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GENERAL DESCRIPTION OF DISPUTE SETTLEMENT PROCEDURE INVOLVING A JUDGE AS JUDICIAL PROCEDURE IN ADMINISTRATIVE PROCEEDINGS

Abstract. ***Purpose***. The purpose of the article is determined by the poor study of judicial procedures in administrative proceedings aimed at settling a pre-trial dispute and identify the features of one of these procedures, namely, dispute settlement involving a judge. ***Results.*** The article emphasises that the functioning of the pre-trial dispute settlement mechanism is one of the areas of heated debate in the field of judicial proceedings, and yet it definitely has more advantages than disadvantages. Meanwhile, the main disadvantage of the introduction of this mechanism is the poor study of its essence, principles and implementation, i.e., the procedure for passing through specific stages and phases of such judicial procedures. ***Conclusions.*** The author provides a general description of the dispute settlement procedure involving administrative proceedings by identifying a number of specific features of the latter: It is conducted outside the court proceedings; It is confidential; It is initiated by two parties to the dispute (the plaintiff and the defendant); It has restrictions on its conduct, i.e., it is impossible to conduct it in the following categories of cases: 1) appeals against legal regulations; against the managerial process and managerial decisions; 2) organisation and conduct of elections; 3) activities of election and referendum commissions, political parties and blocs, termination of powers of MPs; 4) restriction of some constitutional rights of citizens (the right to peaceful assembly and the right to freedom of movement); 5) ensuring the defence needs of the state; 6) at the request of state authorities (tax and customs authorities, the Security Service of Ukraine), as well as standard cases; it is held within a reasonable period of time, but not more than 30 days; implemented in the form of in-person and remote meetings (joint and/or closed); consists of three stages: 1) commencement of the procedure and holding a joint meeting; 2) settlement of the dispute by holding joint and closed meetings; 3) conclusion of a settlement agreement by the parties and its approval by the court or termination of such procedure; this procedure is not documented; cannot be repeated; results in suspension of the proceedings, which can be resumed only in case of termination of this procedure under the circumstances established by the CAPU.

Key words: judicial procedures, dispute settlement involving a judge, administrative proceedings, settlement agreement, plaintiff, defendant, court ruling.

1. Introduction

The adoption of the draft law on amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legal regulations resulted in (Draft Law of Ukraine on Amendments to the Economic Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legal regulations, 2017) a number of amendments made to procedural legal regulations, in particular the CAPU, and establishment of the institution of dispute settlement involving a judge. It should be emphasised that this institution is not the only way to settle a dispute before it is directly considered in court, as the systematic interpretation of the CAPU provisions allows expanding their list, and in particular, supplementing it with: mediation (Chapter 4, Article 47, part 5, which also sets out the procedure for settling a dispute involving a judge); conciliation; withdrawal of the claim by the plaintiff (Chapter 5) (Code of Administrative Procedure of Ukraine, 2005). Such legislator's perspective is fully con-

sistent with Recommendation No. R (86) 12 of the Committee of Ministers of the Council of Europe to Member States on measures to prevent and reduce excessive workload in the courts, which emphasises the need to promote reconciliation of the parties "both outside the judicial system and before or during court proceedings. To this end, the following measures could be considered: a) to provide, together with appropriate incentives, for conciliation procedures prior to court proceedings or other means of settling disputes outside of court proceedings; b) to impose on judges, as one of their main tasks, the obligation to promote the amicable settlement of disputes by all possible means and on all relevant issues before the commencement of court proceedings in a case or at any stage of such proceedings" (Recommendation № R (86) 12 of the Committee of Ministers of the Council of Europe to member states on measures to prevent and reduce excessive workload in the courts, 1986).

The functioning of the pre-trial dispute settlement mechanism is one of the areas of heated debate around the judiciary, while they clearly have more advantages than disadvantages, including the following: "simplified procedure and absence of the element of proof; lack of formal rules of conduct; free choice of an intermediary (arbitrator, mediator, consultant, etc.); confidentiality and secrecy of dispute settlement; possibility of personal control over the course of the procedure; unlimited time; private (non-state) nature" (Bozhuk, Diachenko, 2019, p. 12). However, the main drawback of the introduction of this mechanism is the lack of research into its essence, principles and implementation, i.e., the procedure for passing through specific stages and phases of such judicial procedures. Therefore, the objective of this study is to address the gap described above by exhaustively clarification and an objective description of judicial procedures in administrative proceedings, in particular, the dispute settlement procedure involving a judge aimed at settling a dispute before a trial, and outlining their specifics, which are due to the existence of a number of differences between these judicial procedures and the trial on the merits.

