

## MEDIATION AS AN INNOVATIVE DISPUTE RESOLUTION TOOL BASED ON THE EXAMPLE OF PUBLIC ORGANIZATIONS

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**Purpose:** The objective of this article is to identify the context of developing mediation in public administration and also to demonstrate its role in problem-solving in that area. On those grounds, the authors attempted at answering the study question: Is the mediation tool widely used in the public administration area and does it facilitate dispute resolution?

**Design/methodology/approach:** To look for evidence enabling to answer the study question, the case study method was used as it was appropriate for the analysis of qualitative phenomena (Grzegorzczuk, 2015). Case study enables to formulate conclusions concerning the causes and results of the actual studied phenomenon course. The study undertaken by the Authors is an individual case study where the authors used various techniques and tools for data collection and analysis, i.e. participant observation, document analysis and Internet sources.

**Findings:** Currently, a growing number of proceedings in administration bodies and administrative courts can be observed, but the role of mediation in their resolution is still negligible. An undoubted problem of the administrative mediation is the absence of trust of the public administration bodies, courts and the general public in this conflict resolution form. This is why it is necessary to introduce legislative amendments, educate in this area and promote it.

**Originality/value:** The presented analysis is important as it indicates the role of administrative mediation and the importance of its popularization.

**Keywords:** administrative mediations, settlement, conflict.

**Category of the paper:** research paper.

## Introduction

Public organizations were created to provide services for the society. This means their basic function is to satisfy collective public needs using public resources and services. As emphasized by B. Kożuch, a public organization is a complex whole with features characteristic of all organizations, but with a specific system of objectives and values. Moreover, it is distinguished by a peculiar internal bond and specific relations with the external environment (Kożuch, 2004). Cooperation of the public organizations with the broadly-taken environment and also shaping the appropriate relations is difficult, as some of them are governed by the applicable legal system, while the other are of a versatile and multi-dimensional nature and depend on the actual or prospective stakeholders, and also on changing forms of cooperation (Sojkin, 2018). Any disputable matters between them may refer both to the conflict of interests between the parties and to the conflict of social interest and the party's interest (Mediacja..., 2019).

Mediation may constitute an innovative approach to solving the emerging disputes. This tool has not been used so far in the administrative practice. According to the definition, broadly taken innovations are valuable, innovative ideas (Krawczyk, 2012). It should be stressed that innovativeness is no longer characteristic solely of the private sector, but innovations are more and more appreciated in the public sector, though they are not well studied (Innovations in the public sector in the European Union states). Importantly, mediations may take the burden off the administrative bodies and courts, minimize the costs of administrative and court proceedings, and also contribute to speeding them up. Mediation is employed not only for the disputable interests of the parties, but also when there is a negotiation standstill, compensation or deadlock (Sołtysiak, 2012). Using the mediation tool in the public sphere is an alternative to the formalized and domineering proceedings. Mediation in the public administration reduces the risk of initiating the review or court and administrative proceedings by the dissatisfied party. A key component of using mediation as the dispute resolution method in the administrative proceedings is the significant simplification of the procedure course. What is more, the administrative settlement shortens the proceedings. This is why it is important to indicate the role of mediation in the resolution of disputes concerning the public sector and everyday problems of citizens and to verify if this tool contributes to the faster dispute resolution and satisfaction of the parties.

## Mediation as the dispute resolution tool

Mediation is a voluntary, confidential and non-formalized out-of-court procedure enabling to reach a settlement and issue an administrative decision or court order accepted by the parties to the dispute. It enables to go beyond a purely legal conflict resolution which is not always satisfactory. Reference works contain numerous definitions of mediation which are not identical. This results e.g. from the fact that this problem is dealt with by many authors from various sectors. The table below presents selected definitions of mediation proposed by different authors.

