

##  R E P U B L I C O F A L B A N I A

 **COMMISSIONER FOR THE OVERSIGHT OF THE CIVIL SERVICE**

No. \_\_\_\_\_ Protocol Tirana, on \_\_\_\_.\_\_\_\_.2019

Subject**:** Following the cooperation during the supervision process re the implementation of the law on the civil servant during the election campaign

 **To:**

*Dear Mr. / Mrs. \_\_\_\_\_\_\_\_\_,*

 Following the supervision of legality in the administration of civil service during the electoral process, the Commissioner has evidenced repeated requests by the institutions for clarifying and interpreting various aspects of the implementation of the law materialized in the institutes that are most frequently applied in this electoral situation, concerning: a) the assessment of the legality of the civil servants participation in the electoral administration, and b) the due respect / restriction of the political rights of the civil servant during the electoral process *(Article 37 of the law)*.

 We deem it important to bring to your attention the position of the Commissioner on these aspects, in order to unify the practice in all supervised institutions.

**a.** *Regarding the participation of civil servants in the institutions tasked with administering the election process.*

 In order to objectively evaluate the situation, the Commissioner analyzed the legal acts, which regulate different aspects of the electoral process and the administration of the civil service, among which:

* The Constitution of the Republic of Albania;
* law no. 152/2013 “*On the civil servant*”, amended;
* law no. 10 019, dated 29.12.2008 “*The Electoral Code of the Republic of Albania*”;
* law no. 9131, dated 8.9.2003, “*On the rules of ethics in public Administration*”,

In the Electoral Code of the Republic of Albania, in Chapter I, *“Object, definitions and principles”*, article 1, *“Purpose and Object”*, it is clearly stated that:

 *“1. The purpose of this Code is to set rules for the preparation, development, management, supervision, as well as the announcement of the election results for the Albanian Parliament, for the local government bodies and referendums.*

*2. In this Code are subject to regulation: a) the assignment of electoral zones; b) deadlines, procedures and competencies for the registration of electoral subjects; c) organization and functioning of the election administration and commissions; ç) deadlines, procedures and competencies for the preparation of the electoral list; d) financing of electoral subjects; dh) conducting the electoral campaign; e) the voting procedure and the announcement of the results; ë) reviewing the complaints and imposing administrative and criminal sanctions; f) other rules regarding the elections”.*

 In the content of this provision, the purpose of the law is clearly defined, which in this case acts in specific circumstances, in electoral periods, in order to place in procedural frameworks the electoral process, which includes the preparation, development, administration, supervision, and announcement of the elections’ results.

 Likewise, in this provision, among other things it is defined that, the object of regulation of this law is also the organization and functioning of the election administration and commissions, thus defining in this way the concept of *a) election administration*, and *b) electoral commissions*, as well as c) the institution in charge of appointing and dismissing this administration, which is the Central Election Commission (*article 21, of the Electoral Code*).

 Further, by analyzing the content of this Code, it is ascertained that in its second part, are determined *the institutions for the preparation and administration of elections*, on which the electoral administration will function, by defining according to the administrative hierarchy:

* Part Two “*Institutions for the preparation and administration of elections*”;
* Chapter I, “*Central Election Commission (CEC)*;
* Chapter II, “*Electoral Management Zones (EMZ) and Commissions of Electoral Administration Zones (CEAZ)*”
* Chapter III, “*Voting Center Commission (VCC)*”
* Article 95, “*Ballot Counting Groups (BCG)*”, which are established to count the votes at the EMZ, by the decision of the CEAZ.

While assessing the fact that these institutions are envisaged in the law, with the mission to prepare and administer the elections, as well as by analyzing the concrete tasks performed by these institutions *(as an example we bring the CEAZ, which is responsible for the administration and conduct of elections in the EMZ, according to the provisions of this Code and the bylaws issued by the CEC ..., etc.)* and the procedures that they carry out during the process, the Commissioner deems that they have features of public administration institutions, regulated by a special law, which have nothing to do with the politicized aspect of conducting the electoral campaign, by the electoral subjects, despite the fact that because of the nature of the process, the proposals for their members come from political subjects.

