

MEDIATION ORGANS IN PROCEEDINGS BEFORE ADMINISTRATIVE COURTS

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Summary. Mediation before administrative courts is regulated in the following normative acts: act *Law on Proceedings Before Administrative Courts*, act *Law on the Organisation of Administrative Courts* and Regulation by the President of Poland *Rules on Internal Functioning of Regional Administrative Courts*. It is a unique administrative procedure and it is facultative. The subjects who are entitled to conduct mediation before administrative courts are a judge or court registrar.

Key words: judge, court registrar, impartiality, public authority, administered body

Polish legislation provides an instrument of mediation between a public authority and the administered body in the following normative acts: act *Law on Proceedings Before Administrative Courts*¹ (Articles 115–118), act *Law on the Organisation of Administrative Courts*² (Article 27 § 1) and Regulation by the President of Poland *Rules on Internal Functioning of Regional Administrative Courts*³ (§ 36). Mediation is a unique administrative procedure and it is facultative⁴. It involves seeking a settlement of a case that satisfies the parties within the limits of law⁵. “Mediation can be useful in all areas of activity of public authorities, i.e. executive, judicial and legislative branches of the State authority. It is a mode of conduct intended to work out a common position and resolve conflicts that may arise when public authorities execute law, when the judiciary applies law, or when the executive branch makes law, as well as in procedures of

¹ Act of 20 August 2002, *Law on Proceedings Before Administrative Courts*, Journal of Laws No. 2012, Item 270 as amended [LPBAC].

² Act of 25 July 2002, *Law on the Organisation of Administrative Courts*, Journal of Laws No. 2014, Item 1647 [LOAC].

³ Regulation by the President of Poland of 18 September 2003 *Rules on Internal Functioning of Regional Administrative Courts*, Journal of Laws No. 169, Item 1646 as amended [Rules].

⁴ See A. Kuleszyńska, *Szczególne tryby w postępowaniu sądownoadministracyjnym*, „Ius Novum” 1 (2015), 124–133.

⁵ Supreme Administrative Court, *Informacja o działalności sądów administracyjnych w roku 2004*, Biuro Orzecznictwa NSA, Warszawa 2005, 17.

creating provisions by public authorities as part of their executive function”⁶. Given the unique character of mediation before administrative courts due to the presence of a mediator (a judge or court registrar), the paper focuses only on subjects who are entitled to conduct mediation.

JUDGE

According to the law, one of the subjects who may run mediation is a judge (Article 116 § 1 of LPBAC), more precisely a reporting judge (§ 36 Section 2 of *Rules*). One has to ask whether a judge who serves as a mediator should fulfil additional requirements other than those for candidates for judges of a regional administrative court. Who appoints the judge for mediation? What tasks belong to a judge mediator? Does the participation of a judge in mediation affect his or her impartiality?

Appointment

Mediation can be conducted at the request of either party, i.e. a complainant or an organ, or initiated *ex officio* (Article 115 of LPBAC). However, the legislator does not envisage a situation in which parties to a dispute have a right to choose a mediator. Both the administering body and the administered subject can restrict the role of the mediator solely to the one of organiser, preventing him or her from putting forward own suggestions with respect to a possible resolution of the dispute⁷. Undoubtedly, a solution which deprives parties to a dispute of the right to choose a mediator contradicts the very nature of mediation⁸.

It belongs to a reporting judge whether or not to institute mediation proceedings (§ 36 Section 1 of *Rules*), while the presiding judge of the department nominates a judge, typically a reporting judge, to conduct mediation⁹.

⁶ M. Tabernacka, *Mediacje – przeciwdziałanie podziałom w praktyce stosowania prawa*, in: *Mediacje ponad podziałami*, ed. M. Tabernacka, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław 2013, 15. In mediation, one has to consider the multifaceted character of conflict in public administration. See: *Ibid*, *Wielopłaszczyznowość konfliktów w administracji publicznej*, in: *Płaszczyzny konfliktów w administracji publicznej*, ed. M. Tabernacka, R. Raszewska-Skałeczka, Wolters Kluwer Polska, Warszawa 2010, 38–39.