**Table 1.**  
*Mediation definitions*

Author	Definition
M. Tabernacka	“Mediation is a process aimed at reaching a settlement both with respect to the dispute, and also in the deadlock or standstill during negotiations. Mediation may contribute also to establishing contacts between the parties” (Tabernacka, 2009).
D. Peters	“Mediation can be understood as assisted negotiations, while the latter constitute the most popular procedure in building legal relations and resolving disputes” (Pieckowski, 2015).
E. Jastrzębska	“Mediation is an amicable dispute resolution method. It appeared relatively recently in the Polish law. The potential of this procedural instrument has not been used fully. At present, a case may be sent to mediation in all the most important court proceedings types, including civil, family, business, administrative and related to the minors. This method was first used in criminal proceedings” ( <a href="http://www.stowarzyszeniefidesetratio.pl/kwartalnik.html">http://www.stowarzyszeniefidesetratio.pl/kwartalnik.html</a> ).
Directive of the European Parliament and of the Council	“Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question” (Directive of the European Parliament and of the Council 2008/52/EC, 2008).
E. Bieńkowska	“Mediation is an attempt at reaching an amicable resolution of a criminal conflict, satisfactory for both parties, by means of voluntary negotiations with the participation of a third party, neutral towards the parties and their conflict, i.e. the mediator who supports the course of the negotiations, mitigates any emerging tension and helps, without imposing any solution related to the developed settlement” (Bieńkowska, 2011).
P. Sołtysiak	“Mediation is an amicable procedure when a third party attempts at the reconciliation of the parties’ standings, mitigating the tension between them and creating conditions to find a solution acceptable for everyone” ( <a href="http://dlibra.bg.ajd.czyst.pl:8080/Content/1549/Gubernaculum_02_6-9.pdf">http://dlibra.bg.ajd.czyst.pl:8080/Content/1549/Gubernaculum_02_6-9.pdf</a> ).
W. Kopaliński	“Mediation is an intermediation in the dispute to reach an agreement” (Morgała, 2014).
K. Bargiel-Matusiewicz	“Mediation (from Latin mediatio) is a voluntary and confidential process of reaching the dispute resolution, carried out in the presence of a neutral person, or the mediator” (Bargiel-Matusiewicz, 2014).
Słownik języka polskiego (Polish dictionary)	“Mediation is the help in dispute resolution to facilitate reaching the settlement by the parties” ( <a href="https://sjp.pwn.pl/">https://sjp.pwn.pl/</a> ).

Source: own work.

Based on the above list of mediation definitions, it can be inferred the mediation process participants are the conflicted parties and also an impartial mediator who is neutral vis-a-vis them and the dispute subject. According to A. Cisek, the source of mediation is the dispute which the parties want to resolve and thus ask a third party, neutral towards the process participants. This third party is to support them when reaching a voluntary settlement which will be satisfactory for the parties to the dispute (Binsztok, 2015). Consequently, a factor required to start the mediation process is the existence of a conflict between the parties and for the mediation procedure to take place it is necessary to ensure the presence of a third party, namely a mediator.

### **Mediation in administrative procedure**

On 1 June 2017, the Act of 7 April 2017 amending the Code of Administrative Procedure and some other acts (Journal of Laws 2017, item 935.) introduced regulations amending the said code (The Act of 14 June 1960 Code of Administrative Procedure, i.e. of 20 December 2019, Journal of Laws 2020, item 256 as amended, hereinafter CAP) and bringing provisions on the mediation instrument in the administrative procedure domain.

The new regulations enable to carry out mediation in the course of the administrative procedure. It adds provisions concerning the rules of the administrative procedure and introducing the concept of the tacit resolution. The provisions concerning mediation (Article 96a – 96n) introduced in the CAP are included in chapter 5a, called “Mediation”.

The new provisions are introduced to reduce the duration of a given case, facilitate the procedure and reduce the number of cassation decisions and promote citizens’ trust towards the public authorities. Mediation is of a transformatory nature and becomes a factor shaping the administration culture (Kocot-Łaszczyca et al., 2018). Mediation in the administrative procedure may be carried out at the request of a party or *ex officio*. A prerequisite for mediation is the participants’ consent for it. It is, first and foremost, a measure which is to enable to consider and explain factual and legal circumstances. Mediation may result in the adoption of arrangements concerning the case resolution by the participants which, in turn, may result in reaching the settlement or issuing a decision considering the said arrangements (Kmieciak, 2019).

Two mediation types can be distinguished, i.e. horizontal mediations with the dispute between at least two parties, and vertical mediations with the dispute between one or more parties and the administration body.

According to Article 96a CAP, mediation may be carried out whenever the case nature allows. Mediation participants may be the body running the procedure and one or more parties to the procedure. Mediation introduced to the administrative procedure is used also in cases when:

- there are multiple parties,
- it is possible to reach the settlement,
- a legal remedy was brought against the decision issued in the first instance,
- competences are exercised when they are acknowledged by the administration body,
- there is some preliminary problem (the need to agree the decision wording with another administration body),
- the body intends to issue a decision detrimental for the addressee and may expect an appeal.