 Once the Commissions of Electoral Administration Zones (CEAZ) and the Voting Center Commission (VCC) are nominated by the CEC, as well as the Ballot Counting Groups (BCCs) are appointed by the CEAZ, we are faced with the fact that some public administration institutions have been established to act in specific circumstances, which perform their activity on the basis of a special law, and consequently, the employees appointed in them, have the duty of implementing it.

 This for the fact that, the Code in question, explicitly provides: *“Electoral commissions, provided for in this Code, fulfill their functions in accordance with the law, impartially and transparently”*.

 *In this regard, the Commissioner considers that, the civil servant has no legal impediment to carry out these public administrative functions, as long as they are not related to political activities during the electoral campaign in favor of the electoral subjects and do not affect the performance of his functional duties, in his position, as part of the civil service.*

 The Commissioner considers that, the performance of this duty has nothing to do with the prohibition laid down in article 37, “*The political rights*”, of law no. 152/2013 “*On the civil servant*”, amended, where in paragraph 1, among other things it is stipulated that: “....*The civil servant should not publicly express his political beliefs or preferences”*. This provision regulates an aspect related to the political activities carried out during the electoral campaign, by the electoral subjects.

 Likewise, the performance of this duty does not relate to the prohibition of the use of public resources in support of electoral subjects, which is provided for in article 88, of the Electoral Code, since in this provision it is clearly stated that:

 *".... 2. In terms of this article, “resources” means tangible and intangible assets, provided for in article 142 of the Civil Code, as well as any human resource of the institution. With the use of “human resources”, it is understood the compulsory use on the election campaign of the institution’s administration within the working hours for electoral purposes, as well as the compulsory and organized use within the student’s timetable of the pre-university education system in the electoral campaign.”*

Therefore, we bring to the attention of the institution, in order to be cautious and to respect also the provisions of paragraph 3, of this provision, which provides that:

 *“During the election campaign, hiring, dismissal from work, termination, movement and transfer among institutions or public entities is prohibited, except for the legitimate cases. Legitimate cases are considered those cases when the transfer or dismissal from work comes as a result of violations under the relevant legislation, or hiring is done within the structure and organigram in force before the election campaign by the institution or the public entity in fulfillment of its mission. Make an exception the emergency cases due to unforeseen events that dictate hiring.*

 On the other hand, even if the participation of civil servants in the institutions administering the electoral process, will be assessed from the perspective of the implementation of the law on the ethics of public administration civil servants, which is a legal act, that establishes the general rules and principles of the behavior of the civil servant, in general and of the civil servant in particular, as part of this category, it is again concluded that there is no legal obstacle on performing this duty on their part.

 Law no. 9131, dated 8.9.2003, “*On the rules of ethics in public administration*”, has defined some basic rules upon which should act a civil servant, who is under the conditions of external activity, since the activity in this case is evaluated as such.

 Specifically, in Chapter III, *“External activities of the public administration civil servant”*, according to article 6, “*External activities*”, of the aforementioned law, defines the notion of the external activity of the civil servant, in this way: “*With external activity of the civil servant we understand every kind of casual or random activity that requires the engagement of the public administration civil servant, either for profit or not, that the civil servant performs besides the official duty*”.

 Further, in article 7 of this law are defined the cases of prohibition of the external activity of the civil servant, expressed in this way:

 *“1. The public servant should not engage in any external activity, that hinders the performance of his or her official duty or that requires a mental or physical engagement which makes it difficult to carry out the duty, or is a continuation of this duty, that violates, in any way, the image of the public administration civil servant.*

*2. In case of doubt about the qualification of an activity as permissible or not, the civil servant shall consult with the personnel unit of the institution.”*

 The Commissioner considers that, in the case which we are analyzing, we are not in the conditions of the prohibition of an activity, but on the other hand, we bring to the attention of the civil servant, and of the institutions, the regulations of the following provision of this law, namely of article 8, “*Allowing external activities*”, which sets out the rules to be applied when an employee carries out an external activity, with or without remuneration, which are clearly defined below:

 *“1. Performance of external activities should be notified in advance to the direct supervisor of the public administration civil servant, and to the personnel unit.”*

 In article 9 of this law, has been provided also for remuneration for external activities and it is stipulated that, the civil servant cannot be rewarded for external activities, when they relate to the duties that he has performed in the exercise of his functions, or are a direct continuation of them, unless otherwise provided in other legal act or bylaws, as it is the case that we are analyzing, since the Electoral Code provides also for rewards for the election administration.

