ARTYKUŁY

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THE PARTY'S INFLUENCE ON THE RESOLUTION OF THE PUBLIC ADMINISTRATION ORDERS IN ADMINISTRATIVE PROCEEDINGS

Abstract

Mediation is one of the most popular dispute resolution methods. It is used in all areas of law, while it did not appear in administrative proceedings until 2017. The purpose of this study is to present the issues related to mediation in administrative proceedings, taking into account the influence of the party in shaping the decision of the public administration body. Mediation serves to implement the principle of amicable settlement of cases, thanks to which a party in administrative proceedings may directly influence a public administration body.

Keywords: mediation, amicable settlement of cases, ADR, mediation procedure

Introduction

The administrative procedure is structured as an inquiry procedure, i.e. such a procedure in which the authority conducting it has a superior position over the party and decides about the scope of its rights and obligations[1] - as opposed to court proceedings (civil or criminal). First of all, it does not have an adversarial form, i.e. there is no dispute conducted by two equal parties before an impartial court. In many administrative proceedings, there is only one party. Even if it concerns several parties, it will not change its form, as these parties remain solely in legal ties with a public administration body. However, the code of administrative procedure[2] contains two basic institutions that allow, to some extent, to re-

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[1] L. Żukowski, R. Sawuła, *Postępowanie administracyjne i postępowanie przed Naczelnym Sądem Administracyjnym*, Warszawa 2002, p. 55,

[2] Act of June 14, 1960 (consolidated text, Journal of Laws of 2021, item 735 as amended).

spect the will of the parties as to the manner of arranging the administrative-legal relationship: a settlement and mediation[3].

Mediation is an attempt to achieve an amicable, satisfactory solution to the dispute by the parties through voluntary negotiations conducted with the participation of a third person, a neutral and impartial mediator, who supports the course of the negotiations, alleviates the arising tensions and helps in reaching an agreement. This institution resolves the dispute in an amicable manner, thus preventing the conflict from being brought to court, reducing the costs of the proceedings and leading to faster fulfillment of administrative and legal obligations[4]. Thus, in mediation proceedings, a party has the option of influencing the administrative authority in resolving the case. All the more so as the administrative procedure is, as a rule, of a cabinet nature, and most often the participation of a party in the procedure is limited only to submitting official documents on the basis of which the authority decides the case and issues a decision. Natomiast biorąc udział w postepowaniu mediacyjnym jednostka ma możliwość bezpośredniego wyrażania swojego stanowiska w sprawie przed organem administracji publicznej.

According to J. Wegner-Kowalska, "The sense of mediation is mutual concessions under the established factual or legal status. The participation of the mediator in the dispute with the administration will enable the identification of the essence of the dispute, determination of the boundary conditions of the negotiations and the scope of the field for a possible agreement. In addition, in those rare cases in which a dispute results from insufficient legal knowledge of a party to the proceedings, the mediator's role may also be to calmly explain to the party the essence of his rights or obligations and, possibly, limiting contesting clearly justified decisions"[5].

Mediation as the implementation of the principle of amicable settlement

Mediation belongs to procedural institutions, key to the implementation of the principle of amicable settlement of cases, which is one of the basic general principles of administrative proceedings, as amended in

[3] P.M. Przybysz, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2017, komentarz do art. 13.

[4] *Kodeks postępowania administracyjnego. Komentarz*, ed. H. Knysiak-Sudyka, Warszawa 2019, komentarz do art. 13.

[5] J. Wegner-Kowalska, *Mediacja (art. 13, art. 96a–96g)*, [in:] *Raport Zespołu eksperckiego z prac w latach 2012–2016. Reforma prawa o postępowaniu administracyjnym*, red. Z. Kmieciak, Warszawa 2017, p. 77.

April 2017[6]. The purpose of introducing mediation - as indicated in the justification to the amending act - is to bring the administration closer to society, to ensure the shaping of administrative and legal relations in a way that increases the influence of the parties to the proceedings, as well as matters important to the society in which they operate[7]. It is participation in mediation proceedings that gives an individual the opportunity to get closer to the authority and influence the final decision.

Pursuant to the article 13 § 1 of the Code of Administrative Procedure, public administration bodies, in cases where possible, aim at amicable resolution of disputes and determining the rights and obligations that are the subject of proceedings in matters falling within their jurisdiction, in particular by taking actions:

1) prompting the parties to reach a settlement in cases involving parties with disputed interests;
2) necessary to conduct mediation.

