedings, and that according to the Court's opinion, the conditions for extending the lawsuit against the disputed decision were acquired.

In the retrial, the defendant authority will remedy the irregularities referred to in this verdict (Article 1.56 LAD), and thereafter pass a new, legally based decision in this administrative matter.

Decision on the costs of the dispute was made in accordance with Article 152 of the Law on Civil Procedure in relation to Article 39, Paragraph 2 of the Law on the Administrative Dispute, and the same relates to the lawsuit on silence of administration, access to hearing and the motion of 04.06.2018 in the amount of €200.00 each, according to the Legal fees, with an increase of 21% of the value added tax.

For the reasons stated, and pursuant to Article 35 paragraph 1 of the Law on Administrative Dispute, the decision from the text is brought.

ADMINISTRATIVE COURT OF MONTENEGRO

Podgorica, 17.07.2018

Court clerk,

Marina Nedović,s.r.

PRESIDENT OF THE COUNCIL,

Vojin Lazović,s.r.