

Mediation as Means of Communication for Public Administration in Settling Administrative Disputes

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Abstract: Nowadays solutions are sought for public administration to involve citizens in decision-making as one of the ways of promoting the development of civil society and thus to foster democratic forms of government. Public administration is looking for efficient methods of resolving administrative disputes. Administrative mediation serving the purpose of ensuring proper communication between the parties to administrative proceedings is one of such methods. Mediation in public administration hinges upon the definition of communication rules. The aim of this paper is to define communication from the perspective of legal science and discuss its application in the administrative mediation proceedings. In this article, we discuss the essence, the subject matter and the object of mediation as well as the legal regulations governing the mediation procedure and consider the possibility of applying mediation to the administrative procedure, as exemplified by the related case law. The study has been conducted by means of the legal research methods, in particular the legal-dogmatic approach and the legal functionalism approach.

1. Introduction

When considering the issue of resolving administrative disputes, it is worth noting that in addition to the authoritative way of settling such cases, public administration bodies seek solutions that would allow them to resolve disputes through mediation. The use of mediation has been extensively described in the doctrine.¹ Various forms of public consultation are becoming more and more common. Referring to the principles of the administrative law, it is worth pointing out that they provide for the involvement of citizens in compliance with the political system of the state. The key principles of the administrative law include social dialogue, decentralisation, subsidiarity, and a democratic state of law. Those principles provide for the foundations and create opportunities for the engagement of citizens and other entities in public life. This idea has also been applied to the Code of Administrative Procedure² by implementing the process of mediation.

The doctrine indicates that in public administration, mediation is appropriate whenever there is a discrepancy of positions, and the law creates room for manoeuvre through the exchange of arguments, verification of one's own assessments and statements as well as concessions or corrections of previous decisions.³ The large variety of types of cases that public administration bodies have to hear has forced the legislator to analyse the possibility of applying alternative dispute resolution methods. This need was reflected in the Recommendation Rec (2001)9 of the Committee of Ministers to the Member States adopted on 5 September 2001 on alternatives

¹ See, among others: Wojciech Federczyk, *Mediacja w postępowaniu administracyjnym i sądownoadministracyjnym* (Warsaw: Wolters Kluwer Polska, 2013); Agnieszka Kocot-Łaszczyca and Grzegorz Łaszczyca, *Mediacja w ogólnym postępowaniu administracyjnym* (Warsaw: Wolters Kluwer Polska, 2018); Leszek Stadniczeńko, „Negocjacje i mediacje jako proces społeczny – instytucja społeczna,” in *Prawnopsychologiczne uwarunkowania mediacji i negocjacji*, ed. Leszek Stadniczeńko (Opole: Wydawnictwo Uniwersytetu Opolskiego, 2006); Magdalena Tabernacka, *Negocjacje i mediacje w sferze publicznej* (Warsaw: Wolters Kluwer Polska, 2009).

² The Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws 2022, item 2000, as amended), hereinafter CAP.

³ Zbigniew Kmiecik, „Mediacja w polskim prawie administracyjnym,” in *Mediacja w sprawach administracyjnych*, ed. Hanna Machińska (Warsaw: Wydział Prawa i Administracji Uniwersytet Warszawski: Biuro Informacji Rady Europy, 2007), 40.

to litigation between administrative authorities and private parties.⁴ This European soft act of law lists several mechanisms for the amicable settlement of administrative cases, including internal reviews, and in the strict sense – conciliation, mediation, negotiated settlement, and arbitration. There is also an opposing view according to which the use of mediation in administrative procedure raises doubts due to the nature of the proceedings.⁵ An important role in this respect is also played by the general rules of the administrative procedure, such as the rule of law, which does not allow for communication (arrangements to be made) between an administrative authority and the party to the proceedings.⁶ The divergence of positions, including the administrative practice, indicates that mediation is not commonly used for the administrative procedure purposes. It may be presumed that this is related to the low social awareness of the possibility of using mediation to settle cases amicably as well as to the legal solutions adopted in this regard. As noted by Przylepa-Lewak, “owing to the development of civil society institutions, the relations of individuals with public authorities can be described as equivalent, which calls for close cooperation that, in turn, entails the need for effective communication.”⁷

It should be noted that in the systems of other countries, mediation has become a popular process that allows for the amicable settlement of a dispute between an individual and the state administration. It is used in both continental-type systems (e.g. the Netherlands, Switzerland, Germany or Spain) and common law systems.⁸ The objective of the mediation proceedings is to bring administrative authorities closer to the public, to ensure that relations under the administrative law are shaped in a way that

⁴ Joanna Wegner-Kowalska, „Mediacja w sprawach administracyjnych – pytania i wątpliwości,” *Zeszyty Naukowe Sądownictwa Administracyjnego*, no. 6 (2017), LEX/el.

⁵ See, among others, Jan Paweł Tarno, *Postępowanie sądowoadministracyjne. Komentarz* (Warsaw: LexisNexis, 2004), 173.