In view of the above, the content of the principle of amicable settlement of administrative matters is the pursuit of the public administration body conducting administrative proceedings to amicably resolve disputes and to amicably determine the rights and obligations (parties to the proceedings) being the subject of administrative proceedings. The administration body should strive for an amicable settlement of the matter, provided that there is a chance for such settlement. In a situation where the complainant challenges the entire decision, without in fact opening a chance to resolve the matter amicably, it is difficult to assume that it would be possible[8]. Therefore, the legal obligation of the body conducting administrative proceedings is not to settle the case amicably, but only - which results from the nature of the provision of the article 13 as a rule of law – 'striving' for its amicable settlement. Therefore, this obligation consists in taking steps to induce the parties to reach a settlement, necessary to conduct mediation, and also to enable mediation or conclusion of a settlement, and in particular providing explanations about the possibilities and benefits of an amicable settlement. Therefore, the authority's duty is to persuade the parties to settle the case amicably, pointing out that settling the case in this way may simplify and speed up the proce-

[6] Act of 7 April 2017 amending the Act - Code of Administrative Procedure and certain other acts (Journal of Laws, item 935).

[7] Justification to the draft act amending the act - Code of Administrative Procedure, in the part covering the institution of mediation in administrative matters - the Sejm of the 8th term, Sejm form No. 1183.

[8] Judgment of the Provincial Administrative Court in Gliwice of 18 December 2018, file reference number I OSK 3132/18, LEX No. 2778028.

dure, which is also important for the economics of administrative proceedings, while the party has only the right to use it. Under no circumstances may the authority force the parties to reach a settlement or participate in mediation proceedings.

Amicable settlement of disputes should refer to all legal and factual issues that are disputed between the parties and may be the subject of mediation, while the amicable settlement of rights and obligations should be understood as settling an administrative matter in the form of a settlement. Mediation may therefore precede the settlement of the case both in the form of a decision and in the form of a settlement. In the latter case, i.e. when mediation precedes settling the matter in the form of a settlement, the principle of amicable settlement of administrative cases is fully implemented[9].

Mediation is one of the ineffective forms of administration, which is characterized by the absence of coercion and is an alternative to traditional administrative proceedings ending with a unilateral, imperative resolution of an authority. The essence of sovereignty boils down to the fact that the public administration unilaterally decides on the content of the legal relationship that connects it with an entity outside its structures, determines its rights or obligations, and itself applies sanctions in the event of violation of bans and prohibitions. Thus, the main element of sovereignty is the possibility of using coercion (pressure, pressure, force)[10].

Mediation is based on the structure of ADR (Alternative Dispute Resolution), which currently means alternative (also called amicable - friendly, appropriate - assisted) methods (methods, forms, models, systems, modes) of dispute resolution. These methods constitute an issue which - as A. M. Arkuszewska emphasizes - is not understood in a homogeneous manner and can be defined as a more or less complex problem[11]. Therefore, ADR is defined as an amicable and conciliatory method of resolving conflicts and disputes based on the idea of striving for an agreement and finding a compromise way out of a conflict situation[12]. In

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[9] A. Wróbel [in:] M. Jaśkowska, M. Wilbrandt-Gotowicz, A.Wróbel, *Kodeks postępowania administracyjnego. Komentarz,* Warszawa 2020.

[10] A.M. Arkuszewska, *Mediacja a ugoda* [in:] *Administracja niewładcza*, red. A. Barczawska-Dziobek, K. Kłosowska-Lasek, Rzeszów 2014, p. 102.

[11] *Eadem*, *Dostęp do informacji o ADR i ODR a rozwój alternatywnych metod rozwiązywania sporów,* [in:] *Reforma ochrony danych osobowych a jawność dostępu do informacji sądowej – aspekty proceduralne,* eds M. Jabłoński, K. Flaga-Gieruszyńska, K. Wygoda,Wrocław 2017, p. 121.

