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Change of Composition of Voivodeship Board as a Result of Changing Its Statute in the Context of Keeping Principles of Polish Structural Administrative Law

Zmiana składu zarządu województwa jako skutek zmiany statutu województwa w kontekście zachowania zasad polskiego ustrojowego prawa administracyjnego

SUMMARY

This article presents the issues of changing the composition of the voivodeship board in the Republic of Poland as a result of the change in the voivodeship statute. As part of the legal analysis of the institution in question, the authors paid special attention to practical issues and nodal problems that may be encountered when interpreting the provisions of the Act of 5 June 1998 on Voivodeship Self-Government. The issues raised refer to the actual state of affairs in the Sejmik of the Świętokrzyskie Voivodeship. The article is of a scientific and research nature. The authors put forward three hypotheses and attempted to prove them in the framework of the conducted analysis. Firstly, a change in the composition of the voivodeship board as a result of the change in the voivodeship statute is possible in the light of the principles of the Polish systemic administrative law without the need to dismiss the entire voivodeship board. Secondly, in a situation where the resolution amending the articles of association did not include any adjusting provisions, it is necessary to adjust the make-up of the management board to the requirements of the amended articles as soon as possible. Thirdly, the solution according to which the dismissal or acceptance of a resignation of a board member by the voivodeship parliament and the election of a deputy marshal in his place within one resolution

should be rejected. The results of the research carried out in the course of the analysis are original and innovative, as such studies have not been conducted so far. As a result, this article is a valuable source of knowledge for representatives of science and practice.

Keywords: voivodeship board; change in the voivodeship statute; board member; resignation of a board member

INTRODUCTION

The issue of changing the composition of the board of the voivodeship as a result of amendment in the voivodeship statute in the context of keeping the principles of structural administrative law has not yet been formulated in specific statements in the doctrine or established views in jurisprudence. There is also no well-established local government practice here, as it has not been developed yet. Hence, the solutions described in this study should be treated as a contribution to the start of the discussion on the topic. These solutions have been graded as more or less risky in the context of potential possibility of applying supervision measures on the part of the voivode or legality control conducted by administrative courts.

The problem outlined in the title concerns the situation when, as a result of the amendment to the statute of the voivodeship, the previous composition of the board: marshal, vice-marshal and three members of the board of the voivodeship is replaced by the marshal, two vice-marshals and two members of the board of the voivodeship. Contrary to appearances, the implementation of the above-mentioned amendment to the statute may pose many legal and pragmatic problems, and finding the right way to adapt the composition of the board of the voivodeship to the requirements of the statute in the new wording may give rise to many problem situations.

Undoubtedly, when changing the composition of the voivodeship board and thus electing a vice-marshal in place of one of its members, the voivodeship assembly should be guided by the principles of structural administrative law, as the outlined issues are closely related to this particular area of law[1]. On the one hand, the legislative body of the voivodeship should act in accordance with the rule of law (legality), also referred to as the principle of legal legitimacy of the authorities and the resulting rule of creating administrative bodies pursuant to generally applicable

[1] According to the views of representatives of the science of law, structural administrative law regulates the organization, principles of functioning, creation and transformation of public administration – hence, its subject is related issues, including the creation and structure of public administration as well as processes and relationships occurring within their system. Cf. J. Jeżewski, *O strukturze pojęciowej ustrojowego prawa administracyjnego*, [in:] *Przeobrażenia we współczesnym prawie administracyjnym i nauce administracji. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Kucie*, Wrocław 1997, pp. 79–80.

law[2]. On the other hand, this body should not forget about the necessity of keeping the other principles of structural administrative law resulting from the principle of implementation of the common good[3] such as: the principle of proportionality, the principle of efficiency of administrative activities, the principle of determining the organizational effects of administration, the principle of balancing the interests of the state, communities and citizens, the principle of identifying the common good[4] and the related principle of stability of executive bodies of local government units. Both the rule of law and the principle of the realization of the common good result from the more general assumption, i.e. the constitutional value of the political system characterized as a democratic state of law[5].

In this context, the following research hypotheses should be put forward. Firstly, a change in the composition of the voivodeship board as a result of a change in the voivodeship statute is possible in the light of the principles of the Polish structural administrative law without the need to dismiss the entire voivodeship board. Secondly, in a situation where the resolution amending the statute does not include any adjusting provisions, it is necessary to bring the composition of the voivodeship board to the requirements of the amended statute as soon as possible. Thirdly, the solution according to which the dismissal or acceptance of the resignation of a member of the voivodeship board by the voivodeship council and the election of a vice-marshal in his place should take place within one resolution should be rejected.

CONSTITUTIONAL STATUS OF ADMINISTRATIVE LAW: COLLISION OR COHERENCE?

From the comments included in the introduction, a conclusion arises, ordering to reconcile various principles of structural administrative law. The principles of law are not concrete norms, but rather praxeological[6] directives with a high degree of

[2] This principle was articulated by D.R. Kijowski (*Przepisy czy zasady ogólne prawa administracyjnego*, [in:] *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi*, ed. J. Supernat, Wrocław 2009, pp. 294–295).

[3] According to Z. Cieślak (*Zasady prawa administracyjnego*, [in:] *Prawo administracyjne. Część ogólna*, ed. Z. Niewiadomski, Warszawa 2000, pp. 67–71), "law making and application takes place in processes whose key principles are: the principle of legal legitimacy of the bodies' operations and the principle of the common good. […] Between these two pillars of administrative law there are more detailed rules describing the three aspects of public administration discussed above – subjective, functional and final".

[4] *Ibidem*.

[5] Cf. M. Stahl, *Zasada demokratycznego państwa prawnego*, [in:] *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, ed. M. Stahl, Warszawa 2004, p. 121. For more on the topic, see K. Walczuk, *Zasada demokratycznego państwa prawnego*, [in:] M. Bożek, M. Karpiuk, J. Kostrubiec, K. Walczuk, *Zasady ustroju politycznego państwa*, Poznań 2012, pp. 87–104.