⁶ D. Rejowski, „Zastosowanie mediacji w prawie administracyjnym,” in *Mediacja – nowa przestrzeń zarządzania konfliktem wyzwania, strategie, rozwiązania*, eds. Sebastian Morgała and Edyta Stopyra (Warsaw: Wydział Prawa i Administracji Uniwersytet Warszawski, 2014), 158.

⁷ Agata Przylepa-Lewak, „Mediacja jako forma komunikacji w postępowaniu administracyjnym,” *Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia, Sectio G* 69, no. 2 (2022): 65.

⁸ Wegner-Kowalska, „Mediacja w sprawach administracyjnych,” LEX/el.

increases the influence of the parties to the proceedings on their own affairs as well as on matters that are important to the society in which they live (participation of the public in the administrative power).⁹ The participatory model is also noticeable in the Polish legal system in which the public administration sees the need to involve citizens in public affairs. However, this is a long-term and complex process that requires the legal education to be increased and the awareness, ensuing from the powers vested by the law, to be raised.

Article 13 of the Code of Administrative Procedure stipulates an administrative culture principle which imposes on public administration bodies the obligation to seek amicable settlement of disputes and to determine the rights and obligations constituting the subject matter of the proceedings under cases falling within their jurisdiction, in particular, by taking actions that, firstly, encourage the parties to conclude a settlement under cases in which the parties have conflicting interests, and secondly, are necessary for mediation purposes. According to the authors of the amending bill, the main objective of the amendments has been to bring the public administration closer to the civil society and to ensure that relations under the administrative law are shaped in a way that strengthens the influence of the parties to the proceedings on their own affairs and affairs important to the public, i.e. to improve the participation of the civil society in the public administration.¹⁰ Those regulations are also similar to the provisions on mediation set forth in the Act – Code of Civil Procedure.¹¹ The explanatory memorandum to the amending bill under consideration indicates that the provisions of the Act should create the possibility and legal grounds for using mediation at an earlier stage than before, i.e. during the administrative proceedings, so that the differences of views on the manner of settling the case between the party to the proceedings and the administrative

⁹ Wojciech Sawczyn, „Mediacja,” in *Postępowanie administracyjne i sądownoadministracyjne*, eds. Roman Hauser and Andrzej Skoczylas (Warsaw: Wolters Kluwer Polska, 2021), LEX/el.

¹⁰ Explanatory memorandum to the Act amending the Act – Code of Administrative Procedure and some other acts, Sejm of the 8th term, Parliamentary printed paper no. 1183, accessed March 21, 2023, <https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=1183>.

¹¹ The Act of 17 November 1964 – Code of Civil Procedure (Journal of Law 2021, item 1805, as amended), Art. 183 to 183¹⁵.

authority can be explained in an amicable way already at that stage, without the need to institute the judicial administrative proceedings.¹²

2. Around the Communication Conceptual Framework

Public administration today faces the challenge of ensuring effective communication. To address this challenge, it uses specific types of solutions proposed by communication sciences, psychology and sociology, but also concepts grounded in legal sciences. Wódz and Wódz define communication as:

an intentional exchange of verbal and non-verbal signs (symbols) aimed at improving cooperation or sharing meanings between partners. Sharing of meanings is understood as producing a consistent interpretation of elements of social culture. The essence of acts of communication is therefore the intentionality of behaviour – the intention to send a certain message encoded in a system of conventional signs, symbols with a conventionalised meaning, which, however, are also largely underspecified and require contextual redefinition in specific interpersonal situations.¹³

Understood in this way, the communication process requires the participation of at least two subjects. By definition, this process is conceptually similar to mediation, which should additionally be based on specific legal principles. In this type of communication, there are also two subjects whose intentions are defined by the law, i.e. the law determines a certain scope of communication.

The communication conceptual framework can be found in a number of legal acts, in which communication refers to the provision of services, contact with citizens, public consultations or the provision of electronic services (the so-called electronic communication). All those categories are examples of social communication. As noted by Dudek, social communication is understood as a mechanism through which human relations come into existence and develop as do all the symbols of the mind together with

¹² Agnieszka Dauter-Kozłowska, „Stosowanie mediacji w postępowaniu administracyjnym i sądownoadministracyjnym,” *Przegląd Prawa Publicznego*, no. 1 (2020).

¹³ Kazimiera Wódz and Jacek Wódz, *Funkcje komunikacji społecznej* (Dąbrowa Górnicza: Wyższa Szkoła Biznesu w Dąbrowie Górniczej, 2003), 7.

the means of transmitting them in space and preserving them in time.¹⁴ Zarzycka aptly notes that “communication, contrary to appearances, is an intricate and rather complicated process that requires constant control of the content and the method of transmitting it, as well as the recipient’s response to a given message.”¹⁵ This statement also applies quite adequately to the legal arrangement arising from the general principles of the administrative procedure, such as the obligation to notify a party to administrative proceedings. The process of communication within the framework of the public administration is also related to ensuring access to public information, i.e. all the information on public affairs. Access to information is provided in the fulfilment of the obligation to inform. When discussing communication, it is worth noting that a citizen must be guaranteed the right to information, as provided for, among others, in Article 61 of the Constitution of the Republic of Poland¹⁶ or the Act on access to public information.¹⁷ Those provisions also create specific obligations.