The introduced amendments to the Code of Administrative Procedure extended and modified Article 13 thereof which contains the rule that the public administration bodies – in cases the nature of which allows that – strive to resolve any disputes amicably and determine the rights and obligations being the subject of the procedure in cases within their competence, including but not limited to by the following actions:

- 1) inducing parties to reach a settlement in cases where the participants have disputable interests;
- 2) required to carry out mediation.

They are also obliged to undertake any activities reasonable at a given stage of the procedure which enable to carry out mediation or reach a settlement, including but not limited to providing explanation on the possibilities and benefits of the amicable case resolution.

The mediation principle in the above-mentioned Article of the Code does not include limitations concerning the multiple parties to the procedure and does not indicate the existence of the disputable interests of those parties as a prerequisite. Particular attention is deserved by the fact that the prerequisite for initiating mediation is the existence of disputable matters and not of the disputable interests of the parties. Disputable matters are the aspects where the procedure participants do not share the same opinion. Those aspects, however, are important for the determination of the rights and obligations of the participants of a given case. If mediation results in any arrangements concerning case resolution within the applicable law, the administration body is obliged to resolve it according to such arrangements (if no settlement is reached).

It should be stressed also that before the said amendments were introduced (before 1 June 2017) there were no provisions in the administrative law which would refer to carrying out mediation within the administrative procedure. There was solely a regulation enabling the parties with disputable interest to reach the administrative settlement.

A certain exception was Article 47(2) of the Act of 13 October 1995 Hunting Law (At present, i.e. as at 20 December 2019, Journal of Laws 2020, item 67 as amended). The above provision stated, by 29 June 2027, that when there is a dispute between the owner or holder of land and the lessee or administrator of the hunting district concerning the value of the compensation for losses, the parties could contact the communal body competent based on the loss location for mediation to reach the amicable dispute resolution. However, that was not an administrative, but a civil dispute. The provision provided for the transfer of competences to carry out mediation to the communal bodies. A body competent to carry out mediation in this respect was a voivode, mayor or president of the town/city, or another authorized body. At present, the resolution of such disputes is governed in detail in the Hunting Law. The decision-making competences in this respect are held e.g. by the forest manager, and this procedure in any non-regulated aspects is subject to the provisions of the Code of Administrative Procedure, including in relation to mediation.

A similar situation took place when carrying out mediations before the voivodeship inspector of the Trade Inspection. Until 9 January 2017, mediation in this respect was carried out pursuant to Article 36 of the Act of 15 December 2000 on the Trade Inspection (Consolidated text of 19 July 2019, Journal of Laws 2019, item 1668 as amended) which was in force at that time, and the forms of cooperation in the mediation process were determined by §2 of the Regulation of the Council of Ministers of 5 March 2002 on the method of cooperation of the Trade Inspection bodies with the poviats (municipal) ombudsman for consumers' affairs, government and local government administration bodies, inspection bodies and non-governmental organizations representing the consumers' interests. The mediation between a consumer and an entrepreneur was to promote the social sense of the legal transaction security and, consequently, contribute to the development of the civic society idea. Reaching the dispute resolution by the parties themselves in the course of mediation improves their relations permanently.

Currently, the Act on the Trade Inspection states that if this is supported by the nature of the case, the voivodeship inspector initiates measures aimed at the out-of-court resolution of the civil law dispute between a consumer and an entrepreneur by means of:

- 1) promoting the reconciliation of both parties' standings to resolve the dispute by the parties thereto or
- 2) presenting a proposed dispute resolution to the parties.

The Trade Inspection as the public administration body is authorized to carry out procedures related to the out-of-court resolution of consumer disputes.

In the recent legislative activity, the legislator tries to differentiate between the administrative law and civil law disputes. The new regulations introduced to the Code of Administrative procedure as at 1 June 2017 enable to carry out mediation procedure in administrative law proceedings. They determine the subjective and objective scope and the course of mediation. It seems that amending CAP the legislators indicated the direction and

operation method of the modern public administration which is less domineering and more amicable.

## **Public organization characteristics**

Identifying public organizations, it is important to define the term “administration” first to understand the origin of the public organizations in a broader context. In the most general approach, administration is any organized activity aimed at achieving specific objectives. It is a permanent, purposeful and planned activity (Ochendowski, 2013). Administration can be understood also as the governing activity of the authorities carried out pursuant to the acts to satisfy the collective and individual needs of the citizens (Zimmerman, 2008). It means identified activity structured formally, organizationally and in terms of competences (Hausner, 2005). To ensure it is fully an organizational activity, it should be carried out by a bureaucratic system, comprising a broad range of problems of social significance, and should be governed appropriately in the general legal standards (Hausner, 2005). Currently, the public administration in European states has an organizational, enforcement and operational function. To perform such functions, more and more extended structures are created, i.e. the public administration system (Hausner, 2005).