[12] A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu*, Warszawa 2014, p. 26.

the literature, one can also find the definition of the concept of ADR in a more complex way - through a conceptual approach, basing it on reconstructionism (static approach), descriptivism (dynamic approach) and the evaluative approach[13]. In the reconstructive approach, the conceptual analysis of the concept of ADR assumes a reconstruction through the arbitrary formulation of criteria allowing for the definition of a given concept, resulting in a rigid definition in which all specific elements must appear. In descriptive terms, the conceptual analysis of ADR assumes the creation of a systematic catalog of specific elements that make up the concept of ADR, and its result may be the ADR continuum theory. In the multi-segment approach, it is assumed that certain moral or evaluation criteria are established, which, if implemented, determine whether they belong to a given concept. Podejście wielosegmentowe zakłada także w jednym z wariantów analizę istotnych lub niezbędnych cech pojęcia ADR. W takim wypadku określenie tego pojęcia powstaje poprzez zdefiniowanie jego istotnych lub niezbędnych cech[14].

In light of the above, the most important advantages of ADR are:

- fast pace,
- reduced costs,
- informal course (confidentiality),
- creative and permanent solution (participation of experts),
- a chance to preserve / rebuild the relationship (psychological satisfaction),
- the possibility of return or use the court[15].

Course of mediation proceedings

Mediation consists in the fact that the mediator, who is not an employee of the public administration body conducting the proceedings, seeking an amicable settlement of the dispute, supports the mediation participants in explaining and considering the factual and legal circumstances of the case and in formulating settlement proposals by them - in order to adopt arrangements for settling the case within the limits of applicable law, including by issuing a decision or reaching a settlement. A mediator does not need to have any legal training. When taking on this

[13] K. Weitz, K. Gajda-Roszczynialska, *Alternatywne metody rozwiązywania sporów w sprawach konsumenckich* p. 15–24, (after:) M. Araszkiewicz, K. Płeszka, *The concept of alternative dispute resolution* [in:] *Mediation in Poland: Theory & practice*, ed. M. Araszkiewicz [et. al.], Kraków 2015, p. 5 and next.

[14] *Ibidem*, p. 15.

[15] A. Kalisz, A. Zienkiewicz, *op.cit.,* p. 27.

role, he should, however, have legal knowledge. It cannot be expected that he will provide professional legal advice to mediation participants. The role of the mediator is only to support the participants, not to guide their conduct. Of course, it cannot be ruled out that the mediator will present the parties with possible variants of the settlement. However, it may never strive to achieve greater benefits by one of the mediation participants[16].

Mediation participants may be: the body conducting the proceedings, a party or parties to the proceedings. This means that mediation can be conducted in two configurations: authority - party and party - party. Mediation leads to an amicable settlement of the dispute, reduces the costs of the proceedings and, in principle, should eliminate situations of transferring the case to administrative court proceedings[17]. Even if a settlement is not reached, mediation in administrative proceedings ensures - if possible - a greater influence of the party in the formation of the administrative decision and may be a good instrument for the protection of its rights. The decision issued after the mediation has been made resembles a bilateral administrative act[18].

Mediation in the course of the proceedings may be conducted if the nature of the case allows it. Used in the article 96a § 1 of the Code of Civil Procedure the term 'nature of the case' is a vague concept. As B. Adamiak rightly pointed out, from the juxtaposition of the content of the provisions of the article 13 § 1 and the article 96a § 1 of the Code of Administrative Procedure it follows that mediation is admissible both in cases in which "the provisions of substantive law regulate the examination and settlement of cases in which entities have disputed interests (e.g. matters related to building permits, water law permits, investment location matters) ", as well as in cases" in which there is a conflict of public interest with the individual interest by imposing an obligation on a party, limiting rights, but also granting rights"[19]. On the other hand, as material mediation, the author defined its aspect, which includes the content of the decision by determining the manner of settling the matter. On the other hand, mediation in the procedural terms is the one that is limited

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[16] M. Bursztynowicz, M. Sługocka, *Postępowanie administracyjne dla jednostek samorządu terytorialnego. Komentarz do art. 96*, Warszawa 2020.

[17] Z. Kmieciak, *Partycypacja w postępowaniu administracyjnym, W kierunku uspołecznienia interesu społecznego*, Warszawa 2017, p. 22.

[18] H. Knysiak-Sudyka, *Perspektywy mediacji w postępowaniu administracyjnym* [in:] *Władza w przestrzeni administracji publicznej*, eds. Z. Duniewska, R. Lewicka, M. Lewicki, Warszawa-Łódź 2020, p. 668.

[19] B. Adamiak [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2019, p. 497.

only to the factual circumstances, although she argued for the lack of grounds for conducting mediation only to this extent, without combining it with the findings as to the decision itself[20].