⁷ B. Dauter, *Postępowanie mediacyjne i uproszczone* [commentary to Articles 115–122], in: *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, ed. B. Dauter *et al.*, Wolters Kluwer Polska, Warszawa 2009, ed. 3, 330.

⁸ P. Sołtysiak, E. Wójcicka, *Mediacja w postępowaniu przed wojewódzkim sądem administracyjnym*, „Zeszyty Naukowe Instytutu Administracji AJD w Częstochowie. Gubernaculum et Administratio” 2 (6) 2012, 37.

⁹ A judge is to conduct mediation only when it is not possible to run mediation by the court registrar. See B. Dauter, *Postępowanie mediacyjne i uproszczone*, 329.

Requirements for candidates. Requirements concerning candidates for the position of judge in a regional administrative court, hence also a mediator, are spelled out in the act *Law on the Organisation of Administrative Courts*. It must be concluded that a mediator judge may be one who: 1) is a Polish citizen and enjoys the fullness of civil and civic rights, 2) is of irreproachable character, 3) has completed a university course in law in Poland and holds the title of Master of Law, or has completed a course abroad that is recognized in Poland, 4) is in good health to work as a judge, 5) has attained 35 years of age, 6) is distinguished by a considerable knowledge of public administration, administrative law and other areas of law associated with the activity of public authorities, 7) for a minimum of 8 years has held the position of judge, prosecutor, president of a court, vice-president, senior counsellor, counsellor with Attorney General of the Treasury, or for at least 8 years worked as an attorney-at-law, legal counsellor or notary, or for at least 10 years held public administration positions involving application or creation of administrative law, or worked as an assistant judge (assessor) in a provincial administrative court for at least 2 years (Article 6 § 1 of LOAC)¹⁰.

Judges of administrative courts are appointed by the President of Poland, on motion of the National Judicial Council (Article 5 § 1 of LOAC).

Due to lack of additional regulations¹¹ with respect to a judge whose task is to assist parties to a dispute in reaching agreement, it seems that being a judge is sufficient to be able to run mediation. Nevertheless, it must be pointed out that this solution carries some risk. On the one hand, proceedings involving a mediator judge who has an extensive knowledge of administrative law and judicial administrative law maintain a high standard. On the other, to maintain adequate quality of the proceedings the mediator needs to be trained in psychology of mediation and have good communication skills. Therefore an adequate programme for mediators is called for to develop and enhance their skills¹².

Impartiality of judges. It should be noted that the statutory regulation enabling judges to run mediation raises some doubts, especially that civil¹³ or crim-

¹⁰ § 2. Requirements referred to in § 1 Item 7 do not apply persons holding the title of professors or habilitated doctors of juridical sciences. § 3. In exceptional cases, the President of Poland, on motion of the National Judicial Council, can appoint a candidate to be a judge despite shorter periods than those mentioned in § 1 Item 7 with respect to positions referred to in this item or professions of attorney-at-law, legal counsellor or notary. § 4. Persons referred to in § 2 can be employed as part-time judges (Article 6 §§ 2–4 of LOAC).

¹¹ For example, the legislation provides that any natural person who has a full legal capacity and enjoys the fullness of public rights can act as a mediator. See Act of 17 November 1964 *Code of Civil Procedure*, Journal of Laws 2014, Item 101 as amended, Article 183² § 1.

¹² Z. Kmiecik, *Mediacja i koncyliacja w prawie administracyjnym*, Zakamycze, Kraków 2004, 158.

