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Mirosław Karpiuk
University of Warmia and Mazury in Olsztyn, Poland
ORCID: 0000-0001-7012-8999
miroslaw.karpiuk@uwm.edu.pl

Mediation in Administrative Proceedings and Its Role in Amicable Dispute Resolution

Mediacja w postępowaniu administracyjnym i jej rola w zakresie polubownego rozwiązywania sporów

ABSTRACT

Mediation is one of the alternative methods of amicable dispute resolution. It is carried out in the course of administrative proceedings and, therefore, before the authority reaches a decision. It may occur both in proceedings before the authority at first instance and in appeal proceedings. Its statutory purpose is to clarify and consider the factual and legal aspects, and to determine how the matter could be resolved under the law in force. The matter can be resolved by a decision or settlement, under the determinations made throughout mediation.

Keywords: mediation; administrative proceedings; disputed matters

INTRODUCTION

There is a general principle of the amicable resolution of disputed matters in administrative proceedings. In matters whose nature so permits, public administration authorities shall endeavour to resolve disputed matters amicably, and to ascertain the rights and obligations being the object of the proceedings relating to matters for which they have competence. This is done, in particular, by undertaking actions to persuade the parties to settle, in affairs involving parties of opposing interests, as well as actions necessary to carry out mediation. Public administration authorities shall, at a given stage of the proceedings, undertake actions enabling them to conduct mediation or to settle the matter. In particular, they shall explain the

possibility and benefits of an amicable settlement.[1] The authorities shall, therefore, undertake any action to facilitate the conduct of mediation, which is justified at a given stage of the proceedings.[2]

The administration should strive for an amicable settlement, provided there is a chance for such a settlement.[3] It is not obliged to urge a party, in every case, to participate in mediation in order to work out settlement proposals.

The public administration authority may not pressurise a party to conclude a settlement.[4] A party may have no interest in either settlement or mediation and it is, therefore, up to the authority to settle the matter by decision when there is no possibility for an amicable dispute resolution.

The principle of the amicable settlement of matters imposes an obligation on public administration authorities to amicably resolve disputed affairs, and to ascertain the rights and obligations being the object of the proceedings relating to matters for which they have competence. This general principle has a broad scope, as the responsibility to resolve disputed matters amicably should apply to all factual and legal issues arising in administrative proceedings. By way of example, the legislator has enumerated the actions to be undertaken by the authority to comply with the principle of amicable settlement of matters, consisting of urging the parties to conclude an amicable settlement, in cases involving parties with disputed interests, or in undertaking actions necessary to carry out mediation. The authority is also to comply with the information obligation consisting of providing explanations about the possibilities and benefits of an amicable settlement.[5]

Conducting negotiations for a settlement does not cause by itself that the authority was not at fault in failing to comply with the time limit for resolving the matter. Such talks cannot last longer than the time limit set for resolving the administrative matter by way of a decision since, as a rule, the settlement is to accelerate the resolution of the matter.[6]

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[1] Article 13 of the Act of 14 June 1960 – the Code of Administrative Procedure (consolidated text, Journal of Laws of 2023, item 775, as amended.), hereinafter: the CAP. On the subject of the applicability of general principles for the administrative procedure, see A. Majewska, *Zakres obowiązywania zasad ogólnych postępowania administracyjnego*, „Studia Iuridica Lublinensia" 2016, vol. 25(4), pp. 147–170.

[2] P. Krzykowski, [in:] *Kodeks postępowania administracyjnego. Komentarz do art. 1–60*, red. M. Karpiuk, P. Krzykowski, A. Skóra, Olsztyn 2020, p. 76.

[3] Judgement of the Supreme Administrative Court of 18 December 2019, II SA/Gl 1264/19, LEX No. 2782208.

[4] Judgement of the Supreme Administrative Court of 12 February 2020, I OSK 3812/18, LEX No. 3038179.

[5] H. Knysiak-Sudyka, [in:] *Kodeks postępowania administracyjnego. Komentarz*, red. H. Knysiak-Sudyka, Warszawa 2023, LEX/el., Article 13.

[6] Judgement of the Supreme Administrative Court of 13 January 2016, I OSK 2237/15, LEX No. 1529037.