Nowadays, in the science of administrative law, few studies are focused on judicial procedures for pre-trial dispute settlement in general, and dispute settlement involving a judge, in particular. Among the scientific works that form the basis of this study, we should mention the works considering: judicial practice of applying alternative dispute settlement methods (I.V. Bozhuk, S.V. Diachenko); mediation (E.V. Kataieva), and the specifics of dispute settlement involving a judge (S.V. Kivalov, A.O. Lesko, L.D. Romanadze, R.Yu. Khanyk-Pospolitak).

The purpose of the article is determined by the poor study of judicial procedures in administrative proceedings aimed at settling a pre-trial dispute and is to identify the features of one of these procedures, namely, dispute settlement involving a judge.

2. Dispute settlement involving a judge as a judicial procedure in administrative proceedings

The differences between court proceedings and judicial procedures in administrative proceedings aimed at settling a dispute prior to trial are described in detail in the study by E.V. Kataieva, despite the fact that the priority area of scientific research was the mediation procedure, we believe it is possible to extend them to other procedures similar in nature: "1) litigation can be initiated against the will of one of the parties, the mediation procedure is voluntary; 2) a judge is appointed, a mediator is elected; 3) a court decision is made in accordance with the letter of the law, a mediation decision is made allowing for the interests of the parties, but within the law; 4) the court has full powers, the mediator has no full powers and only facilitates the development of a decision; 5) the judicial procedure is long and formalised, the mediation procedure is accelerated and informal; 6) publicity is the feature of the judicial procedure, confidentiality is one of the mediation process; 7) competitiveness of the parties is present in the court process, cooperation is characteristic of the parties to the mediation" (Kataieva, 2013, p. 160). The above list characterises judicial procedures in administrative proceedings aimed at settling a dispute prior to trial as a process characterised by discretion, since the parties to a court dispute have the opportunity to act at their own discretion to reach an agreement. In addition, each of these judicial procedures, as we have repeatedly emphasised, has its own alterations, which cannot be studied without clarifying the content of the procedures for settling a dispute before the consideration of cases on the merits.

According to A.O. Lesko, dispute settlement involving a judge "relieves the courts, which are currently overloaded, facilitates resolution of disputes as soon as possible, and also serves to save procedural costs and sometimes reduce the cost of legal assistance" (Lesko, 2019, p. 54). Following I.V. Bozhuk and S.V. Diachenko, "the essence of the procedure for dispute settlement involving a judge is communication between the parties and the judge to obtain clarification and additional information in order to assess the case by the parties" (Bozhuk, Diachenko, 2019, p. 12).

The decision on the dispute settlement procedure involving a judge is made by the judge during the preparatory hearing (Code of Administrative Procedure of Ukraine 2005) only with the consent of the parties to the dispute, as a result of which the relevant decision is made and the proceedings are suspended (the CAPU, Article 185, part 1) (Code of Administrative Procedure of Ukraine, 2005). Moreover, the will of the claimant and the defendant to resolve the dispute before the trial is not the only condition for the implementation of this procedure. Instead, the restrictions on its implementation relate to certain articles of Chapter 11 of Section II of the CAPU, as well as to typical cases. In other words, "administrative cases in which the defendant is the same public authority (its separate structural subdivisions), the dispute in which arose on similar grounds, in relations governed by the same rules of law, and in which the plaintiffs have made similar claims" (Code of Administrative Procedure of Ukraine, 2005). In addition, a systematic interpretation of the articles of Chapter 11 of Section II of the CASU (Code of Administrative Procedure of Ukraine 2005) leads to the conclusion that such a procedure is impossible in administrative cases concerning: appeals against legal regulations; managerial decisions (including decisions to place administrative liability), actions or omissions, including those documented by the bodies of the head of state, state authorities and local self-government, their officials, including those vested with state powers, political parties and blocs, election and referendum commissions (Articles 264-266-1, 273-276, 286, 287, 289-1); the electoral process (Article 277); restrictions and interference with the exercise of the right of citizens to peaceful assembly (Articles 280, 281); the right to travel outside the territory of the state (Article 289-2); meeting the needs of the defence sector of Ukraine (Article 282); appeals of public authorities (tax and customs authorities, the Security Service of Ukraine) (Articles 283, 284); early termination of the powers of a people's deputy of Ukraine (Article 285); forced return or expulsion of foreigners and stateless persons, as well as their detention (Articles 288, 289 of the CAPU).

