

PARTICIPATION OF A PARTY TO THE ADMINISTRATIVE PROCEEDINGS IN THE ISSUING OF AN ADMINISTRATIVE DECISION

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Abstract. The model of jurisdictional procedure created by the provisions of the Code of Administrative Proceedings is accused of being inadequate for the implementation of certain tasks set for the modern public administration. In particular, it is noticed that the code solutions favour the abuse of strictly perceived power when considering and settling administrative matters. The legislator's reaction to the thus diagnosed dysfunctionality in activities of public administration authorities is an attempt to remodel the administrative procedure in order to guarantee a more partnership-based approach of the administration to the citizens. The postulate of "partnership administration" in administrative procedure may be realised first of all by strengthening the guarantee of party's participation in proceedings. This participation should be understood as a possibility of influencing the course of the process by the party. The research undertaken in this article focuses on the issues of character, admissible scope, degree of intensity and legal consequences of this influence in the light of new normative solutions. Influence on the course of proceedings and settling the case will be different depending on the stage at which the procedural actions are taken. In the most intensive way a party may influence the content of the resolution of the case by participating in the activities of taking evidence. Only in this sense it is possible to speak of participation in the creation of a decision. The participation of a party to the administrative proceedings in the issuance of an administrative decision should not be identified with the participation in the phase when the authority takes a decision and puts it in the form of a formalised judgment.

Keywords: administrative proceedings, party of the proceedings, administrative decision, procedural guarantees

INTRODUCTION

One of the main reasons for the amendment of the Code of Administrative Proceedings,¹ made in 2017,² was to introduce into the administrative proce-

¹ Act of 14 June 1960, the Code of Administrative Proceedings, Journal of Laws of 2021, item 735 as amended [hereinafter: the Code].

² Act of 7 April 2017 amending the Act – the Code of Administrative Proceedings and some other acts, Journal of Laws item 935.

dure such legal-procedural solutions that should contribute to “a more partnership approach of the administration to citizens,” in particular by providing principles and detailed regulations allowing for a more effective implementation of the procedural directive of protecting citizens’ trust in public authority. “Excessive formalism and rigorously considered authority in resolving administrative matters” were at the same time recognised by the drafters of the new regulations as dysfunctions of administrative procedure.³ It is not difficult to notice that the weakness of the administrative process were found in its model assumptions. One of those assumptions is procedural formalism, which is an immanent attribute of every legal procedure, and the other is the exercise of procedural authority, which determines the nature of the relationship between the public administration authority and the party to administrative proceedings conducted in an individual case.

The research undertaken in the article aims at determining whether and to what extent the procedural solutions of the Code actually implement the postulate of “partner administration” in the use of legal and procedural tools by the subjects of administrative proceedings. The point of reference for the conducted analysis is the general principle of active participation of a party in administrative proceedings, perceived as a structural principle of these proceedings, constituting the implementation of the constitutional right to a trial [Adamiak 2012, 72]. There is no doubt that administrative decisions are created with more or less intensive participation of their addressees, but it is necessary to consider to what extent a party to administrative proceedings by its actions may influence the course of the proceedings and, consequently, also determine the content of an administrative decision defining its rights or obligations.

1. ADMINISTRATIVE POWER IN THE PROCEDURAL SPHERE

Administrative (public) power is manifested in unilateral and binding creation of a legal situation of an individual by a public administration authority. The source of this authority is the binding force of a legal norm, which determines the obligation of the addressee of an administrative authority’s act to comply with the content of this act and the possibility to enforce it without the necessity of obtaining by the authority a consent to perform the act [Radziewicz 2005, 143]. Among the prerequisites of administrative power the jurisprudence enumerates: 1) the authoritative nature of the concretization of the law made by the public administration authority, 2) the presumption of

³ See Explanatory statement for the draft Act on amending the Code of Administrative Proceedings and some other acts, Sejm of the Republic of Poland, 8th Term, Sejm Paper No. 1183 of 28 December 2016 r, p. 4–5 [hereinafter: Explanatory statement].

the legality of an act of administration, 3) the possibility of using administrative coercion in the event of a voluntary failure to perform the obligations deriving from an act of administration – both a general and an individual act [Chróstlewski 1995, 51; Borkowski 1972, 46, 49].