Amicable resolution of disputed matters is further specified and developed by two procedural instruments, i.e. settlement and mediation. The difference between these two is fundamental, as mediation is not a form of resolving a matter, but a special mode of explanatory proceedings conducted before resolving an administrative matter, whereas settlement is a form of resolving a matter equivalent to a legal decision.[7]

MEDIATION IN ADMINISTRATIVE PROCEEDINGS

Mediation can be conducted during administrative proceedings, i.e. when the authority has not yet resolved the matter. The determinations made in its course govern the content of the decision to be issued or the settlement to be concluded. Through mediation, a dispute is sought to be resolved without the need for the administration authority to use forceful instruments, and to apply amicable solutions.

If the nature of the matter so permits, mediation may be conducted in the course of the proceedings, as stipulated in Article 96a § 1 of the Code of Administrative Procedure.[8] Therefore, not every matter may be the subject of mediation, but only such whose nature permits so. If the legislator explicitly defines the content of the settlement when the circumstances provided for by the law arise, the authority has no margin of discretion, the nature of the matter does not allow for mediation, as no disputed matter can be settled amicably.

Mediation is conducted in the course of the proceedings. Therefore, this mode cannot replace administrative proceedings or be independent of them. First, the proceedings must be initiated and only then is it possible to consider whether the mediation provisions may apply to the matter. This will be the case if the nature of the case permits so. Therefore, all matters in which the authority issues bound decisions should be excluded here. Since the public administration authorities act on the basis of and within the law, and this law stipulates the conditions which a party must fulfil so that a favourable decision could be made for that party, any determinations made during mediation will not affect the decision resolving the matter.[9]

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[7] A. Wróbel, [in:] *Kodeks postępowania administracyjnego. Komentarz*, red. M. Jaśkowska, A. Wróbel, M. Wilbrandt-Gotowicz, Warszawa 2020, LEX/el., Article 13.

[8] As it follows from Article 96 § 1 of the CAP, mediation may be conducted in the course of proceedings. Therefore, mediation can only be conducted in the course of administrative proceedings, before the authorities of first and second instance, until an administrative decision is issued. The above means that mediation can only be conducted on condition that proceedings in an individual matter have first been initiated. Its admissibility is, at the same time, excluded by the fact that the public administration authority has issued an administrative decision concluding the proceedings at a given instance; decision by the Provincial Administrative Court of 12 September 2019, VI SA/Wa 643/19, LEX/el. 3013887.

[9] M. Bursztynowicz, M. Sługocka, *Postępowanie administracyjne dla jednostek samorządu terytorialnego. Komentarz*, Warszawa 2020, LEX/el., Article 96a.

The parties (a party) cannot be forced to participate in mediation since, as it follows from Article 96a § 2 of the CAP, it is voluntary. Therefore, it will depend on the will of the parties (the party) whether they will participate in it or decide that the public administration authorities will resolve the matter without it.

The purpose of mediation results from Article 96a § 3 of the CAP, which is to clarify and consider the factual and legal aspects of the matter, and to determine how the matter could be resolved under the law in force, including by way of a decision or settlement. The determinations made during mediation may, therefore, envisage that the matter should be resolved not by issuing a decision but through an administrative settlement.

The participants in mediation, as provided in Article 96a § 4 of the CAP, may be the authority conducting the proceedings and the party (or parties) to these proceedings; or only the parties to the proceedings.

If mediation participants express their consent, then, pursuant to Article 96d of the CAP, the public administration authority shall issue an order referring the matter to mediation. The order shall be served on the parties and on the authority obliged to cooperate (if a provision of the law makes the issuance of an order conditional on the taking of a position by another authority – the expression of an opinion or consent, or the expression of a position in another form). The order to refer the matter to mediation shall state the name of the mediator elected by the participants in mediation and, if the parties have not elected such mediator, the name of the mediator elected by the public administration authority; the mediator shall have the appropriate knowledge and skills to conduct the mediation in matters of a given nature. As it follows from Article 123 of the CAP, in the course of the proceedings, the public administration authority shall issue orders, concerning particular issues which arose in the course of the proceedings; however, they do not conclude the matter as to its merits. An order is a manifestation of the will of a public administration authority, addressed to an individually specified addressee in a specific case, with that addressee being obliged to obey it. This act does not decide on the substance, i.e. it does it conclude the matter as to its merits. Concerning the principle of the rule of law, the authority should demonstrate the legal basis for issuing it.[10]