[6] Z. Cieślak, *Zasady prawa*..., p. 65.

generality[7]. These principles constitute a kind of program norms, regulatory ideas of the legal system[8]. The need to reconcile these principles leads to the conclusion that their application depends to some extent on the circumstances of the case, relying on the rule "less… more"[9] as opposed to the rule "either… or"[10]. This implies that the principles of law – in the event of their collision with other principles – are applied to the extent that, if possible, both principles are reflected in the activities of public authorities. Of course, in such a situation, both principles will be subject to some reduction – it will not be a case in which one or the other principle will be fully applied. One principle will be applied more and the other less[11]. This is the case here, which is discussed in detail in further considerations.

To begin with, we should briefly characterize the principles of law mentioned in the introduction applicable in the case described in this article.

So the rule of law was described in Article 7 of the Constitution of the Republic of Poland of 2 April 1997[12], according to which "public authorities operate pursuant to and within the bounds of the law". The authority's competence to take specific actions must therefore result from the provisions of applicable law and may not be presumed. While a citizen does not have to specify the legal basis of his actions, in accordance with the principle "which is not legally prohibited – is allowed", the opposite rule applies to public authorities, "actions not defined by the law are

[7] Cf. L. Morawski, *Filozofia prawa*, Toruń 2014, p. 233.

[8] *Ibidem*, p. 231.

[9] The authority applying the rule of law must consider whether the rule should be fully applied or another rule should be considered. If this authority concludes that "more important reasons are for not applying the rule than for its application, it should depart from the application of the rule". In order to break the deadlock, the state authority should apply the rules of interpretation (e.g. *argumentum ad absurdum*) and conflict rules (e.g. *lex specialis derogat legi generali*). The ineffective nature of the principles of law means that they can be partially and even completely abandoned, when there are important arguments (cf. *ibidem*, pp. 231–232). That is why the Constitutional Tribunal indicates in its judgements that, e.g., the principle of non-retraction is not absolute and may be renounced, when in a given case it is justified by considerations of equity (cf. decision of the Constitutional Tribunal of 25 September 1991, S 6/91, OTK 1991, no. 1, item 34; also see judgement of the Constitutional Tribunal of 25 February 1992, K 3/91, OTK 1992, no. 1, item 1).

[10] If the conditions expressed in the standard have been fulfilled, it should be used, if not, it should not be used. Thus, normal standards in the event of a conflict with other standards must either be considered non-binding or exception to these standards. Cf. L. Morawski, *Filozofia…*, p. 233.

[11] The above analysis shows the algorithm for the application of conflicting rules of law completely different from the algorithm for the application of conflicting legal norms other than the rules – the collision between the latter is removed on an "either-or" basis – either one norm or the other is applied. Cf. *ibidem*.

[12] Journal of Laws 1997, no. 78, item 483 as amended), hereinafter: the Constitution of the Republic of Poland. English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.12.2020].

not allowed"[13]. The representatives of the science of law indicate, however, that binding public administration by law is not uniform and the level of this binding is conditioned by the sphere, type and form of action taken by the administration[14]. At this point, internal and external operations of the administration should be highlighted. As part of internal operations manifested in the implemented organizational powers, there is a certain scope of freedom of action of the administrative entities', expressed in "creating internal organizational rules, creating or lifting auxiliary organizational units, making changes in the organizational structure of offices, and undertaking managerial and control activities, etc."[15]. On the other hand, the external sphere of the administration's operation, addressed to unrelated, non-subordinate entities, not remaining in special dependence with its organs, is characterized by strict legal regulation[16].

The above principle is made more precise by the principle of creating administrative bodies pursuant to generally applicable law. According to this principle, the creation of an administrative body takes place by way of statutory route. Making changes related to such an authority should also be based on the provisions of applicable law. Nevertheless, "laws may leave to the parliament, government and also legislative authorities of local government a kind of organizational autonomy by setting only the framework within which these authorities will have to create new public administration bodies"[17]. The above statement results in admissible, specific organizational looseness, under which the legislative body of the voivodeship may change the composition of the board in accordance with the principles set out in legal regulations, but also in some space complementing these provisions. The discussed principle allows, therefore, to fill legal gaps in the procedures of constituting and reconstructing the voivodeship executive bodies, while ensuring making structural changes in them also in legally permissible situations, which the law does not explicitly regulate.

While the rule of law is a "specific starting point for law-making and law enforcement processes", the principle of realizing the common good is a certain point of entry for these processes, permeating with its content multiple legal and actual operations of administrative entities. It provides axiological identification of the purpose of creating and applying norms of administrative law. Therefore,

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[13] M. Jaśkowska, *Związanie administracji publicznej prawem*, [in:] *Księga pamiątkowa Profesora Eugeniusza Ochendowskiego*, Toruń 1999, pp. 137–138.

[14] Cf. S. Cieślak, *Praktyka organizowania administracji publicznej*, Warszawa 2004, pp. 47–48; J. Lang, *Związanie administracji prawem*, [in:] *Prawo administracyjne*, ed. M. Wierzbowski, Warszawa 2012, pp. 22–23.

[15] P. Tusiński, *Zasady ustrojowego prawa administracyjnego*, [in:] *Ustrojowe prawo administracyjne*, eds. L. Bielecki, P. Ruczkowski, Warszawa 2011, p. 34.

[16] *Ibidem*.

[17] D.R. Kijowski, *op. cit.*, p. 295.

both establishing and implementing legal and administrative norms should not be aimed at reducing public interest, consistent with the axiological system of values identifying a given society. These values should first be identified by the legislator (the principle of identification of the common good), which means that their content should be directly or indirectly articulated in legal norms. Next, the authority applying the law should protect the values identified in this way, taking into account the principle of balancing the interests of the state, communities and citizens. The latter principle is a remedy for the emerging conflicts of socially recognized values with particular interests and the interests of the state itself[18]. In this context, the principle of stability of executive authorities of local government units should be reminded, according to which self-government executive bodies may be recalled only for very important reasons, and for their recall it is necessary to conduct a local referendum (in the case of a municipal executive body[19]) or to obtain a qualified majority 3/5 of the statutory composition of the legislative body (in the event of recall of an executive body of a poviat or voivodeship). The aforementioned principle is aimed at protecting local government units against destabilization. Without a stable executive authority, these could not be managed efficiently, and irresponsible political actions could easily frustrate the implementation of a uniform policy, which, according to the legislator, should in principle cover a period of at least one term of office.