Mediation may be desirable in cases where the decision is left to the discretion of the authority (allowing for a comprehensive analysis with the participation of the parties of the advisability of a potential resolution within the decision-making gap left by the legislator to the administrative authority)[21]. Thus, the subject of mediation may be a matter where a conflict of interest is apparent and a number of legally permissible solutions can be considered and the one that will be optimal in a given situation can be considered[22]. This also applies to cases in which the authority balances various interests due to the imprecise notions used.

According to the article 96 § 1 of the Code of Administrative Procedure - mediation may be conducted in the course of the proceedings, if the nature of the case allows it. Accordingly, mediation may be conducted only in the course of administrative proceedings, both before the first and second instance authorities, until the administrative decision is issued. This means that the condition for conducting mediation is the prior initiation of an individual case. At the same time, its admissibility is ruled out by the fact that a public administration authority issues an administrative decision ending the proceedings in a given instance[23].

Mediation is voluntary, and it means that the condition for admissibility of mediation is the consent of the party to conduct mediation. It should be assumed that this is tantamount to the obligation of the party to show the will to reach an agreement and to strive to resolve disputes. The role of the mediator cannot be understood as dominating over the participants in mediation and consisting in proposing their own solutions to disputes to the parties. The role of the mediator is only to help and assist mediation participants in the search for common solutions[24]. Article 96a § 3 of the Code of Administrative Procedure specifies the purpose of mediation, which is to clarify and consider the factual and legal circumstances of the case and to make arrangements for its settlement

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[20] *Ibidem.*

[21] J. Wegner [in:] *Komentarz do art. 96a kpa*, *Kodeks postępowania administracyjnego. Komentarz*, ed. W. Chróścielewski, Z. Kmieciak, Warszawa 2019.

[22] M. Tabernacka, *Opinia dotycząca propozycji w przedmiocie mediacji, przedstawionych w toku prac Zespołu*, [in:] *Reforma prawna o postępowaniu administracyjny: raport Zespołu Eksperckiego z prac w latach 2012-2016,* red. Z. Kmieciak, Warszawa 2017, p. 453.

[23] Decision of the Provincial Administrative Court in Warsaw of September 12, 2019, file ref. no. VI SA / Wa 643/19, LEX No. 3013887.

[24] P.M. Przybysz, *op.cit.*, komentarz do art. 96a.

within the limits of applicable law, including by issuing a decision or concluding a settlement. The above goal covers the stage of clarifying and considering the factual and legal circumstances of the case, which is characteristic for the phase of the investigation, and the stage of making arrangements for settling the case, appropriate for the stage of issuing decisions.

A public administration body, ex officio or at the request of a party, shall notify the parties and the body co-operating in the case, if the legal provision makes the issuance of a decision conditional on the taking of a position by another body, if that body has not taken a position, about the possibility of mediation. In the case of submitting a request for mediation, a party may appoint a mediator. On the other hand, in the notification about the possibility of mediation, the public administration authority requests the parties to: consent to mediation and appoint a mediator by setting a deadline of fourteen days from the date of delivery of the notification and instructing the parties on the principles of mediation and bearing its costs. If the parties do not agree to mediation within the above-mentioned period, mediation will not be carried out.

Pursuant to the article 96d of the Code of Administrative Procedure, if the mediation participants have agreed to mediation, the public administration body issues a decision to refer the case to mediation. The order shall be served on the parties and the authority. At the same time, in the article 141 § 2 of the Code, it was indicated that a party may appeal against the decisions issued in the course of the proceedings, when the provisions of the Code of Administrative Procedure so stipulate. In the case of a decision to refer the case to mediation and to refuse to refer the case to mediation, none of the provisions of the Code of Administrative Procedure provides that the decision issued pursuant to the article 96d § 2 of the Code may be subject to a complaint. These decisions also do not end the administrative proceedings and do not settle the matter as to the substance, as they are incidental to the main proceedings.[25].

In the decision to refer a case to mediation, a mediator selected by mediation participants is indicated, and if the mediation participants have not selected a mediator, a mediator selected by a public administration body with appropriate knowledge and skills in mediation in cases of a given type is indicated. When referring a case to mediation, the administration authority postpones the consideration of the case for a period of two months. Already at the stage of referring the case to mediation (i.e. issuing a decision), a public administration body should notify the parties

[25] Decision of the Provincial Administrative Court in Warsaw of October 10, 2018., reference number act VI SAB / Wa 31/18, LEX No. 2998207.

that it will not be dealt with within the time limits specified in the article 35 of the Code. Although the legislator used the term 'deferment', it is unknown to the administrative proceedings. Therefore, the application of the article 36 of the Code will be correct[26], namely, of each case of failure to settle the case on time, the public administration body is obliged to notify the parties, stating the reasons for the delay, indicating a new date for settling the case and informing about the right to bring a reminder.