A special category of administrative power is procedural power. It is derived from a procedural relationship established between a public administration authority and an individual in the course of proceedings whose aim is to concretise individual rights or obligations. The general administrative proceedings regulated by the Code are of the jurisdictional type, which means that administrative power as a determining feature is inherent in the nature and character of the procedural acts undertaken by the public administration body conducting the proceedings. Administrative power, actualizing in the course of proceedings, is characterized both by organizational-technical, orderly and disciplinary procedural acts, as well as by evidential and adjudicatory acts of the public administration authority. The administrative decision that ends the proceedings is an expression of administrative jurisdiction, i.e. a sovereign, unilateral manner of applying administrative law, which consists in “issuing an act concretising the rights or obligations of its addressee” [Zimmermann 1996, 10–11]. Administrative power appears in this case as an inseparable attribute of a judicial form of acting of a public administration authority [Radziewicz 2005, 125–26]. Whereas the unilateral nature of an administrative decision is manifested in the fact that it is a declaration of intent by the authority which, irrespective of any reaction on the part of the addressee, acquires legal force [Starościak 1970, 200].

Nevertheless, in the very construction of administrative power the importance of the subject administered, towards whom the authoritative acts of the administrative authority are directed, is perceived. Administrative power is thus constituted by the temporal succession of acts of will of the parties to an administrative legal relationship, i.e. an act of will of an individual in which a proposal is contained to shape the content of a future substantive legal relationship, and an act of will of an administrative authority which is decisive for the final shape of this relationship. This decisive act of will, creating the content of administrative rights and obligations, is further strengthened by the presumption of legality [Borkowski 1972, 46, 49].

2. NORMATIVE ASSUMPTIONS OF PARTICIPATION OF A PARTY IN ADMINISTRATIVE PROCEEDINGS

The static construction of an administrative case and, consequently, of an administrative proceeding has been shaped as a two-subject structure. One of the subjects of the proceedings is always a public administration authority, equipped with the ability to authoritatively concretise the rights and

obligations set out in legal provisions, and the other one is a party to the proceedings, within the meaning of Article 28 of the Code, basing its legitimacy in legal proceedings on a legal interest, whose rights and obligations are to be authoritatively concretised [Kielkowski 2004, 49–52]. The two-sided nature of the administrative process does not, of course, preclude more than one person from being a party to the proceedings [Skóra 2009, 94]. The subjective scope of the administrative case, and thus the number of parties to the proceedings in this case, are determined by the content of the substantive law provisions, which are the source of the legal interests of the parties. In a situation where the legal interests of the parties to the proceedings are not identical, the public administration authority, entering into an additional role of an “arbitrator,” nevertheless invariably retains its essential function aimed at issuing a ruling on the legal situation of the parties [ibid., 103].

The relations which occur between the public administration authority and the party in the course of the process belong to the dynamic dimension of the administrative proceedings. The content of these relations (interactions) is determined by the norms of administrative proceedings, giving them, in accordance with the requirements of procedural formalism, the form of procedural acts. In a dynamic meaning, administrative proceedings are thus an orderly sequence of procedural acts taken by the subjects of these proceedings for the purpose set out by the law. The proceedings take place within a specific legal framework and in a manner dictated by the logic of procedural acts. Thanks to this the proceedings gain a very important for their participants feature of structural and functional stability. A participant of the proceedings may take actions prescribed by law and exercise procedural rights adequate to the state of the proceedings. Also the authority conducting the proceedings orders its course in accordance with the logic imposed by normative criteria. In particular, when initiating administrative proceedings at the request of a party, the public administration authority to which the application has been submitted shall assess in turn: the capacity to conduct the proceedings, as determined by the provisions on jurisdiction and exclusion from the case, the completeness and formal correctness of the application submitted and, finally, the admissibility of the proceedings, after which, in the event of a positive result of the assessment made, it shall determine the scope of the subject matter of the proceedings and notify all parties of its initiation. A negative result of the assessment in any of its aspects implies the necessity for the authority to take appropriate actions, such as: transferring the application to the competent authority and simultaneously notifying the applicant of this act and its consequences (Article 65 of the Code), returning the application to the applicant (Article 66(3) of the Code), leaving the application unprocessed, after a possible earlier request for rectification of its formal defects (Article 64 of the Code), or refusal to initiate proceedings (Article 61a of the Code). On the other hand,

the applicant is provided by the procedural law with an adequate legal remedy (complaint to an authority of higher level, reminder, complaint to the administrative court), which enables him to react to the action taken by the authority.

Participation of a party in administrative proceedings should obviously not be understood as including it in the subjective structure of the process, but it should be read in a dynamic sense – as granting to the party the status of a subject, which by its actions may influence the course of the process. However, the questions about the nature, admissible scope, intensity and legal effects of this influence remain open.