The principle of proportionality requires public authorities to use only such means that are necessary to achieve a specific purpose (Article 31 para. 3 of the Polish Constitution). The principle of proportionality was derived from the rule of law by the Constitutional Tribunal, indicating that it must "meet three criteria: usefulness, necessity and proportionality *sensu stricto*"[20]. The Constitutional Tribunal articulated that from the principle of proportionality stems the "prohibition of undue interference", whose essence is "to recognize that the legislator may not impose restrictions exceeding a certain degree of nuisance, and in particular those restrictions familiarizing the proportion between the degree of violation of the rights of the individual and the rank of the public interest, which thus shall be protected. […] Reflecting whether this prohibition has not been violated by the legislator […] [should lead to giving – P.Ś.] the answer to three questions: 1) is the introduced legislative regulation able to lead to its intended effects; 2) is this regulation necessary to protect the public interest with which it is associated; 3) are the effects of the introduced regulation in proportion to the burdens it imposes on the citizen". At this point, three criteria of the principle of proportionality have already been

[18] Z. Cieślak, *Zasady prawa…*, pp. 66–70.

[19] Cf. provision of Article 2 para. 2 point 1 of the Act of 15 September 2000 on the Local Referendum (consolidated text Journal of Laws 2019, item 741 as amended).

[20] Judgement of the Constitutional Tribunal of 26 April 1995, K 11/94, OTK 1995, no. 1, item 12.

articulated: usefulness (point 1), necessity (point 2) and proportionality *sensu stricto* (point 3). This principle was then included in the content of the Constitution of the Republic of Poland itself, whose Article 31 para. 3 states, "Limitations on the exercise of constitutional freedoms and rights may be established only by law and only when they are necessary in a democratic state for its safety or public order, or for the protection of the environment, public health and morality, or freedom and rights of other people. These limitations may not violate the essence of freedoms and rights". Therefore, the principle of proportionality prohibits the adoption of legal acts that would be "an expression of undue interference in the sphere of individual rights and freedoms. These limitations may only be put to the necessary extent"[21]. On the one hand, this measure requires balancing the importance of the public interest to which the limitation is intended to serve, and on the other hand, the significance of the individual's limited right or freedom[22]. It also means that if a public authority "can use a less onerous measure to achieve the goal and nevertheless chooses a more onerous measure, a public authority violates the principle of the necessity of limitations"[23]. In the context of the discussed principle, postulates are also formulated to use the so-called harm test and balancing of interests test[24]. In this situation, the harm test would consist in determining whether the use of a given legal and structural institution would endanger a particular interest or protected good (e.g. so-called police goods: security, peace or public order)[25]. If the test indicates that no such risk exists, the proposed legal entity should apply. However, if such a threat is demonstrated, then a balancing of interests test should be applied. If the latter test shows that the public interest associated with the use of a given legal and structural body suffers at the expense of preserving the interests of the individual, that institution should not apply.

In accordance with the principle of effectiveness of administration operations, administration operations should be efficient. As S. Cieślak wrote:

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[21] G. Kryszeń, K. Prokop, *Aksjologia polskiej Konstytucji*, Warszawa 2017, pp. 140–141. See also L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2019, p. 120.

[22] L. Garlicki, *op. cit.*, p. 120.

[23] *Ibidem*. See also judgement of the Constitutional Tribunal of 2 July 2009, K 1/07, OTK-A 2009, no. 7, item 104.

[24] Admittedly, they are related to citizens' access to public information (see Ł. Regner, *Aktualne problemy i wyzwania w obszarze jawności działania administracji publicznej oraz kierunki dalszego kształtowania modelu*, [in:] *Stulecie polskiej administracji. Doświadczenia i perspektywy*, ed. W. Federczyk, Warszawa 2018, pp. 172–173), however, their analogy can be applied to other administrative and legal issues "requiring to be tested" and requiring to be set against the principle of proportionality. See also G. Sibiga, [in:] *Główne problemy prawa do informacji*, ed. G. Sibiga, Warszawa 2013, pp. 97–101.

[25] M. Janik, *Policja jako funkcja państwa*, [in:] *Administracja. Prawo administracyjne. Część ogólna*, eds. J. Blicharz, L. Zacharko, Katowice 2018, p. 320.

> […] all actions are efficient when they lead to the achievement of the intended goal with the least possible means. In other words, to act efficiently is, first and foremost, to be effective and fast, as well as to operate economically, i.e. to achieve the intended goals with the least amount of energy and resources[26].

The manifestations of this principle are effectiveness, understood as the efficiency of taken actions, and rationality, understood as "a feature of conscious operations consisting in adapting means to the intended goal as well as the conditions of its implementation"[27]. The efficiency of administration is measured both in the context of administrative decisions, the creation of normative acts, the provision of services to citizens and the fulfillment of many other social expectations[28]. The representatives of the science of law note that giving administrative entities certain freedom of choice of legal means (legal forms) to implement the tasks assigned to them is an appropriate way to ensure the efficiency of operations of administration[29].

The principle of determining the organizational effects of administration consists in "specifying and relating the effects of administration to the common good […]"[30]. Therefore, administrative entities should not take unpredictable actions whose possible effects would be difficult to predict or would negatively affect the common good. Operations of the administration with far-reaching consequences, which are in essence a burden on a specific common good, even if they were undertaken on the basis and within the framework of law, may be implemented only if it is required by a greater good than the one which, as a result of these operations, is diminished.

Bearing in mind the principles described above, in the event of an amendment to the voivodeship statute regarding the composition of the board of the voivodeship, the voivodeship assembly should, on the one hand, adapt the composition of the board to the new wording of the statute pursuant to legal provisions and acting only within their limits (rule of law; principle of creating administrative bodies pursuant to the provisions of generally applicable law). On the other hand, this authority should strive to implement the new composition of the board in a way that interferes as little as possible with its previous form, using effective and rational measures, with the least energy and resources (principle of efficiency of administration operations). The voivodeship assembly should ensure that the methods of operation used for this purpose are useful, necessary and proportionate so as not to violate the rights of other members of the voivodeship board, and at

[26] S. Cieślak, *Praktyka…*, p. 54.

[27] P. Tusiński, *op. cit.*, p. 49.

[28] Cf. E. Ura, E. Ura, *Prawo administracyjne*, Warszawa 2009, pp. 83–84.

[29] P. Tusiński, *op. cit.*, p. 49. The author also indicates that this freedom is currently to a large extent a feature of local government, while "to a small extent a segment of government administration".