¹³ “A judge may not be a mediator. This does not apply to judges emeritus” (Article 183² § 2 of *Code of Civil Procedure*).

inal¹⁴ proceedings feature an explicit prohibition on mediation conducted by judges. Looking at possible reasons behind such a solution, W. Federczyk speculates that the legislator may have wanted to ensure that mediators exhibit subject-matter proficiency. A judge has a knowledge of administrative law and administrative procedure. Moreover, his or her participation in such proceedings provides a guarantee that a settlement will be worked out by the parties in accordance with provisions of the law¹⁵. One has to remember though about one principle of mediation, namely impartiality of the mediator. The participation of a judge as a mediator makes it likely for the parties to perceive him or her as a party who is committed to the case before the judgment is pronounced. Consequently, respect for the principle of impartiality may be dubious¹⁶, especially when mediation is to be run by a reporting judge. It is stressed in the literature of the subject that a problematic situation may arise involving a reporting judge if the parties have not arrived at a resolution, or if they having made some arrangements make a complaint about the administrative act issued as a result of the mediation. The complaint is examined along with a complaint made regarding an act or action in which mediation was conducted (Article 118 § 1 of LPBAC). Therefore the reporting judge who previously was the mediator, will now contribute to the final decision¹⁷. It seems that a way to protect the interests of the parties is, in case of doubtful impartiality of the judge, to recuse him or her at the request of either party or the interested person (Article 19 of LPBAC)¹⁸.

¹⁴ “Mediation proceedings may not be conducted by a person with respect to whom circumstances referred to in Articles 40–42 apply, [or] an active judge [...]” See Act of 6 June 1997 *Code of Criminal Procedure*, Journal of Laws No. 89, Item 555 as amended, Article 23a § 3.

¹⁵ W. Federczyk, *Mediacja w postępowaniu administracyjnym i sądownoadministracyjnym*, Wolters Kluwer Polska, Warszawa 2013, 154.

¹⁶ E. Bojanowski, *Rozpoznanie potrzeby przeprowadzenia postępowania mediacyjnego*, in: *Postępowanie administracyjne i postępowanie przed sądami administracyjnymi*, ed. J. Lang, LexisNexis, Warszawa 2010, ed. 4, 262.

¹⁷ W. Federczyk, *Mediacja w postępowaniu administracyjnym i sądownoadministracyjnym*, 154–155.

¹⁸ “Irrespective of the reasons referred to in Article 18, the court may recuse the judge at his or her own request or when either party demands that if there is such a circumstance that could question his or her impartiality in a given case” (Article 19 of LPBAC). The participation of a reporting judge in mediation does not constitute a sufficient reason to recuse the judge pursuant to Article 18 § 1 of LPBAC. See Decision of Supreme Administrative Court of 19 January 2006, II GSK 68/05, ONSAiWSA 2006, no. 4, item. 99; W. Federczyk, *Praktyka stosowania mediacji przed sądami administracyjnymi*, „ADR. Arbitraż i Mediacja” 4 (2008), 28. Mediation run by a reporting judge raises a great deal of controversy. T. Woś claims it is inadmissible due to doubts it creates in terms of its compliance with constitutional and statutory functions and goals of judicial administrative proceedings. See T. Woś, *Postępowanie mediacyjne i uproszczone* [commentary to Articles 115–122], in: *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, T. Woś, H. Knysiak-Molczyk, M. Romańska, LexisNexis, Warszawa 2012, ed. 5, 605–608. In accordance with Article 184 of the Polish Constitution: “The Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration [...]” See the Constitution of the Republic of Poland of 2 April 1997, Journal of

Tasks

It belongs to the judge who is running mediation to explain and consider all facts of the case as well as propose to the parties a way to resolve the dispute. Tasks of a mediator can be derived from Article 115 § 1 of LPBAC, whereby “at the request of the complainant or organ, submitted before the time of the proceedings is scheduled, mediation can be conducted, the purpose of which is to explain and consider actual and legal circumstances of the case and accept by the parties arrangements as to its resolution within the limits of the law.”