It should be noted that the process of communication involves people. Understanding it, then, depends on comprehending mutual relations between people. Secondly, communicating consists in sharing meanings. Accordingly, people who want to communicate with one another should agree in advance on the terms and definitions they will be using.¹⁸ Those are also important determinants of mediation and setting its course. Mediation must also be based on the standards established for the communication process purposes. In this regard, several mediation models should be distinguished, such as facilitative mediation and evaluative mediation. As far as the former is concerned, the mediator’s task is primarily to stimulate

¹⁴ Wiesława Dudka, ed., *Zarys teorii procesów i środków komunikowania masowego* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 1985), 47.

¹⁵ Martyna Zarzycka, „Rola komunikacji w kształtowaniu wiserunku organizacji publicznej,” *Zeszyty Naukowe Wydziału Zarządzania i Dowodzenia Akademii Obrony Narodowej* 14, no. 2 (2015): 140.

¹⁶ The Constitution of the Republic of Poland of 2 April 1997, *Journal of Laws* 1997, No. 78, item 483, as amended).

¹⁷ Act on access to public information of 6 September 2001, *Journal of Laws* 2002, item 902, as amended).

¹⁸ Stanisława Jung-Konstanty, „Zasady publicznego i organizacyjnego komunikowania się,” in *Strategiczne zarządzanie miastem: w teorii i praktyce Urzędu Miasta Poznania*, eds. Barbara Kożuch and Cezary Kochalski (Kraków: Instytut Spraw Publicznych UJ, 2011), 97.

the exchange, facilitate communication between the parties and support them in looking for constructive solutions to their conflict. In the latter case, the mediator can also make non-committal suggestions as to how to resolve the dispute.¹⁹ Those types of mediation determine/are determined by the model principles for the communication process.

It is worth noting that the concept of using plain language in communication is particularly important here. It assumes that communication in the public sphere should be simplified by adapting official texts (especially written ones) to the perceptual capabilities of the “average recipient”.²⁰ One role of the public administration is to provide information in an accessible manner in the language that citizens will find easy to understand, and in this way to encourage citizens to participate in public life. The legislator has also assumed that the rules of communication should be simplified: one of the rules adopted as part of the Principles of Legislative Technique²¹ is the use of non-specialist language, i.e. the language that would be understandable to the common recipient. This assumption can be treated as a standard of good communication, which ought to be relaid into the practice of mediation.

When discussing the communication conceptual framework in relation to mediation, it is worth paying attention to the international models of application of artificial intelligence in the mediation process. Of course, it is rather difficult to reconcile the use of artificial intelligence in mediation with the definitions of communication cited above, which assume the participation of two subjects (people). As noted by Flaga-Gieruszyńska, “the development of robotics for law enforcement and dispute resolution is one of the main postulates made with regard to the ethical aspects of the use of artificial intelligence in humans’ everyday life.”²² It is

¹⁹ Ewa Gmurzyńska, „Rodzaje mediacji,” in *Mediacja*, ed. Lidia Mazowiecka (Warsaw: Oficyna a Wolters Kluwer Business, 2009), 303.

²⁰ Anna Burzyńska-Kamieniecka, „Wykorzystanie koncepcji *plain language* w upraszczaniu tekstów do testowania znajomości języka polskiego jako obcego,” *Acta Universitatis Lodziana. Kształcenie Polonistyczne Cudzoziemców*, no. 27 (2020): 527–528.

²¹ The Regulation of the Prime Minister of 20 June 2002 on the “Principles of Legislative Technique,” *Journal of Laws* 2016, item 283.

²² Kinga Flaga-Gieruszyńska, „Zastosowanie sztucznej inteligencji w pozasądowym rozwiązywaniu sporów cywilnych,” *Studia Prawnicze KUL* 79, no. 3 (2019): 92.

then difficult to consider communicating with an algorithm in the light of the definitions adopted here. Nevertheless, the experience of the judiciary worldwide shows that it is possible to use dedicated online platforms to resolve disputes. As Stępień and Kalicińska have observed:

such solutions are gaining popularity especially in the United States of America. An example of an ODR-based court is an online court in Utah, which tested a pilot programme already at the end of 2018. It uses a communication platform through which parties try to resolve disputes (over smaller claims) without the participation of the court. The proceedings at this stage are moderated by facilitators who explain basic legal issues, make attempts at mediation and help prepare a draft settlement or procedural documents. If the facilitator decides to refer the case to a judge, then the judge decides if an in-person hearing is needed. If not, then, with the consent of the parties, the case is resolved online based on the documentation submitted earlier.²³

The use of AI has not yet been considered in the Polish legal system. However, the idea of applying it both in the communication process and in mediation may become a challenge for the future.