Therefore, it is impossible to conduct a dispute settlement procedure involving a judge within administrative proceedings in the following categories of cases: 1) appeals against legal regulations; the managerial process and managerial decisions; 2) the electoral process; 3) the activities of election and referendum commissions, political parties and blocs, termination of powers of people's deputies; 4) restrictions on certain constitutional rights of citizens (the right to peaceful assembly and freedom of movement is enshrined in Articles 39 and 33 of the Constitution of Ukraine, respectively); 5) ensuring the country's defence needs; 6) at the request of public authorities (tax and customs authorities, the Security Service of Ukraine). All of the above categories of administrative cases are of crucial importance for the functioning of the state, as they relate to the social, administrative, political sectors, etc., as well as to preventing violations of citizens' rights, including through unlawful actions by state and local authorities and their officials. Given the strategic importance of the quality and outcome of such cases, it is necessary to state the objective impossibility of any negotiations on the issues in question.

Under the provisions of the CAPU, Article 185, part 3, in case of failure to reach an agreement between the parties to the case, the dispute settlement procedure involving a judge is not allowed to be repeated. This can be explained by the fact that the procedure, which is supposed to simplify administrative proceedings, may become a tool for delaying the timeframe for consideration of the case. In addition, this procedure is not possible even if one of the parties to the proceedings is a third party that makes independent claims regarding the subject matter of the dispute. The fact is that satisfaction of the third party's claims automatically causes damages to both the plaintiff and the defendant.

3. Particularities of dispute settlement involving a judge as a judicial procedure in administrative proceedings

Dispute settlement procedures involving a judge are implemented in the form of an in-person or remote meeting, which may be of two types: joint and/or closed (the CAPU, Article 186, part 1). Moreover, two types of meetings may be used simultaneously within the same procedure, since each of them has its own goals and objectives. Thus, a joint meeting is held involving the parties to the dispute, their representatives and the judge, while a closed meeting is a kind of "one-on-one" meeting between one of the parties to the dispute and the judge, initiated by the latter. Therefore, it is virtually impossible to reach a consensus between the parties without both public discussions of the dispute and private conversations between the judge and the parties to clarify their positions and hold additional consultations. Closed meetings provide an opportunity to formulate clear positions of the parties on fundamental issues that need to be resolved to settle the dispute, while joint meetings allow to clarify the essence of the dispute, finally agree on the positions of the parties and reach a con-

sensus. It is clear that such discussions should be thorough, and their conduct requires the judge to engage in a consistent dialogue, demonstrate flexibility and communication skills. As a rule, holding such consultations requires certain preparation on the part of the judge, therefore, as part of the dispute settlement procedure, the judge is allowed to announce breaks, in particular, to optimise and improve the quality of the meetings.

The timeframe for the dispute settlement procedure involving a judge is clearly established by the administrative procedure law. According to the provisions of Article 187 of the CAPU, this procedure should be carried out within a reasonable time, which depends on the specific circumstances of the dispute, the behaviour of the parties, and their real desire for the speedy resolution of the case, however, it may not exceed 30 days, and may not be extended. Certain procedural issues related to dispute settlement involving a judge are regulated by Articles 186 and 188 of the CAPU, the analysis thereof enables to present this procedure as a system consisting of the following stages:

1) commencement of the procedure and a joint meeting, during which the judge should clearly define the purpose and order of the procedure, as well as explain to the parties their rights and obligations;

2) dispute settlement, which is carried out through both joint and closed meetings, which have fundamentally different purposes: "during joint meetings, the judge establishes the grounds and subject matter of the claim, grounds for objections, explains to the parties the subject matter of proof for the category of dispute under consideration, invites the parties to submit proposals for the amicable settlement of the dispute and performs other actions aimed at the amicable settlement of the dispute by the parties" (Code of Administrative Procedure of Ukraine, 2005), instead, closed meetings are necessary for a more detailed discussion of issues related to the subject matter of the dispute, review of court practice in similar cases, discussion of the prospects for dispute settlement and specific ways to resolve it;

3) the parties enter into a settlement agreement and apply to the court for its approval by the court or terminate such procedure at the initiative of one of the parties or directly by the judge and issue a relevant ruling that is not subject to appeal.