[30] Z. Cieślak, *Zasady prawa…*, pp. 67–68.

the same time the stability of that authority (the principle of proportionality, the principle of stability of executive bodies of local government units). Therefore, the legal body of the voivodeship should not just blindly aim at implementing the new composition of the board, but also ensure that this process proceeds in a rational manner, guaranteeing the preservation of socially recognized values, in particular including public peace (the principle of determining the organizational effects of administration, the principle of identification of common good, the principle of balancing the interests of the state, communities and citizens). Compliance with the rule of law will allow the resolutions adopted in this respect to pass positively through the review of their legality, conducted by the voivode and administrative courts. Meeting the requirements of the rules arising from the principle of the implementation of the common good will, in turn, respond to the need to maintain – as far as possible – the stabilization of constituted voivodeship authorities, whose composition should not be disturbed without significant reasons.

INTER-TEMPORAL CONDITIONS FOR IMPLEMENTING CHANGES IN THE VOIVODESHIP STATUTE

While striving to implement the new wording of the provisions of the voivodeship statute as regards the composition of the board, it is first necessary to determine the moment from which the new statute should be applied. Two solution models may be considered here. According to the first model, the new statute is applicable since the date of entry into force of the resolution amending the statute, and this applies to all provisions amending the previous statute, therefore, also those relating to the new composition of the board. According to the second model, the amended statute – in relation to the composition of the board – is applicable in a sense "for the future", that is only from the end of term of office or from the moment of recall or resignation of the entire board, which would result in the need to re-elect the entire board in order to adapt the composition of the board to the regulations of the amended statute.

When choosing the first solution, it should be stated that as a result of the entry into force of the statute, the previous composition of the board expires[31], therefore it is advisable to adapt the composition of the board to the requirements of

[31] At the same time, the termination of the previous composition of the board should not be understood as a dissolution by law of the executive body of the voivodeship, which occurs only in cases clearly indicated in legal regulations (e.g. as a result of merging two voivodeships into one new voivodeship – cf. Article 390 § 1 point 3 of the Act of 5 January 2011 – Electoral Code, consolidated text Journal of Laws 2019, item 684 as amended). According to this concept, as a result of the entry into force of the resolution amending the statute, only the functional composition of the body has changed, however, while maintaining its existence in terms of personnel. Due to the above, the board

the statute as soon as possible, so that instead of three members of the board and one vice-marshal on the board, two vice-marshals and two board members will function. However, if such a solution is chosen, it would be necessary to indicate which of the remaining board members who are not the marshal or vice-marshal could become the vice-marshal of the voivodeship. This, in turn, raises the question of the manner in which the composition of the board should be adjusted to the requirements of the amended statute.

When choosing the second model, it would be admissible to state that the board may function according to the previous composition despite the entry into force of the amendment to the statute which has established a different composition of the board. However, this model would only be acceptable if in the resolution amending the statute adaptation provisions were included which would clearly indicate that the previous version of the statute's provisions apply to the composition of the board until the end of the current term of office or until the recall or the resignation of the entire board. From the provisions of § 31 para. 1 in conjunction with § 142 of the Regulation of the Prime Minister of 20 June 2002 on "Principles of legislative technique"[32] it follows indirectly that if it is intended to temporarily apply the provisions of the previous statute to a voivodeship executive body, this shall be clearly indicated, giving the transitional provision the appropriate wording "Until the end of the current term or until the recall or resignation of the entire board, the provisions of the statute in their previous wording shall apply to the composition of the board". The above directly results from the principle of direct application of new law[33].

It should be noted that the analyzed problem[34] of choosing one of these solutions does not arise in a situation where the resolution amending the statute includes ad-

still functions in its previous personnel composition, however, it is necessary to adapt its functional composition to the requirements of the statute in the new wording.

[32] Consolidated text Journal of Laws 2016, item 283, hereinafter: the Principles of legislative technique.

[33] Cf. judgement of the Constitutional Tribunal of 8 November 2006, K 30/06, OTK-A 2006, no. 10, item 149: "The silence of the legislator regarding the intertemporal rule should be considered as a manifestation of his will to act directly in the new law, unless important system or axiological reasons are against it".

[34] M. Kamiński (*Prawo administracyjne intertemporalne*, Warszawa 2011, pp. 100–101) draws our attention to the fact that the lack of adaptation provisions causes a number of problems that are difficult to solve and says that "it is important to note that the normative change in the organization and functioning of public administration leads to the modification of systemic norms, which in turn raises specific problems in terms of legal succession between liquidated or transformed and newly created or transformed bodies. Against this background, there is primarily the problem of systemic succession of tasks and related competences, and the consequences in terms of personnel or material resources associated with the previous set of tasks and competences. In order to ensure the continuity of administrative tasks, the legislator usually provides for special, transitional and transforming normative solutions".

aptation provisions clearly specifying[35] the manner of changes in the voivodeship executive body. In accordance with § 35 para. 1 point 5 in conjunction with § 142 of the Principles of legislative technique, the adjusting provisions regulate matters related to the adaptation of its addressees to the amended statute, including bodies or institutions, and in particular the method of transforming bodies or institutions created pursuant to the previous Act into bodies or institutions created by the new Act.

Summing up the above considerations, in a situation where no adjustment provisions have been included in the resolution amending the statute, the composition of the board should be adjusted as soon as possible to the requirements of the amended statute.

CHANGE OF COMPOSITION AND CHANGE IN COMPOSITION OF THE BOARD OF THE VOIVODESHIP

The voivodeship board, in accordance with the provision of Article 31 para. 2 of the Act of 5 June 1998 on Voivodeship Self-Government[36] consists of five members, including: voivodeship marshal as its chairman, vice-marshal or two vice-marshals and the remaining members. Therefore, the Act on Voivodeship Self-Government leaves the specification of the number of vice-marshals and the remaining members of the board to statutory regulation[37]. Consequently, a situation in which the configuration of the board composition changes as a result of a change in the voivodeship statute is legally permissible.

However, if there is a change in the statute of the organization in the discussed field, in which collegiate bodies operate, it should be borne in mind that this change leads to the transformation of the composition of that body as its structure, which should be distinguished from its personnel composition. Making personnel changes in a collegiate body functions under the concept of "changes in composition" while conducting changes in the structure of the body itself through the functional transformation of its individual members is called "change of composition".