3. The Essence, Concept and Subject Matter of Mediation in Administrative Proceedings

Mediation, as defined by the Polish Ministry of Justice, is currently understood as an attempt to secure an amicable and mutually satisfactory resolution of a dispute through voluntary negotiations conducted with the assistance of a third party who is neutral towards the parties. The mediator tries to mitigate any tensions and helps the parties to reach a consensus.²⁴ As Smarż rightly points out, “mediation is generally considered to be a special mechanism leading to dispute resolution, which is conducted with

²³ Adrian Stępień and Agnieszka Kalicińska, „Postępowania przyszłości. Ułatwi pracę sędziemu czy go zastąpi?,” accessed March 31, 2023, <https://crido.pl/blog-taxes/postepowania-przyszlosci-sztuczna-inteligencja-ulatwi-prace-sedziego-czy-go-zastapi/>.

²⁴ „Mediacje,” Ministerstwo Sprawiedliwości, accessed March 16, 2023, <https://www.ms.gov.pl/pl/dzialalnosc/mediacje/>.

the participation of an impartial intermediary – the mediator – in order to reconcile the interests of the parties with social expectations.”²⁵

Administrative mediation was implemented into the general administrative jurisdictional proceedings by the Act of 7 April 2017 amending the Act – Code of Administrative Procedure and certain other acts.²⁶ In Article 13 of the Code of Administrative Procedure, that, before the amendment, had governed the principle of amicable settlement of disputes, a more broadly defined principle of amicable settlement of disputes was set forth. Pursuant to the aforementioned provision, public administration bodies, wherever possible, strive to resolve disputes amicably and to determine the rights and obligations constituting the subject matter of the proceedings under cases falling within their jurisdiction, in particular by taking actions that 1) encourage the parties to reach a settlement under cases involving parties with conflicting interests and 2) are necessary for mediation purposes. Public administration bodies take all the steps, justified at the given stage of the proceedings, to enable mediation or settlement, and in particular, they provide information on the possibility of amicable settlement and the benefits of such a solution. The main goal of mediation is to reach a compromise by making mutual concessions and to resolve the dispute, thus fending off the prospect of launching court proceedings.

Weitz rightly notes that there are three elements that are crucial for mediation in the traditional approach, i.e. the goal of striving to reach an agreement (settlement) resolving the dispute (a difference of opinion) between the parties, the assistance of a neutral third party – the mediator – in achieving this goal, and the use of negotiations as the main technique for reconciling the positions of the parties involved. It has been pointed out that mediation in the case of a dispute is the activity of any third party, i.e. any entity that is not party to the conflict, that entails creating conditions

²⁵ Joanna Smarż, „Instytucja mediacji w postępowaniu administracyjnym,” *Opolskie Studia Administracyjno-Prawne* 16, no. 1(4) (2018): 62.

²⁶ Hanna Knysiak-Sudyka, „Czynności procesowe w postępowaniu administracyjnym ogólnym,” in *System Prawa Administracyjnego Procesowego*, eds. Grzegorz Łaszczyca and Andrzej Matan, vol. 2, part 3 (Warsaw: Wolters Kluwer Polska, 2021), LEX/el.; Hanna Knysiak-Sudyka, „Czynności procesowe stron w ramach mediacji administracyjnej,” in *System Prawa Administracyjnego Procesowego*, vol. 2, part 3., eds. Grzegorz Łaszczyca and Andrzej Matan (Warsaw: Wolters Kluwer Polska, 2021), LEX/el.

for direct talks (negotiations) between the parties to the dispute and guiding them towards an amicable settlement of the dispute. Wach also emphasises that mediation means the use of an intermediary (third party) agent in resolving a dispute by the parties concerned.²⁷ Gmurzyńska, in turn, defines mediation as an agreed intervention of a third party in negotiations or a conflict between parties.²⁸

The discussion so far shows that the most important structural element of mediation as an institution, and at the same time the key principle of mediation proceedings, is voluntary participation (voluntariness).²⁹ The voluntary will of the parties to the administrative proceedings can be viewed as a principle of mediation proceedings, that guarantees consensuality of mediation as an out-of-court method of dispute resolution. The voluntary nature of mediation does not imply that it is irrevocable. It is not admissible to irrevocably commit in advance to accepting the result of mediation (a settlement with specific terms).³⁰ It is always the parties who decide whether and under what conditions the dispute will be resolved, and the role of the mediator is only to facilitate this task.

²⁷ Andrzej Wach, *Alternatywne formy rozwiązywania sporów sądowych* (Warsaw: Liber, 2005), 223.

²⁸ Ewa Gmurzyńska, *Mediacja w sprawach cywilnych w amerykańskim systemie prawnym – zastosowanie w Europie i Polsce* (Warsaw: C.H. Beck, 2007), 30 et seq.