The right of a party to participate actively in administrative proceedings has been raised in Article 10 of the Code to the rank of a general principle of proceedings. The general principles of administrative proceedings, regulated in the provisions of Articles 6 to 16 of the Code, construct – in a static dimension – a procedural model, indicating the values to which the legislator refers when creating an administrative procedure of the jurisdictional type. The general principle of active participation of a party in the proceedings originates “from the rational conviction that no one is able to watch over the proper settlement of cases in the proceedings like the one to whom the case pertains” [Służewski 1982, 36]. However, this principle, like other procedural principles, must be actualised and realised in the dynamics of the proceedings, through the procedural acts undertaken by the subjects of the proceedings.

It should first of all be assumed that the party’s influence on the course of the proceedings and the resolution of the case will vary depending on the stage at which the procedural actions are taken. At the stage of initiation of the proceedings, the scope of the administrative matter constituting the subject matter of the proceedings is determined. “In proceedings initiated at the request of a party, the substance of the decision will depend on the content of the request, taking into account the peremptory norms of substantive administrative law” [Knysiak–Molczyk 2004, 55]. Participation of a party in the evidentiary stage of the procedure which precedes issuing of the decision shall be regarded as “participation in the decision-making process” through the joint finding and evaluation with the authority of the facts relevant to the case [Iserzon 1970, 58]. The participation of a party in the proceedings is even considered to be “the right to determine, together with the authority, the course of the proceedings and their outcome – the decision” [Janowicz 1999, 86].

3. IMPLEMENTATION OF THE PROCEDURAL STANDARD OF PARTICIPATION OF A PARTY IN ADMINISTRATIVE PROCEEDINGS

The principle of active participation of a party in administrative proceedings was formulated in Article 10(1) of the Code as procedural obligations whose addressee is the public administration authority conducting proceedings

in an individual case. The first of them is the obligation to ensure active participation of a party at each stage of proceedings, the second – the obligation to enable a party to express its opinion about collected evidence and materials and submitted demands. The way the normative formula of the principle in question was articulated means that the right to active participation of the party in the proceedings should be reconstructed as a reflexive right, correlated with the procedural obligations of the authority towards the party. Thus, a party has, firstly, the right to active participation at each stage of the administrative proceedings – from the moment the proceedings are initiated until their completion with an administrative decision, within the scope and under the principles set forth provisions of the code regulating the course of proceedings [Adamiak 2012, 72]. Second, the general rule grants a party the right to be heard on the results of the evidence, the facts established, the material gathered and the demands made.

The general principle formula expressed in Article 10(1) of the Code cannot be read as an entitlement to license an active participation of a party in the proceedings by a public administration authority. Instead, the authority is obliged to create conditions in the course of the proceedings to guarantee the party the possibility to participate in the proceedings to the extent expected by the party, within the limits set by the provisions of procedural law. In particular, the authority is not authorised to assess whether the participation of a party in a procedural action is necessary in the situation when the party expresses its will to participate in that action. This does not mean, however, that the party should demonstrate sufficient activity to ensure its active participation in the proceedings. Such an interpretation of Article 10(1) of the Code would be contrary to the content of the obligations of the authority as set forth in this provision.⁴ The consequence of violation by a public administration authority of the general principle of active participation of a party in proceedings is a qualified defectiveness of the administrative proceedings, which constitutes grounds for its resumption, pursuant to Article 145(1)(4) of the Code.

On the basis of the code provisions establishing procedural guarantees of a party's participation in proceedings, two levels of functioning and implementation of the principle in question can be decoded.

Firstly, the standard of active participation of a party in the proceedings is based on the right to information about the administrative proceedings conducted in a given case and about its course. The condition of active participation in the proceedings is the knowledge of the activities undertaken therein, implying the possibility of controlling its course. In this sense, the obligations of the public administration authority related to ensuring a party's participation in the proceedings are inseparably connected with its procedural

⁴ See judgment of the Voivodship Administrative Court in Warsaw of 30 September 2004, ref. no. I SA/Wa 149/03, in: Central Database of Administrative Court Decisions [hereinafter: CDACD].

information obligations. Pursuant to the general principle of information laid down in Article 9 of the Code, public administration authorities are obliged to duly and comprehensively inform parties about factual and legal circumstances which may affect the establishment of rights and obligations being the subject matter of administrative proceedings, as well as to ensure that parties and other persons participating in the proceedings do not suffer any losses due to ignorance of the law. Therefore, the authority conducting the proceedings is obliged to provide the parties with any information connected with the settlement of an administrative case. This concerns both the information on substantive and procedural law provisions, which result in the rights and obligations of the parties influencing the outcome of the case, as well as the explanations on the manner of interpretation of the content of the binding provisions and guidelines on the manner of proceeding that will enable to prevent damages that may arise due to ignorance of the provisions and unawareness of the consequences of their violation.