[35] Strictly speaking, we are talking here about adaptation and transformation rules, whose purpose is "to normalize the method, principles and procedure for transforming existing and existing bodies operating on the basis of existing regulations, into organs, institutions and apparatus created by the new provisions" (*ibidem*, s. 592).

[36] Consolidated text Journal of Laws 2019, item 512, hereinafter: AVSG.

[37] Cf. J. Kostrubiec, *Die Machtorgane der territorialen Selbstverwaltung*, [in:] M. Karpiuk, J. Kostrubiec, *Rechtsstatus der territorialen Selbstverwaltung in Polen*, Olsztyn 2017, pp. 84–85.

POSSIBLE LEGAL SOLUTIONS TO ADAPT THE COMPOSITION OF THE VOIVODESHIP BOARD TO THE NEW WORDING OF THE STATUTE

Assuming as correct the statement that as a result of the statute's entry into force the previous composition of the board has expired, it becomes necessary to adapt the composition of the board to the requirements of the new statute as soon as possible. This, in turn, raises the question of the mode in which this adjustment of the composition of the board should take place. The solutions described below are possible to be presented here.

The first solution reduces to the recall or resignation of the marshal, which is tantamount to the recall or resignation of the entire board[38] and thus generates the need to elect the new board. In case of using the institution of marshal's recall, attention should be paid to the content of Article 37 para. 1 AVSG, pursuant to which "a voivodeship assembly may recall a voivodeship marshal for reasons other than failure to grant vote of approval or failure to grant a vote of confidence only upon the motion of at least 1/4 of the statutory composition of the assembly". Moreover, this motion requires a written form and justification of the reason for the recall and is subject to endorsement by the audit commission. In addition, its voting requires a majority of at least 3/5 of the votes of the statutory composition of the voivodeship assembly and is held by secret ballot. Therefore, it should be noted that the Act on Voivodeship Self-Government allows – admittedly – the possibility of removing the entire board, but only in exceptional cases precisely described in that Act (failure to grant a vote of approval, failure to grant a vote of confidence, request of at least 1/4 of the statutory composition of the assembly, endorsed by the audit commission). Moreover, when voting on a resolution on the recall of a voivodeship marshal, this resolution will not obtain a majority of at least 3/5 of the votes of the statutory composition of the voivodeship assembly, another motion may be submitted not earlier than 6 months after the previous vote[39]. All these restrictions "are supposed to prevent the submission of hasty and destabilizing the operations of the board motions for recall of the board"[40], and they directly correspond to the assumption of the stability of executive bodies of local government units adopted by the legislator, whose existence should be as durable as possible, and its termina-

[38] Voting the resolution on recall of the voivodeship marshal is tantamount to passing the resolution on recall of the entire board (cf. Article 37 para. 4 AVSG). This is "a consequence of the concept of the author's board, whose composition is reported by the chairman of the board" (M. Chmaj, *Prawo samorządu terytorialnego*, Warszawa 2013, p. 119; B. Jaworska-Dębska, [in:] *Prawo administracyjne. Pojęcia…*, s. 329).

[39] Cf. M. Augustyniak, *Wybory samorządowe 2018. Zagadnienia praktyczne i schematy działań*, Warszawa 2018, pp. 166–167.

[40] S. Trociuk, *Samorząd województwa*, Warszawa 1999, p. 31.

tion should take place only in particularly justified cases. One of such cases is the resignation of the marshal of the voivodeship. However, it seems unfounded that the marshal would have to submit resignation in a situation where his person would soon become a candidate for the same position. Perhaps the recall or resignation of the marshal of the voivodeship is tantamount to the resignation or recall of the entire board and then the election of the marshal, two vice-marshals and two board members in accordance with the current statute would be the least risky solution in legal terms, i.e. the most compatible with the principle of legality and the resulting rule creating administrative bodies pursuant to generally applicable law. However, due to the fact that such a solution would conflict with the principle of realization of the common good, and in addition, in pragmatic and expedient terms, it would be too far-reaching and at the same time destabilizing the voivodeship executive body, other legal solutions should be sought that would allow the election of the second vice-marshal while maintaining the four remaining members of the board and thereby keeping the other principles of structural administrative law which are being discussed here, i.e. the principle of proportionality, the principle of identifying the common good, the principle of balancing the interests of the state, communities and citizens, the principle of determining the organizational effects of administration, the principle of stability of executive bodies of the local government and the principle of efficient administration operations.

Therefore, the second method is based on the claim that the solution presented above to adapt the composition of the board to the requirements of the amended statute is legally correct, but there are also other, "less invasive" ways to implement amendments to the statute of the voivodeship. It should be pointed out here that there is a possibility to recall one member of the board at the justified motion of the marshal of the voivodeship or that the said member resigns from the function of the board member, and then the election of the voivodeship vice-marshal by the voivodeship assembly ensues. The first of the proposed procedures is pursuant to the provisions of Articles 37 and 39 AVSG. Pursuant to them, in the first place, based on the provision of Article 37 para. 5 one member of the board should be recalled at the justified motion of the voivodeship marshal, and then pursuant to Article 39 para. 2 the vice-marshal is elected. However, the risk should be considered of the above-mentioned interpretation of the provision of Article 39 para. 2 AVSG, according to which the election of a member of the board may only apply to cases in which the recall and election relate to one and the same function on the board and, moreover, the election concerns a person other than the one who was recalled from the position of a board member. The provision of Article 39 para. 2 AVSG refers to the election of a "new board member". It has not been resolved yet whether the "new member of the board" must be a person other than the one who has been recalled from the function of a board member. Logical reasoning leads to the conclusion that it would be pointless to recall a given person from the function

of the board member so that the same person would become a candidate for this position. Nevertheless, a situation can be imagined in which the board member is recalled from his function as a result of a serious illness, an accident, forcibly remaining outside the Republic of Poland or the occurrence of another indefinable obstacle in fulfilling his duties. However, if after the unexpected, near cessation of the above-mentioned obstacles, a person who has been a board member until now is ready to continue performing this function, it seems irrational to prevent him or her from being indicated as a candidate for this function. Hence, according to the authors of this article, this new board member referred to in Article 39 para. 2 AVSG does not have to be a person other than the one who was recalled from this function.