²⁹ Karol Weitz, „Mediacja w sprawach gospodarczych,” in *Postępowanie sądowe w sprawach gospodarczych*, eds. Tadeusz Wiśniewski et al., vol. 7 (Warsaw: C.H. Beck, 2007), 225; Łukasz Błaszczak, „Charakter prawny umowy o mediację,” *ADR. Arbitraż i mediacja*, no. 1 (2008): 11–12; Rafał Morek, „Dobrowolność mediacji i jej ograniczenia (prawo i praktyka),” *Studia Iuridica* 49 (2008): 141; Tadeusz Ereciński, in *Kodeks postępowania cywilnego. Komentarz. Część pierwsza i druga. Postępowanie rozpoznawcze*, ed. Tadeusz Ereciński, vol. 1 (Warsaw: Wolters Kluwer Polska, 2016), art. 1831, LEX/el.; Przemysław Telenga, in *Kodeks postępowania cywilnego. Komentarz*, ed. Andrzej Jakubecki (Warsaw: Wolters Kluwer Polska, 2010), 241. In the doctrine, the concept of the autonomy of will of the parties is used imprecisely and interchangeably with the concept of voluntariness – cf. Tadeusz Żyznowski, in *Kodeks postępowania cywilnego. Komentarz*, eds. Henryk Dolecki and Tadeusz Wiśniewski (Warsaw 2011: Wolters Kluwer Polska), 648, LEX/el. – who points out that the primary and elementary characteristic of the institution of mediation is the autonomy of the will of the parties.

³⁰ Katarzyna Gajda-Roszczyńska, „Mediacja obligatoryjna,” *Polski Proces Cywilny*, no. 3 (2012): 446.

4. The Use and Application of Mediation for Mediation Proceedings

The administrative mediation can be applied and conducted, pursuant to Article 96a § 1 of the Code of Administrative Procedure, if the nature of the case admits. This means that the provisions of Chapter 5a of the Code of Administrative Procedure are not necessarily applied to all administrative cases. It is the responsibility of the public administration authorities to determine whether there are grounds for using the option of mediation in the jurisdictional administrative proceedings and to facilitate the processing of the parties' request to use it. In the event the authority finds that the conditions for conducting mediation have not been met, this finding will constitute the basis for rejecting the request for mediation. In such a situation, the authority issues an unappealable decision to refuse to refer the case to mediation.

Mediation is useful in those cases where a conflict has emerged between an administrative body and a party or between parties. In this light, it seems reasonable to determine the scope of cases that may be referred to mediation. The premiss of Article 96a § 1 of the Code of Administrative Procedure "the nature of the case admits" should be associated with the norms of the substantive law, that raise interpretation doubts, with the norms that leave the decision to the discretionary powers of the public administration body ("the body may"), and with undefined terms. In other words, the legitimacy of conducting mediation may be considered whenever it is necessary to determine the content of a legal norm in the complex process of interpretation, whenever a legal norm does not require the derivation of legal consequences or whenever a norm makes the derivation of legal consequences dependent on the fulfilment of values falling within an unspecified concept.³¹ Therefore, to determine whether an administrative case has a potential to be settled by means of mediation, it is necessary to analyse (for each individual case) the provisions of the generally applicable law, that serve the legal basis for its settlement, i.e. the provisions of

³¹ Barbara Adamiak and Janusz Borkowski, *Kodeks postępowania administracyjnego. Komentarz* (Warsaw: Wolters Kluwer Polska, 2017), 497; the Ruling of the Voivodeship Administrative Court in Rzeszów of 18 January 2018, II SA/Rz 1225/17, CBOSA [the Central Database of Rulings of Polish Administrative Courts]; Dauter-Kozłowska, „Stosowanie mediacji,” 71–88.

the substantive law. This will make it possible to determine the nature of a right or an obligation.³²

In the past, administrative courts have given their consent to conducting mediation proceedings, for example, in cases concerning determination of damages for the acquisition of real estate by operation of law³³ or violations of water relations.³⁴ Perhaps it would be sound to consider the need to distinguish the subtype of administrative cases – mediation cases, and thus also the subtype of respective qualified administrative acts – mediation decisions. The search for the characteristics of mediation cases should be primarily based on the analysis of the defining features provided for in Article 13 § 1 and Article 96a of the Code of Administrative Procedure. Their lack of specificity makes it difficult or even impossible to indicate the types of cases that may be legitimately referred to mediation.³⁵

It seems that mediation may be conducted in cases, the object of which is to verify the acquisition and use of rights by an entity, rather than their legality, which should indeed be unquestionable. The administrative mediation is inadmissible in cases where there are premisses, in the form of general clauses, which provide grounds for repealing or changing the final decision to the extent necessary, and where the procedure has a subsidiary nature.

The administrative mediation is appropriate primarily for administrative cases aimed at establishing what specific rights or obligations an individual or individuals have, but in principle, not for cases, the focus of which is to verify, within the framework of extraordinary proceedings, the legality of previously issued acts.³⁶ Mediation should therefore be understood as an involvement of a third party in the resolution of a dispute that originates directly from the parties concerned. The mediator is a neutral entity

³² Ibid.

