DISCRETIONARY POWERS OF THE JUDGE REGARDING RECONCILIATION OF THE PARTIES IN ADMINISTRATIVE PROCEEDINGS

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The structure and content of the judge's powers to reconcile the parties in administrative proceedings are considered. Speaking about the directions for improving the judge's powers to reconcile the parties in administrative proceedings, it is noted that in order to expand the practice of reconciling the parties in administrative proceedings, measures should be taken to eliminate some of the restraining factors, including, in particular, the inability of public authorities to achieve reconciliation due to the legal obstacles to fulfilling the conditions of reconciliation provided for by the legislation on the organization and procedure for the functioning of the public authority (insufficient powers to make a public administrative decision determined by the terms of reconciliation, etc.) and the mentality of public administration, which is not conducive to the development by the public authority, together with the private one, of a mutually acceptable decision for them, with the assumption of responsibility for its content and proper implementation. Also, attempts to use conciliation procedures contrary to their purpose for artificially delaying the trial or changing the composition of the court or other procedural abuses should not be allowed.

By optimizing the institutional and legal support for conciliation in administrative proceedings based on positive foreign experience, it should be decided on the appropriateness of the obligation of the parties to submit a draft court decision on which the parties have reached a conciliation, to inform the court of the grounds for hoping for conciliation, and also to express considerations on sending judges to a training course dedicated to aspects of mediation and conciliation.

Keywords: judicial discretion, judicial discretion, discretionary powers, internal conviction, administrative-legal principles, judge's competence, judge's powers, administrative court, administrative proceedings, judge, judicial power, conciliation.

The focus of administrative proceedings on the effective protection of the rights, freedoms and interests of individuals, the rights and interests of legal entities from violations by subjects of power in the field of public-legal relations necessitates the establishment of the right for the parties in administrative proceedings to conclude the case by reconciliation, since the goal of administrative proceedings is most fully achieved often as a result of the peaceful settlement of public-legal disputes and the regulation of disputed legal relations on the basis of voluntary coordination of actions and mutual understanding. In view of this, it seems quite reasonable to consider the right of the parties in administrative proceedings to reconciliation as a component of their administrative-procedural status, which may be of decisive importance for achieving the goal of administrative proceedings and requires independent and thorough scientific study.

To properly fulfill this task, the first step is to study the provisions of the legislation on administrative proceedings regarding reconciliation of the parties, after which it is necessary to turn to scientific works and materials of the practice of domestic administrative courts on relevant issues.

Of no less interest in determining the prospects for improving the procedures for conciliation of the parties in administrative proceedings is a review of scientific sources that raise issues of risks and limitations that are inherent in this instrument of administrative justice and require certain regulatory measures.

First of all, the position that the inability of public authorities to achieve conciliation due to the legal obstacles to fulfilling the conditions of conciliation provided for by the legislation on the organization and procedure for the functioning of the public authority, as well as for a number of subjective reasons, is widely supported.

In particular, judges recognize the limited opportunities for using conciliation procedures, including the procedure for resolving a dispute with the participation of a judge, in administrative legal relations, since public authorities may not have sufficient discretionary powers to make a management decision determined by the conditions of conciliation. In confirmation of this, it is noted that, for example, the State Fiscal Service of Ukraine is not empowered to cancel its own tax notice-decision that impedes the reconciliation procedure. Even if the parties reach an agreement and agree, the resolution approving the terms of reconciliation will either not be issued because the terms of reconciliation cannot contradict the law or go beyond the competence of the subject of authority, or will simply not be implemented [7].

At the same time, there is no doubt that reconciliation of the parties in administrative proceedings can be achieved on the basis of discretionary powers and dispositive administrative legal norms that provide the subjects of authority with freedom of action within certain limits within which the terms of reconciliation may be.