However, it is difficult to answer the argument that the application of the provision of Article 39 para. 2 AVSG applies only to situations in which recall and election refer to one and the same function on the board. A truly literal and logical interpretation of the provision of Article 39 para. 2 AVSG leads to the interpretation according to which a board member can be elected only in place of the recalled board member. Therefore, it seems that the procedure described in this provision concerns a change in the composition of the board and not a change of its composition. Nevertheless, consideration should also be given to the possibility of using the mode described in Article 39 para. 2 AVSG. Pursuant to this provision, in the event of recall of a board member who is not its chairman, the voivodeship assembly shall elect a new board member within one month from the date of recall[41]. This provision provides for each board member who is not its chairman, and therefore also for vice-marshal. Therefore, this interpretation of the provision of Article 39 AVSG, according to which, in the event of the statute amendment regarding the composition of the board, there is no need for consistency of functions between the board member being recalled and subsequently elected. Bearing the above in mind, as well as the lack of court judgements in the subjective scope related to the resulting factual state, a solution may be considered according to which if the voivodeship marshal indicates a different candidate than the person who is a board member who has been recalled, it would be possible to apply Article 39 para. 2 AVSG. It should be signaled that the deadline of one month from the date of recall to the election of a new board member, referred to in Article 39 para. 2 AVSG is only an instructional term, and its failure to meet the deadline does not threaten the dissolution of the voivodeship assembly[42]. In such a case, however, the passivity of the marshal or the assembly in this respect may be a premise for taking urgent

[41] See the exact description of the procedure of recall of a member of the voivodeship board in: W. Kisiel, *Uchwały w sprawie odwołania wójta lub zarządu przed upływem kadencji*, [in:] *Prawo samorządu terytorialnego w Polsce*, ed. W. Kisiel, Warszawa 2006, pp. 296–302.

[42] Cf. A. Szewc, *Ustawa o samorządzie województwa. Komentarz*, Warszawa 2008.

action by the voivode as the supervisory authority[43]. It should be mentioned that the recalled member of the board continues to perform his duties until another person is elected.

It also seems reasonable to consider the third solution – the election of the vice-marshal pursuant to the provision of Article 32 para. 3 AVSG, according to which the voivodeship assembly elects vice-marshals and the other board members at the marshal's motion by a simple majority in the presence of at least half of the statutory composition of the assembly, by a secret ballot. The fact is that this provision basically refers to the election of the board of the voivodeship at the beginning of the term of office, while to supplement the composition of the board during the term of office only if it results from the other provisions of this Act. Nevertheless, the Voivodeship Administrative Court in Kraków, issuing its judgement of 8 November 2016[44], allowed the election of the board member and marshal of the voivodeship pursuant to the provision of Article 32 para. 3 AVSG without having to recall the remaining composition of the board, which allows us to risk analogy of this solution to the situation under consideration[45]. Since the board member has been recalled, a completely new election procedure should be started, because the election would relate to a completely new function introduced in the amendment to the voivodeship statute, i.e. the function of vice-marshal, which did not exist until the entry into force of the statute amendment. At this point it is worth emphasizing that the issue of the election of the vice-marshal after the amendment to the statute in accordance with Article 32 AVSG may raise some doubts, nevertheless, in a situation where the marshal of the voivodeship would indicate a candidate for vice-marshal who has previously been recalled from the function of a board member, this solution would seem to be the most rational and at the same time the least risky.

It is also possible to apply the fourth solution based on the resignation of one board member, pursuant to Article 40 AVSG, according to which "1. In the event of resignation from membership in the board by a member who is not its chairman, the voivodeship assembly adopts a resolution on accepting resignation and recall from the duties of a board member by an ordinary majority of votes, not later than within one month from the date of submitting the resignation. 2. Not adopting the resolution by the voivodeship assembly within the period referred to in para. 1, is

[43] Cf. Article 80. See also C. Martysz, [in:] *Ustawa o samorządzie województwa. Komentarz*, ed. B. Dolnicki, WKP 2012.

[44] I SA/Kr 648/16, LEX no. 2180309.

[45] This kind of analogy seems acceptable. The acts relating to recall and election of the voivodeship board fall within non-imperious activities. And while "analogy cannot be applied to the provisions relating to imperious administration […] [in] non-imperious activities, it is permissible, as long as it does not worsen the legal position of the citizen" (L. Morawski, *Zasady wykładni prawa*, Toruń 2010, s. 227). See also M. Kosiarski, *Zakres stosowania analogii w prawie administracyjnym*, „Kwartalnik Prawa Publicznego" 2003, no. 1, p. 58.

tantamount to accepting the resignation at the end of the last day of the month in which the resolution should be adopted. 3. In the event of resignation by a board member who is not its chairman, the voivodeship marshal is obliged, at the latest within one month from the date of acceptance of the resignation or the lapse of the period referred to in para. 2, to present to the voivodeship assembly a new candidate for a board member". However, it seems that also in the cited provision of Article 40 AVSG the institution of a change in the composition of the board is discussed, within which a board member may only be elected in place of the board member who has resigned. Therefore, after accepting the resignation of a board member by the voivodeship assembly, it would be recommended not to continue the procedure specified in the provision of Article 40 AVSG, but to elect the vice-marshal pursuant to the provision of Article 32 para. 3 AVSG.

At the same time, a solution should be rejected, in which the recall and acceptance of the resignation of the board member by the assembly and the election of the vice-marshal in his place would take place within one resolution. These are two completely separate electoral decisions, requiring for their legality two separate voting acts. Moreover, the provisions regarding both the recall and resignation of a board member indicate the distribution during the voting process on the recall or acceptance of the resignation from voting on the election of a new board member. It is only when a resolution on recall (acceptance of resignation) is passed that the provisions enable to undertake actions aimed at electing a new member. Therefore, lapse of some time is required, at least so-called "logical second" between the act of recall (acceptance of resignation) and the act of election. Combining both of these acts and voting for them under one resolution must be considered absolutely legally inadmissible. Such a statement pursuant to the Act of 5 June 1998 on District Self-Government[46] was expressed by the Voivodeship Administrative Court in Olsztyn in the judgement of 25 October 2005[47], regarding the situation in which the council of the poviat, under one item on the agenda, recalled the vice-starost, elected the vice-starost and accepted the resignation from the function of the first full-time member of the poviat board. In its judgement, the Voivodeship Administrative Court in Olsztyn stated unequivocally that "it is unacceptable to include several issues under one item, even if they are closely related to each other. When adopting resolutions, the procedures specified in the Act on District Self-Government and the poviat statute shall apply, which may not be changed arbitrarily, let alone ignored". To be able to recall and elect a board member in one vote, it would be necessary to include such a legal norm in the provisions of applicable law. This solution was applied in the event of recall and election of the Marshal of the Sejm. Pursuant to Article 10a para. 1 and 2 of the Resolution of the Sejm of the Republic

[46] Consolidated text Journal of Laws 2019, item 511.