It must be noted that the character and scope of actions undertaken by a mediator follows chiefly from the nature of mediation and secondarily from particular kinds of mediation proceedings. When scrutinising the competences of a mediation organ appearing before an administrative court, we need to remember the tasks that each mediator in a dispute is obliged to fulfil, namely: 1) establish contact between the parties; 2) facilitate mediation and moderate its course; 3) mediate in talks between the parties; 4) accept the viewpoints of the parties; 5) advise the parties on possible solutions; 6) offer expert explanation as to the meaning of the factual and legal circumstances, and 7) help to draft an agreement¹⁹.

Explanation and analysis of factual and legal circumstances. The primary task of a mediator is to explain whether a breach of law before the public authority took place, what was the nature of the breach, and what its consequences may be, both for the complainant and public authority²⁰. As a rule, mediation before administrative courts must be done in one session²¹. Hence it is necessary for a mediator judge to prepare for the case with due diligence, which involves careful analysis of the case files and expectations of the parties. The

Laws No. 78, Item 483 as amended. The literature stresses that legality or unlawfulness should not be the subject of mediation proceedings since such appraisal lies within the discretion of court. See Bojanowski, *Rozpoznanie potrzeby przeprowadzenia postępowania mediacyjnego*, 261–262. For more on recusation of a judge see P. Daniel, F. Geburczyk, *Wylączenie sędziego w postępowaniu sądownoadministracyjnym (uwagi na tle prawnoporównawczym)*, „Państwo i Prawo” 2015, Book 4, 50–64.

¹⁹ M. Tabernacka, *Negocjacje i mediacje w sferze publicznej*, Wolters Kluwer Polska, Warszawa 2009, 32–35.

²⁰ “Given the primary function of administrative courts, i.e. administration of justice by monitoring the activity of bodies of public authority for compliance with law, the role of mediation is to explain to the parties, by the person who moderates mediation [therefore this is the task of the mediation organ – A. R., whether the law was broken before a public authority, what was the nature of the breach, and the consequences of a given violation might be, and what action should be undertaken by the public authority to eliminate the infringements found.” See Supreme Administrative Court, *Informacja o działalności sądów administracyjnych w roku 2004*, Warszawa 2005, 17; B. Dauter, *Postępowanie mediacyjne i uproszczone*, 329; W. Chróścielewski, Z. Kmiecik, J.P. Tarno, *Reforma sądownictwa administracyjnego a standardy ochrony prawa jednostki*, „Państwo i Prawo” 2002, Book 12, 40.

²¹ W. Federczyk, *Praktyka stosowania mediacji*, 24. This principle can be derived from general provisions whereby “administrative court should undertake to resolve a case quickly and possibly in one session” (Article 7 of LPBAC).

question arises whether the parties at conflict will be able to work out a satisfactory and licit solution in such a short time. It seems that a *de lege ferenda* conclusion can be formulated with respect to further clarification of the issue of possible postponement of mediation²². As a result, if the mediator could run a series of mediation sessions, the factual and legal circumstances would undergo a more thorough analysis leading to agreement.

It is interesting that the subjects of mediation are: complainant, organ of public authority and mediation body (a judge or court registrar). Thus the mediation body and organ of public authority are to possess specialist knowledge of the object of dispute, which is not obligatory for the complainant, although at times he or she may have such knowledge²³. It is therefore the task of the mediator, in line with the principle of equality of parties in mediation, to reduce the disproportion between the public authority and complainant.

In the process of mediation a public authority and a complainant are expected to review all arguments and expectations before a judge. The parties are in charge of the outcome of mediation. The point is that their confrontation prior to the hearing may lead to a successful resolution of the dispute and eliminate the necessity to hear the case by court²⁴, and this is likely to streamline court procedures. An explanation of the factual and legal circumstances indicates that the arguments of the parties that lead to a settlement have been accepted thus making the case irrelevant²⁵. Further, the possibility of presenting the factual and legal grounds for a settlement in a given case makes it easier for each party to get acquainted with the reasons and understand them, enabling the parties to discover each other's expectations as to the formulation of proposals.