Pursuant to Article 96d of the CAP, if the participants in mediation express their consent, the public administration authority shall issue an order referring the matter to mediation. It should be emphasised that Article 141 § 2 of the CAP indicates that a complaint may be filed by a party against orders issued during the proceedings only if the CAP provides so. In the case of an order to refer the matter to mediation and a refusal to refer the matter to mediation, none of the CAP provisions stipulates that the order issued in this mode is subject to complaint. These decisions also do

[10] M. Karpiuk, [in:] *Kodeks postępowania administracyjnego. Komentarz do art. 61–126*, red. M. Karpiuk, P. Krzykowski, A. Skóra, Olsztyn 2020, p. 382.

not conclude administrative proceedings or determine the matter as to its merits, as they are incidental to the main proceedings.[11]

Article 96d regulates the moment of transition from the preparatory phase to the actual mediation phase, which takes place when the order to refer the case to mediation is served or announced. The issuing of an order to refer the matter to mediation is a formal condition for initiating it and, in this sense, it is mandatory.[12]

As it follows from Article 96e of the CAP, upon referring the matter to mediation, the public administration authority shall postpone the determination of the matter by a period of two months. Upon a joint application of the participants in mediation or for other material reasons, this period may be extended, however, by not more than one month. In case of failure to meet the purpose of mediation (the purpose of mediation is to clarify and consider the factual and legal aspects of the matter, and to determine how the matter could be resolved under the law in force) within the above time limit, the public administration authority shall issue an order terminating the mediation and shall resolve the matter. Once the order terminating the mediation has been issued, the public administration authority shall proceed in the ordinary mode and shall be entitled to resolve the matter in the form prescribed by law.[13]

Exceeding the time limit for conducting the mediation shall not render ineffective the steps taken throughout the mediation. In particular, it shall not affect the determinations included in the minutes of mediation. The time limit for mediation has the effect of reinstating the time limit resolving the matter.[14]

A mediator conducts administrative proceedings during mediation. As stipulated in Article 96f of the CAP, a natural person having both the capacity to enter into legal transactions and full public rights may serve as a mediator, in particular, a mediator entered on the list of permanent mediators or included in the register of institutions and persons entitled to conduct mediation proceedings, kept by the president of the regional court or entered on the list kept by a non-governmental organisation and higher education institutions, whose particulars have been furnished to the president of the regional court. Supposing the authority conducting the proceedings is a mediation participant, the mediator can be elected from the

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[11] Judgement of the Provincial Administrative Court of 10 October 2018, VI SAB/Gl 31/18, LEX No. 2998207. The order refusing to refer the matter to mediation is not subject to appeal, as none of the CAP provisions stipulates that the appeal can be filed. It also does not conclude the administrative proceedings, nor does it determine the matter on its merits, so there is no doubt that it does not fall within the catalogue of administrative acts subject to the control of administrative courts; decision of the Provincial Administrative Court of 6 September 2018, II SA/Łd 514/18, LEX No. 2541545.

[12] Z. Kmieciak, J. Wegner, M. Wojtuń, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2023, LEX/el., Article 96d.

[13] T. Majer, [in:] *Kodeks postępowania administracyjnego. Komentarz do art. 61*…, p. 199.

[14] J. Wegner, [in:] *Kodeks postępowania administracyjnego. Komentarz*, red. W. Chróścielewski, Z. Kmieciak, Warszawa 2019, LEX/el., Article 96e.

list of permanent mediators or from those included in the register of institutions and persons entitled to conduct mediation proceedings. An employee of the public administration authority before which the proceedings have been pending may not serve as a mediator. Regardless of the mediator's qualifications, the legislator has expressly stipulated that a person conducting mediation may not be an employee of the administration authority before which the proceedings have been pending.[15]