A similar view is held by O.M. Mikhailov, pointing out that indeed, the norms regulating legal relations in the public legal sphere are, as a rule, imperative in nature, which excludes the determination of the content of the legal relationship by the will of the parties, however, there are dispositive norms here too. Therefore, according to the scientist, there are no obstacles to achieving reconciliation (conclusion of a peace agreement) in a dispute arising from public relations, if the parties find a way to resolve the dispute within the framework established by law, or use the measure of permitted independent determination of the content of the disputed legal relationship, which is permitted by law. If the dispute between the parties in a case of administrative jurisdiction is annulled on the terms precisely defined by imperative public norms, there will be no contradiction in the essence of the institution of reconciliation (peace agreement) [8]. At the same time, considerable attention is paid by scientists to guarantees against abuses when determining the terms of reconciliation. There is no doubt about the correctness of the position of O.D. Sidelnikov that there is an urgent need to develop clear criteria on which the public administration body should rely when making a decision on dispute resolution. Since the expansion of discretionary powers increases the risks of unlawful behavior of subjects of power, creates threats of committing corruption offenses - it is necessary to develop certain guidelines according to which freedom in this area should be implemented. In addition to the criteria of legality, rationality and expediency, it is necessary to analyze other possible standards and requirements that subjects of public administration should adhere to when making a management decision within the limits of legal discretion [1]. In addition, the likelihood of involving a subject of power in reconciliation procedures and their successful completion is reduced by psychological factors. Among other things, it is pointed out that the participation of public authorities in conciliation procedures in administrative proceedings requires them to take a proactive approach and some changes in the mentality of public administration, the development of which was not accompanied by the widespread use of mediation practices. The success of the conciliation procedure with a public authority depends on whether they really strive to work out a mutually acceptable solution together with the private sector [10]. It is also said that a public servant is often afraid to take responsibility for independently making a decision on a dispute (it is easier and safer to wait for the court's decision and refer to it) [10].

Also, cautions are expressed regarding the use of conciliation procedures contrary to their

purpose for artificially delaying the trial or changing the composition of the court.

According to the observations of the judges, the parties used the institution of dispute resolution with the participation of a judge, mainly for procedural abuses, in order to delay the trial or to achieve the replacement of a judge. In some cases, the participants in the procedure are not oriented towards a peaceful settlement, but pursue completely different goals [7]. In other words, the specified procedure can be used by the party (parties) to replace a judge in the absence of grounds for his/her disqualification [11].

At present, the provisions of the legislation on administrative proceedings stipulate that the parties may fully or partially settle a dispute on the basis of mutual concessions. The reconciliation of the parties may concern only the rights and obligations of the parties. The parties may reconcile on terms that go beyond the subject of the dispute, if such terms of reconciliation do not violate the rights or legally protected interests of third parties. The terms of reconciliation may not contradict the law or go beyond the competence of the subject of public authority (Article 47, Part 1, Article 190 of the Code of Administrative Offenses of Ukraine). On the other hand, the agreement on terms of reconciliation aimed at harming the rights of third parties contradicts the task of administrative proceedings and is recognized as an abuse of procedural rights (Clause 5, Part 2, Article 45 of the Code of Administrative Offenses of Ukraine) [2].