Secondly, the party's right to be actively involved in the proceedings can be decoded in the content of the right to be heard (*audi et alteram partem*), which in the broadest sense includes the initiative of taking evidence, the right to request information, to give explanations in the course of taking evidence, to ask questions to the authority and other participants in the proceedings, to make statements, to express an opinion on the evidence taken and on the totality of the evidence. "In particular, the right of a party to be heard is exposed as a highly emotionally charged right, related to the naturally rooted need to speak, justify, prove, which is to be matched by the obligation to hear, consider, respond. This right is a procedural guarantee of the legal security of the individual, of the sense of trust in the state and the law, of the protection of the individual against the omnipotence of power and of the respect of his dignity in the course of proceedings" [Gajda–Durlik 2019, 98]. In this aspect of the implementation of the right to participate in the proceedings, support should be sought for the postulate of co-administration of the administrative authority and the individual (party to the proceedings), as well as for the criteria for clearly distinguishing the exercise of public power by the authority from the arbitrary conduct of the public authority.

4. STRENGTHENING THE PROCEDURAL GUARANTEES ON THE RIGHT OF THE PARTY TO PARTICIPATE IN ADMINISTRATIVE PROCEEDINGS

In the most intensive way a party may influence the content of the future resolution of the case by participating in the activities of taking evidence. "A party's participation in the taking of evidence is significant not only from the standpoint of his individual interest, but also from that of the general

interest. A party is by nature well informed about the facts of his case, and since he is also in a position to know the positive law to the extent necessary for the case, he is able to think thoroughly and assess the facts from the legal standpoint. By expressing its views in this regard, a party can assist the authority in arriving at a decision based on facts that are well established and well judged in law” [Iserzon 1970, 58].

The provisions of the Code of Administrative Proceedings regulating the course of evidence proceedings were supplemented under the 2017 amendment, in particular by the provision of Article 79a, which provides in para. 1 that in proceedings initiated at the request of a party, when informing about the opportunity to comment on the collected evidence and materials and the submitted demands, the public administration authority is obliged to indicate the premises dependent on the party that have not been fulfilled or demonstrated as at the date of sending the information, which may result in issuing a decision inconsistent with the party’s demand. The purpose of the adopted solution, as it results from the explanatory statement of the draft amendment, is to “prevent situations in which a party has additional evidence of circumstances essential for proving the legitimacy of its request or can easily obtain it, but due to lack of appropriate knowledge about the necessary evidence or the way in which previously submitted evidence was assessed – does not take advantage of such an opportunity. In such cases, the party will be surprised by a negative resolution of the case and will be forced to challenge the decision and to present this additional evidence only at the appeal stage. In this context, it is insufficient to inform the party about the possibility to become acquainted with the case file and to express its opinion on the collected evidence and materials as well as its demands.”⁵

The obligation of the public administration authority provided for in Article 79a of the Code was harmonised with the obligation laid down in Article 10(1) of the Code to give the party an opportunity to express its opinion, before a decision is issued, on the collected evidence and materials and its demands.

The provision of Article 10(1) of the Code creates the procedural right of a party to express its position with respect to all evidence, materials and demands included in the case file, and the effective implementation of this right requires that the authority inform the party of its rights, set an appropriate time limit for reading the case file and for submitting a final statement, and refrain from issuing a decision until the party submits its statement within the set time limit [Dawidowicz 1983, 93–94]. The formal connection of the obligation provided for in Article 79a of the Code with the obligation laid down in Article 10(1) of the Code is expressed by simultaneous fulfilment of both these obligations – in one notification addressed to the party, and also by

⁵ Explanatory statement, p. 28.

establishing a single deadline for the party to take a position both in relation to the collected evidence, and in relation to the information of the authority formulated pursuant to Article 79a of the Code. Moreover, the provisions of Article 10(2–3) of the Code, providing for the possibility to abandon its implementation in cases whose resolution is urgent due to the protection of human life or health or to prevent the threat of irreparable material damage, are also applicable with regard to the obligation established in Article 79a of the Code.