³³ The Ruling of the Provincial Administrative Court in Kielce of 20 February 2018, II SA/Ke 768/17, CBOSA; the Ruling of the Provincial Administrative Court in Kielce of 1 February 2018, II SAB/Ke 80/17, CBOSA.

³⁴ The Ruling of the Provincial Administrative Court in Kraków of 6 December 2017, II SAB/Kr 139/17, CBOSA.

³⁵ Kamil Klonowski, „Charakter administracyjnej sprawy mediacyjnej,” *Przegląd Prawa Publicznego*, no. 6 (2020), LEX/el.

³⁶ Ibid.

committed to creating conditions for the disputants to reach a settlement and to facilitating the procedure by means of various negotiation techniques.³⁷ The Code of Administrative Procedure does not provide for a legal definition of mediation. However, it is commonly assumed that mediation is one of the methods of alternative dispute resolution, the essence of which is to guide the parties towards an amicable settlement of the case through the involvement of a third party in the proceedings – a mediator who helps the disputants to reconcile their positions and come to a mutually agreeable solution.³⁸

Pursuant to Article 96f of the Code of Administrative Procedure, a mediator may be a natural person who has full legal capacity and enjoys full public rights, in particular a mediator named on a list of permanent mediators or a list of institutions and persons authorised to provide mediation services kept by the president of the regional court or a list kept by a non-governmental organisation or a higher education institution of which the president of the regional court has been notified. Importantly, if the authority conducting the proceedings is a participant in the mediation, the mediator can only be a listed permanent mediator or a person named on the list of institutions and persons authorised to provide mediation services kept by the president of the regional court or a mediator named on the list kept by a non-governmental organisation or a higher education institution of which the president of the regional court has been notified. A characteristic feature of the administrative mediation is its confidentiality. In the case of mediation proceedings, there is a principle of confidentiality, as provided for in Article 96j § 2 of the Code of Administrative Procedure, pursuant to which the mediator, the parties, and other persons involved in mediation are obliged to keep confidential the facts they have learned about the mediation, unless the participants of the mediation

³⁷ Wach, *Alternatywne metody*, 223.

³⁸ Apart from mediation, alternative means for resolving disputes include internal reviews, conciliation, negotiated settlement and arbitration. See: Recommendation Rec (2001)9 of the Committee of Ministers to Member States adopted on 5 September 2001 on alternatives to litigation between administrative authorities and private parties, accessed 11 January 2023, <https://rm.coe.int/16805e2b59>. Cf.: Federczyk, *Mediacja w postępowaniu administracyjnym*, 103 et seq.; Zbigniew Kmiecik, *Mediacja i koncyliacja w prawie administracyjnym* (Kraków: Zakamycze, 2004), 129 et seq.

decide otherwise. The settlement proposals, the facts disclosed or the statements made in the course of the mediation proceedings may not be used after their conclusion, except for the results contained in the mediation proceedings report.

While trying to assess the functioning of mediation in the administrative proceedings on the basis of the analysis of the applicable regulations and the relevant court rulings, it would be advisable to indicate issues that could be taken into consideration in the legislative process in order to make the administrative mediation more effective and improve its compliance with the recommendations of the Council of Europe.³⁹ Pursuant to Article 96b § 3 of the Code of Administrative Procedure, before an authority issues the decision to refer a case to mediation, *ex officio* or upon request, it notifies in writing the parties to the proceedings and the authority referred to in Article 106 § 1 of the Code of Administrative Procedure, if the latter has not yet taken a position on the case, on the possibility of conducting mediation, at the same time requesting the parties to present their opinion on the consent to mediation, within fourteen days from the date of delivery of the notification – the consent of a party to mediation (voluntary participation). When the authority has referred the case to mediation, it postpones the hearing of the case for a period of up to two months, and if the mediation is not completed by that deadline (unless this period has been extended but by no longer than one month), it issues a decision on the termination of mediation and settles the case (Article 96e of the Code of Administrative Procedure) – the deadline stipulated in the Code of Administrative Procedure affects the speed of the proceedings as there is a specific time limit fixed for mediation. Mediation does not have to be conducted by professionals with an appropriate education and experience, either, which, were it not the case, would lead to the professionalisation of the institution of mediation in the administrative proceedings. The success of mediation largely depends on the positive approach of the public

³⁹ For more information, see the Recommendations of the Committee of Ministers of the Council of Europe: R (2001)9 of 5 September 2001 on alternatives to litigation between administrative authorities and private parties; R (81)7 of 14 May 1981 on measures facilitating access to justice; R (86)12 of 16 September 1986 concerning measures to prevent and reduce the excessive workload in the courts.