To prove knowledge and skills in mediation, it is not necessary to prove experience in mediating, while experience can reflect the level of skill, not the skills themselves. However, to gain experience, it is essential to conduct mediation. This is made possible by inclusion in the list of permanent mediators, which is updated regularly.[16]

Entry into the list of permanent mediators is made by the president of the regional court by a decision based on an application filed by the person applying for such entry.[17] An application for entry in the list of permanent mediators shall be filed with the president of the selected regional court in an official form. The person applying for entry in the list shall confirm that he or she meets the conditions for such entry by submitting the relevant declarations attested by a legible signature and the originals or copies of the documents. The application shall be accompanied by copies of documents confirming knowledge and skills in mediation, which are: information on the number of mediations conducted, a list of publications issued on mediation, opinions of mediation centres or individuals on their knowledge and skills in mediation, documents certifying education, training in mediation and specifying specialisation. The president of the regional court, if there is any doubt as to the content or authenticity of the attached documents, may require the presentation of the original documents attached to the application.[18]

Throughout the mediation, the mediator shall remain impartial and immediately disclose the circumstances which could raise doubts about his or her impartiality. The mediator shall refuse to conduct mediation in the case of any such doubts and shall immediately inform the mediation participants and the public administration authority of this fact unless that authority is a participant in mediation. The mediator's obligation to remain impartial arises from Article 96g of the CAP. There are reasonable doubts as to the mediator's impartiality in cases provided for in Article 24 § 1–2, i.e. in a case: 1) to which he or she is a party or, if as a result of a legal relationship existing between him or her and one of the parties, the outcome of the matter may affect his or her rights and duties; 2) concerning his or her spouse, relative or relative by

[15] T. Majer, *op. cit*., p. 201.

[16] Judgement of the Provincial Administrative Court of 1 March 2017, III SA/Gl 1487/16, LEX No. 2268809.

[17] Article 157b § 1 of the Act of 27 July 2001 – the Law on the System of Common Courts (consolidated text, Journal of Laws of 2023, item 217, as amended).

[18] § 3–5 of the Regulation of the Minister of Justice of 20 January 2016 on maintaining the list of permanent mediators (Journal of Laws of 2016, item 122).

affinity up to the second degree; 3) concerning a person in an adoptive, wardship or guardianship relation with him or her; 4) in which he or she was a witness or expert, or in which he or she is or has served as a representative of one of the parties, or in which a party is represented by any of the persons listed above; 5) in which he or she participated in the issuance of the challenged decision; 6) due to which an official investigation, disciplinary proceedings or criminal proceedings have been instituted against him or her; and 7) in which one of the parties is his or her official superior. The grounds for disqualifying a person for impartiality reasons shall persist after the dissolution of marriage, adoption, wardship or guardianship. These are cases of being close to the parties and close to the matter itself.[19] In these events, there would be a lack of objective assessment of the mediator's case.

The mediator's remaining impartial provides a guarantee that the mediation will be appropriately conducted and that the statutory purpose of the mediation process will be pursued, which is to clarify and consider the factual and legal aspects of the matter, and to determine how the matter could be resolved under the law in force.

Mediation is not open to the public. The mediator, the mediation participants and other persons taking part in mediation shall keep confidential any facts disclosed to them in connection with mediation unless the mediation participants decide otherwise. Settlement proposals, disclosed facts or statements made during mediation shall not be used after the termination of mediation, except for the determinations contained in the minutes of mediation. The exclusion of the openness of mediation is provided for in Article 96j of the CAP. One of the basic conditions conducive to the success of mediation is, in addition to the mediator's impartiality, the confidentiality of the mediation process itself.[20]

In general, the rationale for excluding mediation openness is the need to ensure the freedom of expression of the participants. This appears to be particularly important for achieving the mediation objectives. In this context, only the determinations made in the mediation, which are included in the minutes, or possibly other issues, with the consent of all mediation participants, should be disclosed.[21]

Pursuant to Article 96k of the CAP, the mediator shall conduct mediation striving for an amicable dispute settlement, also by assisting the participants in formulating settlement proposals. Seeking an amicable dispute resolution by the mediator is a competence of that entity. The manner and degree of his or her involvement are derivatives of the modes of concluding the proceedings. Different activities can be expected when formulating proposals for the non-authoritative conclusion of adminis-

[19] See B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2008, pp. 182–190.