The provision of Article 79a of the Code provides for concretisation and supplementation of the content of the notification addressed to the party after the completion of the investigation procedure and before the public administration authority issues a decision. The implementation of this additional obligation of the authority consists in indicating to the party the premises, dependent on it and based on the provisions of substantive law, which were not fulfilled or demonstrated as at the date of sending the information, which may result, in particular, in issuing a decision refusing the party's request or accepting it only in part. In the light of that provision, it is therefore not sufficient to set out in general terms the statutory grounds for granting the request, but it is necessary to set out the specific conditions which, given the circumstances of the case, must be fulfilled or demonstrated in order for the request to be granted.⁶

As a result of fulfilling the obligation provided for in Article 79a of the Code, a party to the proceedings obtains knowledge about how the public administration authority assesses evidence collected in the case. In other words, the authority presents the party with a preliminary assessment of the collected evidence in terms of the possibility to accept the request. The party is given the opportunity not only to comment on the results of the evidence-gathering procedure, but also to influence the way the case is decided by the authority and the content of the administrative decision, in particular by supplementing the evidence, submitting additional explanations or correcting the request. Provision 79a of the Code should therefore be seen in terms of a procedural guarantee – as a directive on how to implement the party's right to active participation in the proceedings by strengthening the party's ability to influence the content of the decision at the last procedural stage before the authority takes adjudicatory actions closing the proceedings. It cannot, however, be assumed that a party thereby obtains an authorisation to participate with the authority in issuing an administrative act, despite the fact that activities at the decision-making stage of the proceedings, as a result of fulfilment of the obligation under Article 79a of the Code, are to a certain extent included in the instructional stage of the process [Wegner 2019, 468].

⁶ See judgment of the Supreme Administrative Court of 1 October 2019, ref. no. II OSK 985/19, CDACD.

The judicature also emphasises another effect of Article 79a of the Code, deriving from this provision an argument in favour of expecting a broader evidential initiative from a party in proceedings initiated upon request.⁷ In those proceedings in which, in view of their subject-matter, the possibility for the administrative authority to independently determine the facts of the case remains significantly limited, it is established in the judicature that the evidential initiative should be demonstrated by the party in its own interest.⁸ A party to the proceedings may not, however, be obliged to undertake actions indicated to it, pursuant to Article 79a of the Code, by the authority, which may influence the way the case is settled. If the party does not react, a decision will be issued on the basis of evidence and materials held by the authority. Such a decision may then be subject to instance and administrative court control. If the party submits additional evidence in order to obtain a resolution consistent with its demand, the public administration authority will have to assess this evidence comprehensively, pursuant to Article 80 of the Code, i.e. in accordance with the principle of free evaluation of evidence. When issuing a decision on the basis of evidence supplemented by a party in accordance with the information presented to it about the state of the case, the authority should also take into account the directives following from the general principle of proceedings provided for in Article 8 of the Code, and in particular – the requirement to protect a party to proceedings acting in trust for the public administration authority.

CONCLUSIONS

The postulate of “partnership administration” in administrative procedure may be implemented first of all by strengthening the guarantees of the party’s participation in the procedure. Of particular importance for the implementation of this postulate is the standard of procedural information transfer between the party and the authority conducting the proceedings. Exercising the right to be heard must assume full knowledge of the participant of the proceedings about the state of the process and legal effects of actions taken by him. The participation of a party to the administrative proceedings in the issuance of an administrative decision should not be identified with the participation in the phase when the authority takes a decision and puts it in the form of a formalised judgment. At this stage of the procedure the party’s possibilities of influencing the body are not founded in the provisions of procedural law.

⁷ See judgment of the Supreme Administrative Court of 16 May 2019, ref. no. I OSK 1901/17, CDACD.

⁸ See judgment of the Supreme Administrative Court of 15 December 2017, ref. no. II OSK 603/16, CDACD.

The rights and obligations of the parties towards the State are decided by the public administration authority with administrative power, and thus only the body “decides” on the content of the administrative-legal relationship created by the decision. Hence, no procedural guarantees of the party’s participation in the proceedings can go as far as allowing the party to formulate the content of the act of jurisdiction [Zimmermann 2017, 60]. Involving the party in the decision-making activities of the proceedings would mean a change of the procedural paradigm in public administration. Nevertheless, procedural power should not be equated with arbitrariness in the actions of a public authority. Therefore, in the system of procedural law there is a need for guarantees balancing the procedural position of the authority conducting the proceedings and the individual whose rights and obligations the authority decides on, allowing for co-shaping of the ruling as regards the findings of facts of the case, but preserving separate procedural roles of the subjects of the proceedings.

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