The extension of the two-month period may take place at the joint request of the parties or for other important reasons. Other compelling reasons from which this period may be extended are left to the administrative discretion. For example, it is possible to point out the possibility of reaching an agreement in the near future or the party's illness preventing it from participating in mediation.

The mediator draws up a report on the course of mediation, which includes:

1) time and place of mediation;
2) names and surnames (names) and addresses (registered offices) of the participants in the mediation;
3) name and surname and address of the mediator;
4) the arrangements made as to the manner of settling the case;
5) the signature of the mediator and mediation participants, and if any of the mediation participants cannot sign the protocol, a mention of the reason for the lack of signature.

The consequence of achieving the goals of mediation, i.e. making concerted arrangements by its participants as to the manner of settling the matter and reflecting them in the mediation protocol, is binding the authority with these arrangements. However, this bond is not absolute. It should be stipulated that the condition is that the arrangements made in this procedure comply with the provisions of generally applicable law[27].

The mediator immediately submits the mediation protocol to the public administration body in order to include it in the case files and delivers a copy of this protocol to the mediation participants. If, as a result of mediation, arrangements are made to settle the matter within the limits of the applicable law, the public administration authority shall handle the matter in accordance with these arrangements, contained in the mediation protocol.

Settlement of the case in accordance with the mediation arrangements consists primarily in issuing an administrative decision which fully takes into account the mediation arrangements. However, if some

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[26] M. Bursztynowicz, M. Sługocka, *op.cit.*

[27] B. Adamiak, J. Borkowski, *op.cit.*, p. 514.

of the mediation arrangements do not fall within the limits of the applicable law, the authority should resolve the matter taking into account only those arrangements that do not infringe the law. It is obliged, in all cases, to respect the principle of legality. In a situation where the mediation arrangements comply with the law, the body is obliged to resolve the case in a manner fully consistent with these arrangements[28]. An administrative settlement may be another form of settling the matter as a result of mediation, other than a decision. This possibility is *expressis verbis* indicated in the article 96a § 3 (according to which the purpose of mediation is to clarify and consider the factual and legal circumstances of the case and to make arrangements for its settlement within the limits of applicable law, including by issuing a decision or concluding a settlement). A settlement taking into account the mediation arrangements will have legal effects such as a decision, subject to its approval by a public administration body[29].

Conclusion

Summarizing the above considerations, it should be pointed out that mediation is an alternative method of resolving an administrative case influenced by a party to the proceedings, as opposed to the traditional form of termination of the proceedings. It is one of the forms of settling the matter, the aim of which is to encourage the parties to jointly seek a compromise as to a possible solution to the dispute. Mediation aims to limit the perceived one-sidedness and authority of the administration's actions and to actually increase the parties' trust in public administration bodies and the decisions they issue. Thanks to the limitation of authority in the activities of the body, the parties to the mediation procedure have the opportunity to shape their rights and obligations resulting from the provisions of substantive law.

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[28] M. Wilbrandt-Gotowicz, *Komentarz do art. 96n* [in:] *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, Warszawa 2022.

[29] *Ibidem.*

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Wpływ strony w postępowaniu mediacyjnym na rozstrzygnięcie organu administracji publicznej

Streszczenie

Mediacja stanowi jedną z najpopularniejszych metod rozwiązywania sporów. Stosowana jest we wszystkich dziedzinach prawa, natomiast w postępowaniu administracyjnym pojawiła się dopiero w 2017 r. Celem niniejszego opracowania jest przedstawienie problematyki związanej z mediacją w postępowaniu administracyjnym z uwzględnieniem wpływu strony w kształtowaniu rozstrzygnięcia organu administracji publicznej. Mediacja służy realizacji zasady polubownego załatwiania spraw, dzięki której strona w postępowaniu administracyjnym ma możliwość w sposób bezpośredni oddziaływania na organ administracji publicznej.

Słowa kluczowe: mediacja, polubowne załatwienie spraw, ADR, postępowanie mediacyjne