Article 188 of the CAPU provides for the following grounds for termination of dispute settlement involving a judge: reaching reconciliation by the parties to the dispute; submission by one of the parties of an application for termination of the procedure; expiration of the procedure; in case of objective delay of the procedure by the party(ies) to the dispute, on the initiative of the judge; "the plaintiff's application to the court to leave the claim without consideration or in case the plaintiff withdraws the claim or the defendant recognises the claim" (Code of Administrative Procedure of Ukraine, 2005). If such procedure is terminated and the case is resumed in court, the merits of the case will be decided in a different court to ensure a fair and impartial decision.

It should be emphasised that this procedure is characterised by absolute confidentiality, therefore, the process of holding meetings is not documented (minutes are not drawn up), nor is their audio or video recording carried out, neither by court employees, nor by the parties to the dispute, nor by other participants in the meetings. Regarding such exclusive privacy, S.V. Kivalov argues debatably, in our opinion: "dispute settlement involving a judge is based on fundamentally different principles than those enshrined in the Code of Administrative Procedure of Ukraine (this is most evident in connection with the principles of publicity and openness of the trial and its full recording by technical means, which directly contradicts the requirements of confidentiality in closed meetings)" (Kivalov, 2014, p. 5). This position looks ambiguous, because: firstly, a closed meeting during dispute settlement involving a judge is similar in its legal nature to a closed court session, which is directly provided for within the principle of publicity (the CAPU, Article 10, para. 8); secondly, dispute settlement involving a judge is not a trial, and therefore it is hardly correct to extrapolate the principles of administrative proceedings, including the principles of publicity and openness, to this procedure.

Regarding the implementation of the dispute settlement procedure involving a judge, some results of the study by R.Yu. Khanyk-Pospolitak are worthy of attention, as she argues that "the use of the institution from 2018 to 2021 is quite stable. In administrative proceedings, unlike in economic and civil proceedings, this institution is almost never used. Moreover, in economic proceedings, the number of cases of application of the institution has been recently decreased, while in civil proceedings, on the contrary, has increased" (Khanyk-Pospolitak, 2021, p. 90). In our opinion, the unpopularity of such a procedure in administrative proceedings is primarily due to the difficulty of combining imperative and discretionary regulatory methods, which are the basis of administrative proceedings. This is because the very procedure of dispute settlement involving a judge implies reach-

ing an agreement between the parties at their own discretion, rather than a clear inevitable effect of the law during the court consideration of the dispute. The existence of a dialogue between the parties to a dispute is more typical of the discretionary method of a regulatory mechanism prevailing in civil and economic proceedings, while administrative proceedings are based on imperative methods of a regulatory mechanism, as well as the conduct of at least one of the parties to the dispute, an entity vested with state power. This significantly complicates the application of such judicial procedure as dispute settlement involving a judge, which is certainly dispositive.

This procedure in administrative proceedings is unpopular due not only to its dispositive legal nature, which is contrary to the principles of administrative law and justice, but also to a number of procedural problems. For example, L.D. Romanadze identifies the main problems of introduction and development of the dispute settlement procedure involving a judge as follows: lack of specific skills of judges related to dispute settlement through communication skills; lack of motivation of judges to implement such a procedure in combination with a high workload; failure to consider the personal qualities of judges conducting such procedures, because they should be calm, balanced, sociable, etc. (Romanadze, 2017, p. 2).

We believe that most of these problems can be solved at the stage of training of professional courts, as well as during their professional development, by introducing disciplines that will help them acquire knowledge, skills and abilities in the field of effective communication and develop personal qualities necessary for the role of conflict manager. Moreover, it is advisable to introduce mandatory use of the dispute settlement procedure involving a judge in certain categories of administrative cases. In this case, the goals of introducing a mechanism for settling disputes prior to court proceedings, including dispute settlement involving the judge (reducing the workload of judges, shortening the time for consideration of administrative cases, increasing the efficiency of administrative justice, etc.) will be achieved.

