DISCRETIONARY POWERS OF THE ADMINISTRATION

Assoc. Dr. Dejan Vitanski
Law Faculty- Kicevo, 6250 Kicevo, Republic of Macedonia
dvitanski@yahoo.com

Abstract: Passing laws on free evaluation is due to the fact that the legislator is not always able to predict the coming regulations. Legislative body can not anticipate, regulate and incorporated into the general legal norms all cases that may occur in real life. Therefore it is considered necessary for the administration to have some freedom of movement and - according to the circumstances of the case, to decide. This means that free evaluation occurs in addition to the legal norms. So, the administration cannot be tied to rigid and abstract legislation, but inevitably it must be free to assess the circumstances of each particular case. For that reason it is necessary a broad field of creative freedom and maneuvering space for creation and have to adapt constantly to the changing needs of real life.

Key words: administration, clerks, discretionary authority, discretionary assessment

1. INTRODUCTION

The legal norm that gives discretionary authority in the science and in the comparative practice, can use different expressions, such as discretion, discretionary authority, discretionary assessment free assessment etc.

A discretionary power can be given to a certain state authority solely on legal grounds that precisely determines the framework of this authorization. The state authorities through this kind of specific alternative behavior have an opportunity to rule out the public authority in one way or the other. However, this government is by no means illegal, arbitrary or voluntarily decision making body. The body has no right to create other rule or disposition, nor, according to their own will, to change the already chosen alternative of disposition - but only to use that power in terms of making a decision.

2. DEFINING THE TERM DISCRETIONARY AUTHORITIES

Under terms of law, a discretionary authority is a law of the administrative authority that makes a certain act of two or more opportunities, in other words its target is to choose a solution that has the best outcome.

“Discretionary law exists when the administration can choose between different behaviors, if the implementation of the law meet the conditions” (H.Maurer, 1994, p.127).

The term “discretionary authority” means an authority with which the administrative authority entrust certain degree of freedom in terms of making a decision, in other words to choose one of many legally admissible decisions that considers it most appropriate (Компилација на инструменти на Советот на Европа, 2005; Compilation of the instruments of the Council of Europe, 2005).

In case of a discretionary decision one should choose the alternative that best suits the public interest. That is, when using discretionary authority, officials must take into account the social interest. Moreover, their actions and decisions must not exceed the arbitrariness or capriciousness.

Discretionary acts must be brought within the authority and in accordance with the objective to be achieved by such authorization. The norm which contains discretionary authority, it is necessary to be determined the purpose precisely and unambiguously, for which allows administrative discretion.

In some cases, the intention of the legislator is evident from the legislative instrument, but in other cases, the purpose for which is entrusted with certain discretionary, may not be obvious.

www.japmnt.com
Therefore it is advisable, when a certain discretionary authority is predicted, the objective’s achievement is to point it out in the text of the law as clearly as possible that entrusts that rating. When in the laws that does not stand out explicitly, then this power should in any case be made in the public interest (Compilation of the instruments of the Council of Europe, 2005).

The act passed based on discretionary authority is obliged to state regulation and the reasons taken into account in its decision, which means that the solution must be elaborated.

3. PROCEDURE IN DISCRETIONARY DECISION – MAKING

The discretionary acts should be taken by the competent authority, in prescribed procedure and on the basis of established legally relevant or true facts (Stjepanović, N, Lilić, S, 1991; Matović, I, 1988; Stjepanovich, N, Lilich, S, 1991, also Matović, I, 1988). So, jurisdiction, procedure for the adoption of the act and of fact are elements that cannot be subject to discretionary decisions.

Administrative authority in the exercise of discretionary authority:
1. must not endeavor to achieve a different goal than that for which it is entrusted with the authority;
2. should respect the principle of objectivity and impartiality, taking into account only the factors that are relevant in this case;
3. should respect the principle of equality before the law, avoiding unfair discrimination;
4. need to maintain an appropriate balance between any adverse effect that its decision may have on the rights, freedoms and interests of individuals and objective decision should realize, that should provide a reasonable balance between the interests involved, for example, the public interest on the one hand and the private interest of individuals on the other side;
5. to make a decision within a reasonable time;
6. must exercise all other general administrative guidelines in a consistent manner, and at the same time takes into account the specific circumstances of each case (Compilation of instruments of the Council of Europe's 2005, 283-284).