Determination whether the operation of public administration is legal, often criticized by opponents of mediation before administrative courts²⁶, is not the

²² In the practice of administrative courts, mediation sessions are postponed. See T. Świetlikowski, *Mediacja w postępowaniu sądowo administracyjnym (ujęcie praktyczne)*, „Zeszyty Naukowe Sądownictwa Administracyjnego” 2005, Book 2–3, 44; W. Federczyk, *Praktyka stosowania mediacji*, 24.

²³ A. Drelichowska, *Model mediacji w postępowaniu sądowoadministracyjnym*, „ADR. Arbitraż i Mediacja” 2 (2012), 53–54.

²⁴ P. Sołtysiak, E. Wójcicka, *Mediacja w postępowaniu przed wojewódzkim sądem administracyjnym*, 32.

²⁵ B. Dauter, *Postępowanie mediacyjne i uproszczone*, 327.

²⁶ According to T. Woś, the system of administrative courts excludes the possibility of having mediation to determine legality of an administrative act and its compliance with the role of administrative court and judicial administrative procedure, as well as the rule of law. See T. Woś, *Postępowanie mediacyjne i uproszczone*, 606. E. Bojanowski, on the other hand, claims that determination of legality or unlawfulness of the functioning of public authorities should not be the subject of mediation because at this stage the court has the exclusive right to formulate an opinion in this matter. See E. Bojanowski, *Rozpoznanie potrzeby przeprowadzenia postępowania mediacyjnego*, 261. In view of the opinions presented above it should be remarked that the mediation organ does not act as a subject settling a given dispute or determining the legality of an adminis-

primary goal of mediation²⁷. Z. Kmiecik makes a valid point saying that only parties to a dispute come to conclusions, and the role of mediation proceedings is intended to make it easier to find a settlement, but not to participate in settlement finding. Moreover, mediators' activities are subject to control of the administrative court²⁸. Often, as W. Federczyk observes, only this kind of procedure allows the parties to present all circumstances of the case and their arguments²⁹. The Supreme Administrative Court concluded that "in mediation proceedings no decision is issued by the judge [who is the mediator in a given case – A. R.] as to the substance of the case or closing the case in some other way; his or her contribution to mediation is limited to consideration of the facts of the case together with the parties, explaining and informing them of the legal means relevant to the case, relevant judicature, and to suggestions regarding procedural steps and the results of failing to take them"³⁰.

Proposing a solution. After a careful consideration of the factual and legal circumstances⁷ of a case, the mediator is to determine what measures must be undertaken by a public authority in order to eliminate potential breaches³¹. On numerous occasions, the parties are not able to formulate an agreement on their own. The parties may not exhibit sufficient knowledge or they may not have the postulation capacity³². Importantly, the essence of mediation entails that the parties, i.e. complainant and a public authority are to be authors of the agreement. Apparently, this assistance in proposing a solution and then formulating its text may not deprive the interested parties of the right to accept the outcome of mediation.

The following questions should be asked: who offers proposals regarding a settlement in the case in point? Who is in charge of the case within the limits of the law? Proposals should be made by the party who initiated the proceedings, et al. The complainant may produce proposals of a settlement in a separate complaint or a separate application, but organs of public authority do so in reply to a complaint or in a separate writ. Moreover, parties to a dispute may propose possible resolutions which is noted in the protocol during the proceedings³³. Such an interpretation of the provision under discussion (Article 115 § 1 of LPBAC) remains in line with the essence of mediation, in which it is parties who offer a potential resolution of the dispute.

trative act given the specific character of mediation proceedings that are conciliatory by nature. Adopting the above reasoning would contradict the essence of mediation.

²⁷ P. Sołtysiak, E. Wójcicka, *Mediacja w postępowaniu przed wojewódzkim sądem administracyjnym*, 32.

²⁸ Z. Kmiecik, *Mediacja i koncyliacja w prawie administracyjnym*, 155.