administration authorities. Not every administrative case is suitable for mediation (the habit of adjudication). Mediation has a number of other benefits, such as the reduced duration of the proceedings and the educational function, including mediation sessions providing the participants/parties with the opportunity to learn more about the given administrative case and, consequently, to understand the essence of the dispute and its relevant legal provisions that are often difficult to understand to an average person. It seems necessary for the authorities to change their mentality with regard to mediation – they should play an active role in it by informing parties about the possibility of conducting mediation and complying with the relevant guidelines of the European authorities. Procedures normally applied to disputes between equal entities cannot be used in proceedings in which parties have an unequal status. The objective of mediation, as provided for by the Code of Administrative Procedure, is not to resolve a dispute through mutual concessions but to work out a solution to an administrative case that the parties to the proceedings understand and accept. The belief that the costs of proceedings are significantly reduced when mediation is used seems to be false or largely oversimplified. An expertly conducted mediation with the participation of a professional mediator usually generates some costs. In some cases, mediation may speed up the administrative proceedings but this is not the rule as negotiations usually take time. The conclusion of an agreement usually eliminates the need for further proceedings under the case, including the need to institute a judicial review. The provisions on mediation turn out to be, in fact, a dead regulation. To determine the possibility of conducting the administrative mediation under a given administrative case, it is vital to first establish the nature of the case and the degree of advancement of the investigation proceedings conducted under a given case. Mediation is confidential.

The actual effectiveness of mediation will therefore depend on the degree of implementation of the principle of material truth and the principle of disposition but also on the freedom granted to the authority to shape an individual's rights and obligations.⁴⁰ The doctrine emphasises that the failure to notice the advantages of mediation and the reluctance to use it result from the fact that there is no tradition of mediation in the framework of

⁴⁰ Klonowski, „Charakter administracyjnej sprawy,” LEX/el.

the public administration. Moreover, members of the general public believe in the stereotype that relations with the public administration are based on the latter's authority, which excludes any possibility of settling disputes with it or another party to the proceedings on equal terms.⁴¹

5. Nature of Administrative Mediation

When discussing the conduct of mediation, it is important to determine between whom the act of communication takes place. Pursuant to Article 96a § 4 of the Code of Administrative Procedure, the participants to mediation may include: 1) the authority conducting the proceedings and a party or parties to the proceedings, or 2) parties to the proceedings. This regulation allows one to distinguish two variants of mediation – the so-called vertical mediation, the participants of which are: the authority conducting the proceedings and the party or parties to those proceedings, and horizontal mediation, the participants of which are: the parties to the proceedings. With reference to the topic of communication, it bears noting that just as one can speak of communication plains, one can also speak of certain divisions of mediation. The administrative mediation can be conducted both between parties to the proceedings (horizontal mediation) and between a party or parties to the proceedings and the public administration authority before which the proceedings are pending (vertical mediation). This is a distinguishing feature since all other types of mediation are not multilevel processes.⁴²

Horizontal mediation may culminate in an administrative agreement. The mediator conducting this type of mediation may be a natural person who has full legal capacity and enjoys full public rights, in particular a mediator named on a list of permanent mediators or a list of institutions and persons authorised to provide mediation services, kept by the president of the regional court or a list kept by a non-governmental organisation or a higher education institution of which the president of the regional court has been notified. The costs of horizontal mediation (i.e. the mediator's

⁴¹ More on this topic: Włodzimierz Broński, „Efektywność mediacji w postępowaniu administracyjnym,” *Studia Prawnicze KUL* 79, no. 3 (2019): 64–65; Dauter-Kozłowska, „Stosowanie mediacji,” 72, 86–87.

⁴² Dauter-Kozłowska, „Stosowanie mediacji”.

remuneration and the reimbursement of the mediator's expenses incurred on mediation) are covered by the parties in equal parts, unless they agree otherwise.⁴³

Vertical mediation culminates in issuing an administrative decision, as the Code of Administrative Procedure does not provide for an administrative contract. If, as a result of mediation, parties decide to settle the case within the limits of applicable law, the public administration body settles the case in accordance with this decision, as stated in the mediation session report. However, in the course of issuing the decision, the authority still uses an authoritative form of settling an administrative case. Vertical mediation may only be conducted by a listed permanent mediator or a person named on the list of institutions and persons authorised to provide mediation services kept by the president of the regional court or a mediator named on the list kept by a non-governmental organisation or a higher education institution of which the president of the regional court has been notified. The costs of this type of mediation are covered by the public administration authority.⁴⁴

Importantly, in horizontal mediation, the mediator does not need to have professional qualifications; the mediator is only required to have full legal capacity and enjoy full public rights (Article 96f § 1 of the Code of Administrative Procedure). Other and stricter requirements regarding the mediator have been laid down for vertical mediation, where the mediator can only be a person named on the list of permanent mediators or a list of institutions and persons authorised to provide mediation services, kept by the president of the regional court or a list kept by a non-governmental organisation or a higher education institution of which the president of the regional court has been notified (Article 96f § 2 of the Code of Administrative Procedure).⁴⁵

It seems that the legislator, outlining those two variants of mediation, has had in mind two types of situations: those in which the purpose of

⁴³ Hanna Knysiak-Sudyka, „Postępowanie mediacyjne,” in *Ogólne postępowanie administracyjne i jurysdykcyjne*, ed. Hanna Knysiak-Sudyka (Warsaw: Wolters Kluwer Polska, 2021), LEX/el.