Administrative authorities have to determine whether the material conditions are met, and then to apply the discretionary assessment. For example, when the law of possession of a weapon states that permission for holding and carrying weapons can be issued only to adult, psychic sound, sentenced, etc., it means that these parameters represent the material conditions that must be met prior and finally the body of the administration can engage in a discretionary assessment (Христов, А, 1984; Hristov, A, 1984).

The administrative authority shall not reaches for discretion unequivocally, if it is not entitled to it by law. Freedom of its decision-making should consist in a choice of alternatives, which are offered to solve a certain case by a disjunctive legal norm. This is because, a willful perform of a free evaluation is illegal.

The juxtaposition between the so-called imposed authority (when administrative authority has no room for maneuver when it makes decisions) and discretion, is mitigated by the so-called theory of margin assessment. According to this theory, the administration can choose between multiple legal characterization of the facts that the legal terms in the law does not explicitly identified and thus allow several possible interpretations and consequently several possible solutions. For example, if a certain situation is described as very dangerous to public order or not so dangerous, the police may take a decision on smaller or greater restriction of freedom, or decide not to intervene.

Although discretion allows administrators to select the contents of a decision from many features, when the conditions laid down by law are met in terms of its intervention, the margin of assessment allows the administration to choose between several possible assessments about the situation in which case the initiation of an administrative dispute, the court will respect the assessment done if it is done fairly, and to criticize manifest error of assessment. According to this theory the legislature actually authorizes the administration itself to assesses the situation in relation to such terms and allows the court to supervise the assessment being done by the administration in the case of manifest error.

According to German case law, there are three cases of improper execution of discretion: overcoming the limits determined by discretion (Ermessensüberschreitung), not using or
excessive exercise of discretion (Ermessensunterschreitung) and incorrect application or abuse of discretion (Ermessensmissbrauch) (Фромонт, М, Административното право на земјите од Европа, (превод на македонски јазик), Арс Љамина, Скопје, 2010; Fromont, M, Droit Administratif des etats europeens, Presses Universitaires de France, 2006).

The problem with discretionary powers does not consist in their existence, but to in the limit of their use in a reasonable optimum to eradicate potential corruptive hotspots and to allow lawful, efficient and responsible operation of the administrative system.

A striking example of abuse of discretionary powers exist in the selection of civil servants by officials who manage administrative bodies in the country, in terms not to be elected candidates who showed the best result of the examination and the lists prepared by the Agency administration.

Such an election of officials may be motivated by political reasons, or by kinship, friendly business relationship with the candidate and so on. (Витански, Д, 2012; Vitanski, D, 2012).

4. CONCLUSION

The norms, that give discretionary power, authorize state authorities to choose one of two or more alternatives, with the discretionary disposition that are available. These standards are recognized and distinguished from the other types of legal norms, but they always have legislator that uses the word may. Using this power against the legally prescribed parameters is called abuse of power.

The problem with discretionary powers does not consist in their existence, but to in the limit of their use in a reasonable optimum to eradicate potential corruptive hotspots and to allow lawful, efficient and responsible operation of the administrative system. In practice it often happens in different legal acts to exist some gaps and ambiguities or legal vacuum that administrative authorities may use (and use them indeed) as a tacit "legal" authority for discretionary actions. As a result, the administration has a wider maneuvering space for abuse and corruption. In this context, it is necessary an amendment of certain laws that contain too wide discretionary powers in order to avoid overdraft and abuse by their holders.

Furthermore, it is a necessity for publication of all laws of the bodies on their web pages, setting clear and unambiguous criteria for making discretionary acts, expressly prescribed procedure for discretionary decision making, continuous training of officers in their work using discretionary powers, etc.

5. REFERENCES

1. Compilation of the instruments of the Council of Europe, administrative right- recommendations, 2005, p. 283-284, 288-289;
7. Verpo, M, Laticija, G, Public Law, 2012, Public authority and administrative law, (translated from French), (Skopje), Ars lamina;
8. Vitanski, D, 2012, Public administration-conditions, problems and challenges, (Kicevo);