[20] T. Majer, *op. cit*., p. 206.

[21] M. Wilbrandt-Gotowicz, [in:] *Kodeks postępowania administracyjnego. Komentarz*, red. M. Jaśkowska, A. Wróbel, M. Wilbrandt-Gotowicz, Warszawa 2020, LEX/el., Article 96j.

trative proceedings in the form of a settlement and a different one for the authoritative conclusion in the form of a decision. In the first option (settlement), the mediator has greater possibilities, which should boil down to either assisting in the search for settlement solutions or, as an expression of the mediator's greater involvement, presenting compromise solutions regarding the content of the possible settlement. In the second option (decision), the mediator should focus more on showing the other participants the consequences of the possible versions of the administrative act.[22]

As indicated in Article 96n § 1 of the CAP, the matter shall be resolved following the determinations included in the minutes of mediation. If, as a result of mediation, determinations are made to resolve the matter under the law in force, the public administration authority shall resolve that matter following such determinations included in the minutes of mediation. Mediation does not conclude the proceedings, the matter is resolved by issuing a decision or concluding an amicable agreement, but in deciding on the matter the administration authority must take into account the determinations made during the mediation if they are within the limits of the applicable law.

CONCLUSION

In the CAP, the legislator included two basic instruments that make it possible, to a certain extent, to respect the parties' will regarding establishing the relationship under the administrative law, i.e. settlement and mediation. However, this does not exclude the possibility for the administration authority to undertake actions aimed at settling the matter amicably or at resolving disputed matters.[23]

Mediation in administrative proceedings offers the possibility to work out a solution and thus bring about a definitive settlement of an administrative matter. In such a case, the chance to file an appeal against the decision is eliminated, thus, mediation may contribute to solving such problems occurring in administrative proceedings as protraction of proceedings, or excessive or improperly understood formalism. It should be emphasised that the essence of mediation in administrative proceedings refers, in principle, to the balance between the social interest and the legitimate interest of citizens, which is the specificity of such proceedings.[24]

The introduction of mediation into administrative proceedings was associated with the increased possibility of resolving disputed matters amicably. This is

[22] K. Klonowski, [in:] *Kodeks postępowania administracyjnego. Komentarz*, red. H. Knysiak-Sudyka, Warszawa 2023, LEX/el., Article 96k.

[23] P. Przybysz, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2021, LEX/el., Article 13.

[24] A. Przylepa-Lewak, *Mediacja jako forma komunikacji w postępowaniu administracyjnym*, „Annales Universitatis Mariae Curie-Skłodowska. Sectio G (Ius)" 2022, vol. 69(2), p. 66.

a reflection of efforts to limit the perceived formalistic authority of administrative actions, and to genuinely improve the parties' trust in public administration authorities and in the decisions they issue. Such a solution is in line with the needs and contemporary European standards. Mediation is a new method of resolving matters, which belongs to the group of alternative dispute resolution methods. It is fully justified by social rationale. It corresponds to the values that should underlie the relations of citizens with public authorities in a democratic state under the rule of law. Mediation, as a non-confrontational way of bringing about the settlement of a matter with the participation of an impartial and neutral actor, i.e. a mediator, is a reflection of shaping legal relations not only with the active but also with the participation of the parties to the proceedings.[25]

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STRESZCZENIE

Jedną z alternatywnych metod polubownego rozwiązywania sporów jest mediacja. Jest ona przeprowadzana w toku postępowania administracyjnego, a zatem przed podjęciem rozstrzygnięcia przez organ. Może ona mieć miejsce zarówno w postępowaniu przed organem w pierwszej instancji, jak i w postępowaniu odwoławczym. Jej ustawowym celem jest wyjaśnienie oraz rozważenie okoliczności faktycznych i prawnych sprawy, a także dokonanie ustaleń dotyczących jej załatwienia w granicach obowiązującego prawa. Załatwienie sprawy może nastąpić przez wydanie decyzji lub zawarcie ugody, zgodnie z ustaleniami poczynionymi w toku mediacji.

Słowa kluczowe: mediacja; postępowanie administracyjne; kwestie sporne