4. Conclusions

To sum up, the dispute settlement procedure involving a judge can be characterised as follows:

– it is carried out outside the court proceedings;

– it is confidential;

– it is initiated by two parties to the dispute (plaintiff and defendant);

– it has restrictions on its conduct, i.e., it is impossible in the following categories of cases: 1) appeals against legal regulations; the managerial process and managerial decisions; 2) organisation and conduct of elections; 3) activities of election and referendum commissions, political parties and blocs, termination of powers of people's deputies; 4) restrictions on certain constitutional rights of citizens (the right to peaceful assembly and the right to freedom of movement); 5) ensuring the defence needs of the state; 6) at the request of state authorities (tax and customs authorities, the Security Service of Ukraine), as well as standard cases;

– it is held within a reasonable period of time, but not more than 30 days;

– it is implemented in the form of in-person and remote meetings (joint and/or closed);

– it consists of three stages: 1) commencement of the procedure and a joint meeting; 2) resolution of the dispute through joint and closed meetings; 3) conclusion of a settlement agreement by the parties and approval by the court or termination of such procedure;

– this procedure is not documented;

– it cannot be repeated;

– it is a consequence of suspension of proceedings, which may be resumed only in case of termination of this procedure under the circumstances established by the CAPU.

Moreover, clarification of the content of the dispute settlement procedure involving a judge does not enable to form an idea of judicial procedures in administrative proceedings aimed at settling a pre-trial dispute, since this procedure is only one of them. Therefore, as part of further scientific research, we consider it necessary to study the essence of other administrative procedures, in particular, the plaintiff's withdrawal of a claim and reconciliation of the parties.

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ЗАГАЛЬНА ХАРАКТЕРИСТИКА ПРОЦЕДУРИ ВРЕГУЛЮВАННЯ СПОРУ ЗА УЧАСТЮ СУДДІ ЯК СУДОВОЇ ПРОЦЕДУРИ В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ

Анотація. ***Мета.*** Мета статті зумовлена недостатнім рівнем дослідження судових процедур в адміністративному судочинстві, спрямованих на вирішення спору досудового розгляду, та полягає у визначенні ознак одної з указаних процедур, а саме врегулювання спору за участю судді. ***Результати.*** У статті наголошено, що функціонування механізму вирішення спору до судового розгляду є одним із напрямів палких дискусій, що точаться навколо сфери судочинства, між тим вони однозначно мають більше переваг, аніж недоліків. Водночас головним недоліком запровадження такого механізму є недостатня дослідженість його сутності, принципів і реалізації, тобто порядку проходження конкретних стадій і етапів, за якими відбуваються такі судові процедури. ***Висновки.*** Автором надано загальну характеристику процедури врегулювання спору за участю в адміністративному судочинстві шляхом наведення низки специфічних ознак останньої: провадиться поза межами судового провадження; вона є конфіденційною; ініціюється двома сторонами спору (позивачем і відповідачем); має обмеження щодо проведення, тобто її проведення неможливо в таких категоріях справ, як: 1) оскарження нормативно-правових актів; управлінського процесу та прийнятих управлінських рішень; 2) організація та проведення виборів; 3) діяльність виборчих комісій і комісій з референдуму, політичних партій і блоків, припинення повноважень народних депутатів; 4) обмеження окремих конституційних прав громадян (право на мирне зібрання та право на свободу пересування закріплене); 5) забезпечення оборонних потреб держави; 6) за зверненнями органів державної влади (податкових і митних органів, Служби безпеки України), а також типових справ; проводиться протягом розумного строку, але не більше 30 днів; реалізується у формі очних і дистанційних нарад (спільних та/або закритих); складається з трьох стадій: 1) початок процедури та проведення спільної наради; 2) врегулювання спору шляхом проведення спільних і закритих нарад;

3) укладення сторонами мирової угоди та затвердження її судом або припинення такої процедури; така процедура не документується; не може бути проведена повторно; є наслідком зупинення провадження по справі, яке може бути поновлене лише у випадку припинення такої процедури за обставинами, встановленими КАСУ.

Ключові слова: судові процедури, врегулювання спору за участю судді, адміністративне провадження, мирова угода, позивач, відповідач, ухвала.

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