[47] II SA/Ol 661/05, www.nsa.gov.pl.

of Poland of 30 July 1992 – Rules and Regulations of the Sejm of the Republic of Poland[48] the Sejm shall remove the Marshal of the Sejm on a motion submitted by at least 46 deputies and shall name the candidate for the Marshall of the Sejm. The Sejm shall remove and elect the Marshal of the Sejm by an absolute majority of votes in the presence of at least half of the statutory number of deputies, in one vote. On the other hand, the recall and election of a vice-marshal of the Sejm may be conducted only in two separate votings (Article 10a para. 5 of the Resolution).

POSSIBLE CONSEQUENCES OF ADOPTING RESPECTIVE SOLUTIONS

In accordance with the principle of determining the organizational effects of administration, it is necessary to assess the correctness of the above solution models also in terms of the possible consequences associated with the adoption of each one of them.

A solution model in which the composition of the board changes as a result of the recall or resignation of the entire board and then its re-election would undoubtedly be in accordance with the rule of law and therefore it would be difficult to challenge its legality in the supervisory procedure conducted by the voivode or in the procedure of examining the compliance with the law of adopted resolution by the voivodeship administrative court. Nevertheless, the application of such a solution would be detached from the reality in which operate the bodies elected at the political level. It should be borne in mind that the choice of the voivodeship executive body is the result of lengthy politicians' negotiations, as a result of which a consensus is reached. Any attempt to interfere in such a consensus may result in destabilization not only of the voivodeship executive body, but also of the voivodeship assembly itself, disrupting the established balance of power. The greater the interference in this area, the more difficult to predict its effects. As a result of the application of this solution – recall or resignation of the entire board, councilors of the assembly might not reach another consensus within three months, which would result in the dissolution of the assembly by law. There could also be a situation in which a completely different person than before would be elected the marshal of the voivodeship, who in his intentions would implement a completely different from his predecessor personnel and organizational policy in the marshal's office. Both situations would inevitably result in destabilization, and thus would be incompatible with the good of the voivodeship self-government community (the principle of identifying the common good) and at the same time with the principle of balancing the interests of the state, communities and citizens. The situation of the previous board members should also be considered, who – due to a seemingly only cosmetic

[48] Consolidated text M.P. 2019, item 1028.

change in the composition of the board – would have to undergo a re-verification of the voivodeship assembly, despite prior vote of approval and vote of confidence. The interpretation of the provisions of the Act on Voivodeship Self-Government that would lead to the conclusion that the analyzed solution is the only acceptable way of adapting the composition of the board to the requirements of the amended statute is thus in contradiction to the principle of proportionality. Performing such radical operations as a result of such a cosmetic change as the discussed change of the composition of the board appears to be useless and unnecessary. A board member should be forced to undergo verification by the voivodeship assembly only in the cases specified in the Act and only when necessary. Recall of the board members whose status after the change of the composition of the board would not change would be an expression of excessive interference in the sphere of individual rights and freedoms. Any such interference "requires on the one hand balancing the importance of public interest which the restriction is intended to serve and the significance of the individual's right or freedom being restricted"[49]. Therefore, if, in order to change the composition of the board, the voivodeship assembly may use a less onerous measure for the other board members whose status in this body would change, and yet chooses a more onerous measure, it will violate the "principle of necessity of restrictions"[50].

Adopting the second, third or fourth of the presented solution models would therefore be in accordance with the principle of proportionality, as well as the principle of identifying the common good and the principle of balancing the interests of the state, communities and citizens. In particular, the indicated solutions pass the harm test because the change of the composition of the board in the discussed mode will not pose a threat to any good protected by law, as well as they pass the balancing of interests test, because the public interest associated with the application of these solutions will not suffer at the expense of preserving the interests of the other board members whose function in the executive body of the voivodeship will not change.

As for compliance with the rule of law and the resulting principle of creating administrative bodies pursuant to the provisions of generally applicable law, it should be stated that any provision of the Act on Voivodeship Self-Government does not order directly to adapt the composition of the board to the requirements of the statute in the new wording through recall of the entire board and its re-election. At the same time, solution models related to the recall or resignation of one board member and the election of a vice-marshal appear to be compatible with the provisions of law.

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[49] L. Garlicki, *op. cit.*, p. 120.

[50] *Ibidem*. See also judgement of the Constitutional Tribunal of 2 July 2009, K 1/07, OTK-A 2009, no. 7, item 104.

Adoption of the concept according to which the third of the presented solution models is correct and applicable, does not give rise to the consequence described in the provision of Article 33 para. 1 AVSG, and, therefore, in the event of failure to elect the vice-marshal within three months of recall of a board member, the assembly shall not be dissolved by law and early election will not be held. The solution adopted in the said provision can only be used in two cases. Firstly, when within three months from the day of announcing the election results, the voivodeship board will not be elected. The second option is related to the situation of recall or resignation of the entire board, referred to in Article 39 para. 1 AVSG. The third possibility is not provided for by the Act on Voivodeship Self-Government and thus the discussed consequence cannot be extended to the situation of not electing only one vice-marshal following the recall of only one board member that being the result of the need to adopt the composition of the board to the new wording of the statute. The provision of Article 33 para. 1 AVSG clearly refers to a situation where no executive body has been established in the voivodeship, and does not refer to a situation where, as a result of recall of one of its members, there is only one vacancy to be filled. The consequence of the dissolution of the voivodeship assembly by law to prevent a lengthy complete (and not partial) lack of a new executive body in the voivodeship, which in the long run would lead to a situation in which the recalled board or board from the previous term would hold its function until the end of the current term of office, which in no way corresponds to the principle of a democratic state of law, in which the composition of state and local government authorities should reflect the results of recent democratic elections. However, there is no doubt, that provided for in Article 32 para. 1 AVSG deadline of three months should be interpreted as meaning that within it a full five-member board should be elected by the voivodeship assembly. Therefore, in a situation where the voivodeship assembly elects the marshal, vice-marshal and one or two board members within the indicated period, the expiry of this period will be absolutely associated with the dissolution of the voivodeship assembly by law[51].