Setting out the procedural procedure for reconciliation of the parties in administrative proceedings, the legislation establishes that the terms of reconciliation of the parties are set out in a statement on reconciliation of the parties, which may be set out in the form of a single document signed by the parties, or in the form of separate documents: a statement by one party on the terms of reconciliation and the written consent of the other party to the terms of reconciliation (Article 190 of the Code of Administrative Offenses of Ukraine). Having received a statement on reconciliation of the parties, the court, at the request of the parties, suspends the proceedings in the case for the time necessary for them to reconcile (Article 190, Clause 4 Part 1, Article 236 of the Code of Administrative Offenses of Ukraine). Having explained to the parties the consequences of reconciliation, and having checked whether the representatives of the parties are not limited in their right to take appropriate actions and whether there are grounds for refusing to approve the terms of reconciliation and continue the trial, the court shall approve the terms of reconciliation of the parties by a ruling and simultaneously close the proceedings in the case (Article 190, Clause 3, Part 1, Article 238 of the Administrative Procedure Code of Ukraine) (Code of Administrative Procedure of Ukraine, 2005). It should also be noted that the court shall facilitate the reconciliation of the parties during the consideration of the case on the merits (Part 5, Article 194 of the Administrative Procedure Code of Ukraine). Moreover, the parties may reconcile at any time before the end of the appeal proceedings (Part 1 of Article 314) and at any time before the end of the cassation proceedings (Part 1 of Article 348 of the Code of Administrative Offenses of Ukraine) with the invalidation of the court decision that ended the consideration of the case, as well as in the process of execution with the features provided for in Article 377 of the Code of Administrative Offenses of Ukraine [2].

The resolution approving the terms of reconciliation is an executive document and must meet the requirements for an executive document established by law, and in the event of non-execution of the court resolution approving the terms of reconciliation, it may be filed for its compulsory execution in the manner prescribed by law for the execution of court decisions (Article 191 of the Code of Administrative Offenses of Ukraine) [2].

Summarizing the above, we note that reconciliation of the parties in administrative proceedings, among the most significant aspects:

- may be full or partial;
- occurs on the basis of mutual concessions of the parties;
- is related exclusively to the rights and obligations of the parties with the possibility of going beyond the subject of the dispute, if such terms of reconciliation do not violate the rights or legally protected interests of third parties;
- cannot contradict the law or involve going beyond the competence of the subject of public authority;

- is the basis for issuing a resolution approving the terms of reconciliation, which can be submitted for its compulsory execution.

A review of foreign regulatory and legal sources indicates that, according to their provisions, the procedure for reconciliation of the parties in administrative proceedings is largely the same as that provided for by domestic legislation on administrative proceedings, with some insignificant differences.

For example, in Germany, a competent single judge or a panel of judges is empowered to refer a case to a mediator after hearing the parties' opinions if the likelihood of reaching an agreement on the rights and obligations of the parties violated in the case appears high. However, a court mediator is not a judge or a member of a panel of judges authorized to resolve the case. His or her activities are aimed at finding a solution that satisfies the parties in the case, balances their interests, taking into account the specifics of the case, and minimizes the risk of evasion of its implementation. There are no restrictions on the possibility of initiating a settlement of a case with the help of a judge-mediator in German law, however, in practice, settlement of a case with the help of a judge-mediator as a procedural tool is most often used in administrative cases that arise in stable legal relations, such as those related, for example, to public service, social security, urban development and environmental protection. The amicable agreement of the parties is fixed by a court decision, which may act as an executive document for direct execution [3].

Almost similar to the above is the procedure for conciliation of the parties in administrative cases, which is provided for by the procedural legislation of the United Kingdom. Thus, if the parties to the case have reached a conciliation and agreed on what the final court decision on the merits of the case or other court decision should be, the claimant must submit to the court a document setting out the method of resolving the relevant issue and its concise legal and evidentiary justification (Article 17.1 of Practice Directions 54A - Judicial Review). The claimant must also submit a draft court decision in respect of which the parties have reached a conciliation, which contains the designation "by agreement of the parties" and is signed by the parties to the case to which this court decision applies, or their representatives. The court decision agreed by the parties may provide, inter alia, for the suspension or termination of the proceedings in whole or in part on the terms specified in the court decision; the distribution of court costs; annulment of a decision of a public authority, its taking of certain actions or its refraining from taking certain actions; compensation for damages caused by the decision, actions or inaction of a public authority; release of a party to the case from liability (part 3 of article 40.6 of the Rules of Civil Procedure of the United Kingdom). Court costs are distributed by agreement of the parties to the case or by order of the court approving the draft court decision (part 7 of article 40.6 of the Rules of Civil Procedure of the United Kingdom [4]. At the same time, it is noteworthy that the parties to the case are obliged to inform the court that they have grounds to expect reconciliation so that the judges and other court employees have sufficient time and opportunities to organize the court session accordingly. Failure to fulfill this obligation may result in the court issuing a ruling on the full or partial non-return of court costs to the parties [5].