 This provision, in the case of the civil servant, must be interpreted as closely related to article 47, of the civil servant law, where the obligation to declare the interests and wealth, is provided in this way:

 *“1. The civil servant shall be obliged to inform his supervisor in advance of any paid activity that he performs outside his duty in the civil service and he may carry out such an activity only with the written permission of the institution. 2. The civil servant is obliged to inform without delay his supervisor, in case of suspicion of a conflict of interest, and to implement the commandments of the institution for the prevention of the conflict of interest. 3. The civil servant is obliged to declare his private interests and wealth according to the legislation in force.”*

 The authorization of the institution in this case, justifies also the fulfillment of the obligations set forth in article 14, of the law on ethics, which is related to the work time. In this provision, it is envisioned that the civil servant should use the time of work effectively for the fulfillment of his official duties. This time is not used for any other purpose, except when the use of it for other purposes *is officially authorized, in accordance with the legislation in force*.

 In order for the Commissioner to verify the implementation of the law in this case, we request from the institutions that have authorized civil servants to perform functions in the electoral administration, to send us the administrative act that materializes this permission.

 *In these circumstances, as we analyzed above, the Commissioner considers that the civil servant has no legal impediment to exercise his activity, as part of the institutions established for the administration of the electoral process, under the conditions when he is appointed to their composition by the Central Election Commission, which is the body charged by the law with this competence, as well as has received the authorization from the institution for this activity.*

**b.** *Regarding the assessment of the legality of the conduct of civil servants, in accordance with the content of Article 37 of Law no. 152/2013, "On the Civil Servant", as amended.*

The monitoring process that is being carried out by the Commissioner during the electoral campaign is aimed, among other things, on the prohibition of compulsory use of civil servants in the electoral campaign, during office hours, for electoral purposes of political entities, as well as on the oversight of the implementation of their rights with political character, as well as respecting the limitations that the law has imposed on these rights from their side.

The development of the electoral process puts in difficulty the mechanisms that have the power to evaluate the civil servants activities in these specific circumstances, which evidences the need for interpretation of various aspects related to the behavior of civil servants during the election campaign.

For this reason, in order to prevent the misapplication of the law, as well as to unify the practice of resolving the cases that might arise in any institution, during this period, below you will find the Commissioner’s position on this provision of the law in question.

Article 37, entitled *“Political rights”*, of law no. 152/2013 “*Civil servant status*”, amended, has to do with the identification of the civil servants’ political rights. This provision explicitly states that:

 “*1. The civil servant has the right to participate in political activities beyond the official office hours. The civil servant should not publicly express his political beliefs or preferences.*

*2. Top management level civil servants may not be members of political parties. Civil servants of other categories have the right to be members of political parties, but cannot be members of their governing bodies.*

 *3. The civil servant has the right to run and to be elected in the elections to the Assembly of the Republic of Albania or for the local government bodies. In this case, the civil servant is forced to seek suspension from duty.”*

During the development of the civil service in our country, and consequently of the evolution of the civil servants’ rights, has been respected the requirement that these rights are fully in line with the rights of every citizen, and therefore, based on the European Convention of Human Rights, as well as in the Constitution of the Republic of Albania, these rights that are materialized in the law on civil servants, are grouped as follows:

* *the political rights;*
* *the collective rights;*
* *the economic rights;*
* *as well as the rights to employment in the civil service.*

Respecting the rights of civil servants plays an important role in the current law on the civil servant, as it entails also the solution to the real concern to guarantee the most important civil service principles, such as neutrality, impartiality and integrity.