The consequences of the court or voivode recognizing the legality of the second solution while at the same time recognizing the third and fourth solutions as being unlawful are worth considering. It should be noted here that regardless of whether the procedure under Article 39 or Article 40 AVSG, or a new procedure under Article 32 AVSG, the election of a vice-marshal would follow the same rules, i.e. by a simple majority in the presence of at least half of the statutory composition of the voivodeship assembly, by a secret ballot. According to the views expressed in the jurisprudence, incorrect referring in the resolution to "legal basis in a situation

[51] "Vice-marshals and other members of the board are elected by the parliament at the marshal's motion within the same period (3 months) and under the same sanction (termination by law) […]" (H. Izdebski, *Samorząd terytorialny. Podstawy ustroju i działalności*, Warszawa 2008, p. 188).

where it exists in reality, does not constitute a significant violation of law in the case of a resolution which is not a normative act"[52]. Such a breach as irrelevant only results in a reproach on the part of the voivode and cannot constitute grounds for annulling the resolution[53].

CONCLUSION

Regulations of the Act on Voivodeship Self-Government do not directly regulate the situation in which the composition of the board changes as a result of a change in the statute of the voivodeship. Therefore, they do not cover the procedure under which such changes should be conducted. For this reason, the best solution applied in such a situation would be to include in the resolution amending the statute adaptation and transformation provisions specifying the procedure for transforming the voivodeship executive authority.

In a situation where such adaptation provisions will be lacking, an impasse ensues that is difficult to escape, with only the provisions of the Act on Voivodeship Self-Government available. Undoubtedly, due to the entry into force of the amendment to the statute specifying a new arrangement of functional members (marshal, vice-marshals) and non-functional members (the other board members) in the board of the voivodeship, it is necessary to immediately adapt the composition of the board to the new wording of the statute, which is a consequence of the principle of direct application of new law. For this purpose, the recall of the entire board so that it can be elected in the new composition despite it being legal, seems to be too far-reaching solution, contrary to the principles of proportionality, efficiency, determining the organizational effects of administration, balancing the interests of the state, communities and citizens, identification of the common good and stability of executive bodies of local government units. Therefore, it is necessary to find a way that is the least disturbing both for the voivodeship executive body and its members, so that the operations of the voivodeship assembly are not only reflected in the principle of legality, but also in the principle of implementing the common good, whose structural stability of the voivodeship is an important part.

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[52] Judgement of the Voivodeship Administrative Court in Gliwice of 25 June 2015, IV SA/Gl 1015/14, LEX no. 1750012. The Supreme Administrative Court did the same in its judgement of 20 July 2012 (I OSK 843/12, LEX no. 1218321): "The mere establishment of an incorrect legal basis for a resolution by a local government body is not an infringement of this rank, which must always lead to the court declaring the resolution invalid or unlawful, despite the fact that in the legal status in force on the date of the resolution was legal basis for issuing such a resolution by the authority that issued it".

[53] Cf. supervisory decision of the Greater Poland Voivode of 20 November 2013, KN-1.4131.2.50.2013.22.

Thus, in this article, it has been proved that a change in the composition of the voivodeship board as a result of the change in the voivodeship statute is possible in the light of the principles of the Polish structural administrative law without the need to dismiss the entire voivodeship board. Moreover, it has been proved that in a situation where the resolution amending the articles of association does not include any adjusting provisions, it is necessary to adjust the composition of the voivodeship board to the requirements of the amended articles as soon as possible. It was also shown that the solution according to which the dismissal or acceptance of the resignation of a member of the board by the regional council and the election of a vice-marshal in his place should take place within one resolution should be rejected.

The issues discussed in this study are new, because they have not yet been formulated specific statements in the doctrine or confirmed views in jurisprudence. *Ipso facto* it is difficult for authors to refer to the results of other scientists' research. There is no well-established self-government practice here, as it has not been developed so far. Hence, it is hoped that the solutions described in this study will not only contribute to the initiation of the discussion on the outlined topic, but will also help voivodeship self-governments adequately assess the risk when selecting a specific procedure for changing the composition of the voivodeship board as a result of changing the voivodeship statute, in the context of the potential application of supervision measures by the voivode or legality control carried out by administrative courts.

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STRESZCZENIE

Niniejszy artykuł przedstawia problematykę zmiany składu zarządu województwa w Rzeczypospolitej Polskiej, przeprowadzanej na skutek zmiany statutu województwa. Autorzy w ramach analizy prawnej przedmiotowej instytucji szczególną uwagę zwrócili na kwestie praktyczne oraz problemy węzłowe, na jakie można się natknąć, dokonując wykładni przepisów ustawy z dnia 5 czerwca 1998 r. o samorządzie województwa. Podjęta problematyka nawiązuje do stanu faktycznego, jaki wystąpił w sejmiku województwa świętokrzyskiego. Artykuł ma charakter naukowo-badawczy. Autorzy postawili trzy hipotezy i podjęli próbę ich udowodnienia w ramach prowadzonej analizy. Po pierwsze, zmiana składu zarządu województwa na skutek zmiany statutu województwa jest w świetle zasad polskiego ustrojowego prawa administracyjnego możliwa bez konieczności odwoływania całego zarządu województwa. Po drugie, w sytuacji gdy w uchwale zmieniającej statut nie zamieszczono przepisów dostosowujących, konieczne jest jak najszybsze doprowadzenie do dostosowania składu zarządu do wymogów zmienionego statutu. Po trzecie, należy odrzucić rozwiązanie, według którego do odwołania lub przyjęcia rezygnacji członka zarządu przez sejmik województwa oraz do wyboru wicemarszałka w jego miejsce miałoby dojść w ramach jednej uchwały. Wyniki przeprowadzonych w toku analizy badań mają charakter oryginalny i nowatorski, badania takie nie były bowiem dotychczas prowadzone. Powoduje to, że niniejszy artykuł stanowi cenne źródło wiedzy dla przedstawicieli nauki i praktyki.

Słowa kluczowe: zarząd województwa; zmiana statutu województwa; członek zarządu; rezygnacja członka zarządu