However, the introduction of conciliation procedures into administrative proceedings in France has not led to their widespread use, which is explained, first of all, by the lack of attempts to provide appropriate training for judges [6].

Therefore, when considering ways to optimize the institutional and legal support for reconciliation in administrative proceedings, it is necessary to decide on the appropriateness of the obligation of the parties submit a draft judgment on which the parties have reached a settlement, inform the court of the grounds for hoping for a settlement, and express considerations regarding sending judges to a training course on aspects of mediation and settlement [12; 13].

Taking into account the above, we have grounds to summarize the study of the issues of reconciliation of the parties in administrative proceedings, noting that in order to expand the practice of reconciliation of the parties in administrative proceedings, measures should be taken to eliminate some of the restraining

factors, including, in particular, the inability of public authorities to achieve reconciliation due to legal obstacles to the fulfillment of the conditions of reconciliation stipulated by the legislation on the organization and procedure for the functioning of the subject of public authorities (insufficient powers to make an administrative decision determined by the terms of reconciliation, etc.) and the mentality of public administration, which is not conducive to the development by the subject of public authorities, together with the private one, of a mutually acceptable decision for them, assuming responsibility for its content and proper implementation. Also, attempts to use reconciliation procedures contrary to their purpose for artificially delaying the trial or changing the composition of the court or other procedural abuses should not be allowed. When considering ways to optimize the institutional and legal support for reconciliation in administrative proceedings based on positive foreign experience, it is necessary to decide on the appropriateness of the obligation of the parties to submit a draft court decision on which the parties have reached reconciliation, to inform the court of the grounds for hoping for reconciliation, and also to express considerations regarding sending judges to a training course dedicated to aspects of mediation and reconciliation.

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ДИСКРЕЦІЙНІ ПОВНОВАЖЕННЯ СУДДІ ЩОДО ПРИМИРЕННЯ СТОРІН У АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ

Розглянуто структуру та зміст повноважень судді щодо примирення сторін у адміністративному судочинстві. Висловлюючись щодо напрямів вдосконалення повноважень судді щодо примирення у адміністративному судочинстві, зазначено, що для розширення практики примирення сторін у адміністративному судочинстві мають бути вжиті заходи для усунення деяких стримуючих факторів, серед яких, зокрема, неспроможність суб'єктів владних повноважень досягти примирення через передбачені законодавством про організацію та порядок функціонування суб'єкта владних повноважень правові перешкоди для виконання умов примирення (недостатність повноважень для прийняття владного управлінського рішення, визначеного умовами примирення тощо) та ментальність публічного адміністрування, що не є сприятливою для вироблення суб'єктом владних повноважень разом із приватною взаємоприйнятного для них рішення із взяттям на себе відповідальності за його зміст та належне виконання. Також, не мають допускатись спроби використати процедури примирення всупереч їх призначенню для штучного затягування судового розгляду або зміни складу суду чи інших процесуальних зловживань.

Шляхами оптимізації інституційного та правового забезпечення примирення у адміністративному судочинстві на основі позитивного зарубіжного досвіду, слід визначитись щодо доцільності зобов'язання сторін подавати проект судового рішення, щодо якого сторони досягли примирення, повідомляти суд про підстави сподіватись на примирення, а також висловити міркування щодо направлення суддів на навчальний курс, присвячений аспектам посередництва і примирення.

***Ключові слова**: судова дискреція, судовий розсуд, дискреційні повноваження, внутрішнє переконання, адміністративно-правові засади, компетенція судді, повноваження судді, адміністративний суд, адміністративне судочинство, суддя, судова влада, примирення.*