²⁹ W. Federczyk, *Praktyka stosowania mediacji przed sądami administracyjnymi*, 21.

³⁰ Decision of Supreme Administrative Court of 19 January 2006, II GSK 68/05.

³¹ B. Dauter, *Postępowanie mediacyjne i uproszczone*, 329.

³² M. Tabernačka, *Negocjacje i mediacje w sferze publicznej*, 35.

³³ B. Dauter, *Postępowanie mediacyjne i uproszczone*, 327.

Arrangements made by the parties should lie in the scope of the law; therefore, in a sense, the legislator restricts the activity of complainants and organs of authority in mediation. The question arises: who monitors the correctness of the arrangements made? W. Federczyk emphasises that the presence of the mediator guarantees the lawfulness of the arrangements. This is the one who enjoys “official authority and legal expertise”³⁴. As for the limits imposed on arrangements made in a dispute, the doctrine stresses that the parties are not bound by limits on claims and motions in their complaints or the legal norm invoked therein³⁵.

It must be concluded that at this stage the unique character of mediation becomes evident since the mediation organ under no circumstances may resolve the dispute, but through his or her participation in the talks between the complaining party and public authority the mediator facilitates an agreement and makes sure the arrangements arrived at are not *contra legem*. The above interpretation is also supported by the Supreme Administrative Court who stated that the purpose of mediation “[...] is to achieve an amicable settlement of the case between the parties within the limits permitted by the law, and no interference of an administrative court is necessary with respect to the contested act of a public authority [...]”³⁶. Hence the view that the lawfulness of the act under discussion is assessed becomes dubious³⁷.

Cessation. The presiding judge nominates a judge to run mediation in a particular case (Article 116 § 1 of LPBAC). Consequently, the mediator stops his function the moment the mediation proceedings terminate as a result of the following circumstances: 1) reaching an agreement, 2) complaint is withdrawn, or 3) no arrangements in the case are made³⁸.

When the first two situations occur, it is obvious that the mediator judge stops acting in this capacity since the mediation is ended. Given the outcome, the authority in question revokes or reviews the contested act, carries out or undertakes another activity within its jurisdiction and competence, depending on the case (Article 117 § 1 of LPBAC). The complaining party may also withdraw the complaint (Article 60 of LPBAC), which will effect a discontinuation of the proceedings (Article 130 § 1 of LPBAC).

Although mediation, as a rule, is terminated if no agreement has been reached, the participation of a reporting judge – if appointed by the presiding

³⁴ M. Tabernačka, *Negocjacje i mediacje w sferze publicznej*, 35.

³⁵ B. Adamiak, *Postępowanie mediacyjne*, in: *Postępowanie administracyjne i sądowniczo-administracyjne*, B. Adamiak, J. Borkowski, LexisNexis, Warszawa 2014, ed. 12, 426.

³⁶ Ruling of the Supreme Administrative Court in Warsaw dated 19 January 2006, II GSK 68/05.

³⁷ T. Woś holds a different view, stressing that the formulation “within the limits of the law” is not precise enough. Invoking Article 2 of Polish Constitution, he claims that a public authority may not undertake to issue an act that is against the law or act unlawfully. See T. Woś, *Postępowanie mediacyjne i uproszczone*, 611.

³⁸ A. Drelichowska, *Model mediacji w postępowaniu sądowniczo-administracyjnym*, 36.

judge to run mediation – may seem controversial in further proceedings. Hence, two situations may arise. First, the legislator provides that in the absence of arrangements between the parties, the case is reviewed by the court (Article 117 § 2 of LPBAC). Second, an act issued on the basis of final arrangements in a case can be appealed to the provincial administrative court. In such a case, the court examines the complaint jointly with the complaint brought in the case in which mediation was ordered earlier (Article 118 of LPBAC). The role of the reporting judge will be fulfilled by a judge who earlier ran the mediation. He or she will then participate in further proceedings before the administrative court despite an earlier engagement as a mediator³⁹.