In the civil service field, the exercise of employee rights can be limited only if we are facing a public interest, but this can only happen if it allowed by the Constitution. Article 17 of the Constitution of Albania stipulates that:

 *“1. Restrictions on the rights and freedoms provided for in this Constitution may be imposed only by law for a public interest, or for the protection of the rights of others.*

*The limitation should be proportionate to the state that has dictated it. 2. These restrictions may not affect the essence of the freedoms and rights and in any case may not exceed the limits laid down in the European Convention on Human Rights”.*

Under the Constitution, these restrictions must be in any case in accordance with the principle of proportionality and at the same time, determining a necessary balance between the rights and obligations of civil servants.

These are some general principles in the case of limiting the exercise of rights, which have been taken into account and at the same time have been materialized in the legal provision that we have as the object of discussion in this case (article 37).

Determining the political rights of a civil servant is a novelty of the current law on the civil servant, since the previous legislations had not foreseen this concept in any case.

 If we would analyze the provision concerning the political rights, divided by its paragraphs, which deal with various aspects of the political rights, it results that, in the first part of it, it is determined that the civil servant is entitled to participate in political activities, but limits this right with the clause *“beyond office hours”*.

Further, this provision continues with the definition that the civil servant should not publicly express his political beliefs or preferences, bounded this prohibition with its first part, thus past office hours, under the conditions when during office hours, the civil servant is prohibited to participate in political activities.

 *In these circumstances, the purpose of this clause of the provision is to discipline the civil servants to exercise self-control with regards to public manifestation of political views and loyalty to a political force in private life, which means that, they cannot manifest themselves with banners in their hands, or be protagonists in the podiums of political subjects that hold the election campaign.*

But, on the other hand, the existence of this provision should not lead to an extended interpretation of it, by categorically prohibiting civil servants from participating in political activities, or in electoral organizations of political parties past office hours, since this right of them, stems from the right that they have to choose the governing alternative, which is achieved by listening to the electoral subjects and the programs that they present.

In the second part of this provision, it is stipulated that senior management level civil servants cannot be members of political parties. Civil servants of other categories have the right to be members of political parties but cannot be members of their governing bodies.

*In this case, are ascertained constraints on political activities, with the purpose of ensuring neutrality and political impartiality, as principles of the civil service.*

In the third part of the provision, it is stipulated that the civil servant has the right to run and to be elected in the elections for the Assembly of the Republic of Albania, or for the local government bodies. In this case, the civil servant is required to seek suspension from duty. This legal regulation is regarded as an innovation of the current law on civil servants, which extends the sphere of political rights.

*As we discussed above, in the interpretation of the legal provision governing the political rights of civil servants, the Commissioner considers that, civil servants, have no legal impediment to participate in electoral arrangements of different electoral subjects, but always beyond office hours and being careful to exercise self-control with regards to public manifestation of their political views and loyalty to a political force in their private life.*

***Finally***, in order for the Commissioner to provide the necessary information regarding the participation of civil servants in the election administration, we ask that you inform us, by ***30.05.2019*** and onwards, about:

* Cases when civil servants are registered at CEC as candidates to be elected as Mayor and member of the Municipal Council.

 In these cases, you should also send to the Commissioner the acts that materialize the administrative actions that accompany this process, which are the request for suspension by the employee, as well as the approval of this request by the institution, as we have explained in the letter we sent before to your institution, which has to do with assessing the legality of the participation of civil servants in the election administration.

* Cases when civil servants participate in the institutions established by the Central Election Commission to administer the electoral process, such as CEAZs, VCCs and BCC (CT).

 In these cases you should send to the Commissioner the employees' requests, as well as the authorization of the institution, which allows these employees to participate in these election mechanisms.

 Appreciating the progress of this process, which we are implementing together, the Commissioner is always ready to assist your institution and encourages you to seek technical assistance, in every aspect you will deem it necessary.

 **THE COMMISSIONER**

 **Pranvera Strakosha**