⁴⁴ Ibid.

⁴⁵ Dauter-Kozłowska, „Stosowanie mediacji.

mediation is to determine how the case is to be settled by way of an administrative decision (vertical mediation) and those in which mediation leads to a settlement. The assumptions presented above serve the basis for rejecting the scheme in which mediation initiates the investigation proceedings, except for the situation in which mediation has been requested by the party who is the applicant, and the entire evidence necessary to determine the circumstances of the case has been collected by this party and attached to the application instituting the proceedings.⁴⁶

Importantly, mediation may result in diverse outcomes. More precisely, (1) a settlement may be concluded between the parties to the proceedings (though it has to be emphasised that a settlement concluded before a mediator is not the same as a settlement concluded before a public administration body and with its participation, cf. Article 114 et seq. of the Code of Administrative Procedure); (2) a party may withdraw or modify its application/request; (3) a party may withdraw the appeal lodged or ultimately decide not to lodge it; finally, (4) the case may be settled by way of an administrative decision, and a successful mediation will mean that this decision has been accepted by the parties and will not be appealed to a provincial administrative court.⁴⁷

If as a result of mediation parties decide to settle the case within the limits of applicable law, the public administration authority settles the case in accordance with this decision as stated in the mediation session report. In the event the objectives of mediation are not achieved within the fixed time limit, the public administration authority issues a decision on the termination of mediation and settles the matter by way of an administrative decision.⁴⁸ Even if no settlement is reached, mediation in administrative proceedings ensures – if this is possible at all – that the party has a greater influence on the content of the administrative decision, and may thus be a good instrument for protecting the rights of the party.⁴⁹ It should be emphasised that the legislative process of developing new, hybrid forms of

⁴⁶ Klonowski, „Charakter administracyjnej sprawy,” LEX/el.

⁴⁷ Dauter-Kozłowska, „Stosowanie mediacji.

⁴⁸ Paweł Rochowicz, „Kłapa mediacji, ale uproszczenia działają – resort rozwoju ocenia wprowadzone procedury”, accessed March 21, 2023, <https://www.prawo.pl/samorzad/uproszczenia-procedur-administracyjnych-nie-zawsze-dzialaja,516368.html>.

⁴⁹ Knysiak-Sudyka, „Postępowanie mediacyjne,” LEX/el.

legal action to be undertaken by the public administration is visibly underway. One can observe similarities to legal forms of a private nature.⁵⁰

6. Conclusion

The analysis carried out in this paper leads to the conclusion that mediation is one of the forms of communication within the framework of the public administration. This is supported, among others, by the fact that the standards of proper communication are based on the principles that are applicable to mediation. Although the position of the doctrine on the use of mediation in the administrative proceedings in Poland is not clear-cut, models of other countries provide evidence for the feasibility of applying this process. Mediation should become an instrument that will allow for an amicable settlement of a dispute between an individual and the public administration. As already indicated, the objective of mediation is to bring the public administration closer to the civil society and to ensure that relations under the administrative law are shaped in a way that increases the influence of the parties to the proceedings on their cases. The active role of citizens is one of the foci of changes in the provisions of the systemic administrative law, such as the implementation of the institution of legal forms of public participation. In this light, it seems that the idea of mediation in the administrative proceedings should be strongly promoted. However, this requires a change in the approach to the formalised procedure of the administrative proceedings since mediation is an instrument for the implementation of the principle provided for in Article 13 of the Code of Administrative Procedure. The positive aspects of mediation demonstrated in this study indicate that mediation helps ensure that relations under the administrative law are shaped in a way that increases the influence of the parties on their own affairs as well as matters important to the public. Like any legal institution, mediation is not free from flaws. There are categories of administrative cases in which mediation is doomed to failure with regard to the objectives provided for in Article 13 and 96a § 3 of the Code of Administrative Procedure – such cases do not have the potential for mediation. It can therefore

⁵⁰ Paulina Bieś-Srokosz and Patryk Błasiak, „Ugoda administracyjna w świetle nowelizacji Kodeksu postępowania administracyjnego. Refleksje na temat konsensualnej formy działania w administracji publicznej,” *Przegląd Prawa Publicznego*, no. 6 (2018): 104.

be concluded that the administrative mediation can be used primarily for the administrative cases aimed at establishing what specific rights or obligations an individual or individuals have. In this regard, attention can also be drawn to the provisions governing mediation under the private law, which could constitute a kind of a model for the mediation proceedings. In the context of communication, solutions should also be sought to popularise the use of mediation and change the approach of the administrative authorities to this institution. There is a growing need for educating the public and encouraging citizens to get involved in their disputes and try to resolve them amicably. Another challenge arises from the response to the changes in the surrounding environment and the new developments affecting this process, such as the use of means of remote communication or the use of artificial intelligence.

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