COURT REGISTRAR

Another person entitled to run mediation before administrative courts is the court registrar (Article 116 § 1 of LPBAC; § 36 Section 2 of *Rules*)⁴⁰.

Appointment

A court registrar for given mediation proceedings is appointed by the presiding judge (Article 116 § 1 of LPBAC; § 36 Section 2 of *Rules*), following an earlier decision by the reporting judge to refer a case for mediation. To remove any controversy due to a judge appearing as a mediator it seems justified to run mediation proceedings by a court registrar.

Requirements for candidates. Legislation provides that the position of court registrar can be filled by a person who: 1) is a Polish citizen and enjoys full civic and civil rights, 2) is of irreproachable character, 3) has completed a university course in law in Poland and holds the title of Master of Law, or has completed a course abroad that is recognized in Poland, 4) for a minimum of 3 years held positions involving application or creation of administrative law (Article 27 § 1 of LOAC; Article 6 § 1 Items 1–3 of LOAC).

W. Federczyk observes that the requirements for candidates for court registrar are lower than for judges, however they are sufficient for proper conducting of mediation⁴¹. However, it could be postulated that court registrars are further trained in mediation techniques, without challenging their expertise.

³⁹ We need to note that a party or the judge themselves may request that he or she be recused in a given case (Article 19 of LPBAC). More on this in W. Federczyk, *Mediacja w postępowaniu administracyjnym i sądownoadministracyjnym*, 154–156.

⁴⁰ For information on the institution of court registrar, see Ł. Korózs, M. Sztorc, *Referendarz sądowy. Przepisy i objaśnienia*, Zachodnie Centrum Organizacji, Warszawa-Zielona Góra 1998.

⁴¹ W. Federczyk, *Mediacja w postępowaniu administracyjnym i sądownoadministracyjnym*, 158.

Advantages of mediation run by court registrar. Unlike in mediation run by a reporting judge, mediation conducted by a court registrar does not entail his or her partiality⁴². Therefore, a court registrar has to possess necessary skills to run mediation; if this is not possible, a judge should be trained to do so⁴³.

According to the principle of speedy procedure, the court must undertake actions resulting in quick resolution of cases (Article 7 of LPBAC). Mediation run by court registrars saves judges' time, affecting the economy of court operations⁴⁴.

Tasks

Since the legal basis for court registrars and judges acting as mediators is the same, tasks allocated to the former are the same as those for latter⁴⁵. It must be emphasised that running mediation proceedings constitutes one of the main tasks of court registrars, who are appointed to primarily "[...] perform tasks in mediation proceedings and other judicial tasks referred to in statute [...]" (Article 27 § 1 of LOAC).

The statutory regulation specifying mediation tasks as principal tasks of a court registrar as well as controversy associated with a judge running mediation (especially a reporting judge), make one question the purposefulness and compliance with the essence of mediation of a statement that mediation proceedings are run by a judge. It seems that a further specification of the current regulation would minimise bias, especially of the complaining party, to mediation in which a judge will act as a mediator. Such a postulate is supported by the judicature of administrative courts, where cases for mediation are mainly assigned to court registrars⁴⁶.

Cessation

The tasks of a court registrar, appointed pursuant to Article 116 § 1 of LPBAC and § 36 Section 2 of *Rules* will cease upon the termination of mediation proceedings resulting from an agreement reached, complaint withdrawn by

⁴² Ibid.

⁴³ B. Dauter, *Postępowanie mediacyjne i uproszczone*, 329.

⁴⁴ W. Federczyk, *Mediacja w postępowaniu administracyjnym i sądownoadministracyjnym*, 158.

⁴⁵ In consequence, an earlier analysis of tasks allocated to judges as mediators applies to the court registrar.

⁴⁶ By way of illustration, one can refer to the draft law on the organisation of administrative courts, whereby court registrars "will be given a competence to independently perform actions in mediation proceedings and in proceedings to grant the right to assistance [...]. This solution is closely associated with the provisions of draft procedure law which regulates mediation proceedings [...]. The purpose of these provisions is to create conditions for quick resolution of matters in this area by specialised court personnel to relieve judges." See *Projekt prawa o ustroju sądów administracyjnych z dnia 22 października 2001 r.*, Sejm Paper No. 18, at: <http://orka.sejm.gov.pl/proc4.nsf/opisy/18.htm> [access: 7 March 2015], 20.

the complainant, or lack of agreement in a given case⁴⁷. The court registrar, unlike the reporting judge, does not take part in further proceedings, for example when a complaint is filed with a provincial administrative court concerning an act issued on the basis of arrangements made during mediation proceedings.

DEPARTMENT OF MEDIATION

Legislation provides that a special department can be established in an administrative court, where matters subject to mediation would be referred to (§ 36 Section 3 of *Rules*) and where mediation proceedings would be conducted⁴⁸.

It should be said that it is within the discretion of the president of Supreme Administrative Court to call such a department into existence⁴⁹. W. Federczyk observes that given “scant interest in mediation in administrative courts,” the provision permitting the creation of a separate department is not used⁵⁰. It is worth noting that the existence of such a department would increase public interest in mediation in case of disputes between complainants and organs of public administration. Firstly, only persons with adequate mediation training would make up such a department. Secondly, the possibility to seek help in resolving a dispute in such a department would eliminate potential suspicions regarding the impartiality of the mediator judge. Thirdly, it seems that such a structure would accelerate processing of cases (cf. Article 7 of LPBAC), because neither a judge nor court registrar would have to conduct mediation proceedings.

Summing up the above considerations concerning the functioning of mediation organs before administrative courts, the following conclusions can be drawn:

1. The legislator has equipped one-person with mediation competences: judge and court registrar, postulating the creation of a multi-person organ, i.e. a department of mediation.

2. Granting judges the right to run mediation raises some doubts. One of the basic principles of mediation, impartiality, can be infringed, especially in a situation when no agreement is reached in mediation and the same judge takes part in resolving a given dispute. No doubts arise if mediation is run by a court registrar since one of his statutory tasks is to conduct mediation proceedings. It must be

⁴⁷ These premises have been specified more thoroughly in the section on tasks of mediator judges.

⁴⁸ “In a court where a separate department for mediation cases has been established, mediation proceedings are conducted there” (§ 36 Section 3 of *Rules*).

⁴⁹ “A regional administrative court consists of departments created and liquidated by the president of the Supreme Administrative Court” (Article 17 § 1 of LOAC).

⁵⁰ W. Federczyk, *Mediacja w postępowaniu administracyjnym i sądowniczym*, 151–152.

postulated then that court registrars should be the first ones to do mediation tasks, and judges should be engaged as mediators only in extraordinary matters.

3. Using the possibility created by the Regulation by the President of Poland and the creation of a special department to resolve cases by mediation would speed up the processing of matters, eliminate partiality, and ensure suitable preparation of the department employees for mediation proceedings.

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ORGANY MEDIACYJNE W POSTĘPOWANIU PRZED SĄDAMI ADMINISTRACYJNYMI

Streszczenie. Mediacja przed sądami administracyjnymi została uregulowana w następujących aktach normatywnych: w ustawie *Prawo o postępowaniu przed sądami administracyjnymi*, w ustawie *Prawo o ustroju sądów administracyjnych* i w Rozporządzeniu Prezydenta Rzeczypospolitej Polskiej *Regulamin wewnętrznego urzędowania wojewódzkich sądów administracyjnych*. Jest szczególnym trybem postępowania administracyjnego o charakterze fakultatywnym. Podmiotami uprawnionymi do prowadzenia mediacji przed sądami administracyjnymi są sędzia i referendarz sądowy.

Słowa kluczowe: sędzia, referendarz sądowy, bezstronność, organ władzy, jednostka administrowana