Public administration provides public services which may be analyzed in a narrow and a broader sense. Public services in the narrow sense are connected directly with the public goods category. In the broader sense, on the other hand, they cover the whole range of services which are provided in the public interest and which the state can have influence on by its financial or organizational instruments. This comprises services performed directly by the public administration and also by other entities which the public authorities are responsible for (System monitorowania..., 2019, p. 8). Considering the public tasks in those two aspects, it is possible to distinguish tasks satisfying directly repeatable, typical social needs in the narrow approach. However, in the broad approach those may be tasks satisfying all the needs, even the indirect ones (Noworól, 2016).

As mentioned above, public services are provided e.g. by public organizations acting in the public interest in line with the social and political criteria. They constitute an open system, are subject to external influences and their paramount task is to react to the society needs and to satisfy them on the best level possible (Sternal, 2004). The subject of the public organizations’ operations is very broad and versatile. Examples of the areas dealt with by the public sector organizations include activities ensuring the sovereignty of the country and legal order, activities protecting the ownership and freedoms of individuals, tasks concerning land management, infrastructure management, environment protection, health care, education, culture, sports, social services or administrative services (Kozuch, 2007). The objectives of

public organizations are complex, often not defined clearly, and sometimes even non-viable as they need to meet many different requirements at the same time. The objectives are a peculiar link between the interested parties, top managers and employees of the organization (Hatch, 2002).

The most important properties of public organizations include (Kozuch, 2004):

- creation by people or by founding members,
- combination of the basic creative factor, i.e. people, with the material, technical and property measures,
- purpose orientation (implementation of individual and collective objectives of the participants and the ones stipulated in the founding act, pursuit of the social mission),
- having an internal structure, i.e. the set of organizational rules, work distribution,
- having a common management body (coordinating control system created to plan, organize, check and motivate),
- deliberate conduct (the ability to determine and possibly change the objectives and the methods to achieve them independently),
- equifinality (the ability to achieve the same end objectives with different initial conditions and different resources),
- the ability to consolidate the activity patterns (creating conditions promoting institutionalization, i.e. the identification in space, economy, law and formalizing the objectives and functions) (Golinowski, 2005),
- cooperation with the surrounding environment in terms of exchanging any goods, information,
- self-organization ability, i.e. increasing the capacity.

Based thereon, it can be stated the public nature is an essential attribute of public organizations.

Comparing public organizations to non-public ones, it can be noticed the former have a more formalized nature than the private-sector ones (this is connected with the inability to take a risk and with the decision-making process where highly formalized procedures are present). The decision-making process is based on the legal regulations and all conduct of a public organization employees is described by legal standards (Golinowski, 2005). Public sector organizations have values and missions targeted towards the public good and satisfaction of the public interest. Public organizations, contrary to the commercial ones, are responsible towards the citizens using the provided goods or services as they affect the quality of human life directly by providing them. The public institution responsibility is determined by the legal regulations (Kozuch, 2004). This specific system of values and the social mission fulfilled are the key value of public organizations.



## **Mediation in public administration – case study**

For the study, one of the qualitative scientific research methods was selected, i.e. a case study. The case study is empirical reasoning concerning the phenomenon in its natural context, particularly when the boundary between the case and its context cannot be drawn beyond any doubt (Yin, 2013). Case study is deemed to be an attractive problem-solving method in reference works. Here, the qualitative studies ensure empirical, in depth insight in the structure of the case of the administrative body's inactivity. In the studies described, the study question was formulated as follows: is the mediation tool widely used in the public administration area and does it facilitate dispute resolution?

The research process started from the analysis of the cases connected with mediation carried out in public organizations in the Voivodeship Administrative Court in Gliwice which was selected on purpose. The studies enable to claim that only one case connected with administrative mediations was examined in the years 2015–2019 in the Silesian Voivodeship (Judgment of the provincial administrative court in Gliwice, reference number IV SAB/GI 111/15, 2015). This case was related to the administration body inactivity. See its outline below.

Legal counsel A. B., acting in the name of the Nursing Home for Adults in B, in a communication of 5 February 2015, applied for disclosing public information to the Emergency Medical Services in K. In the said application, he applied for providing information if the entity has a procedure concerning the rules of transporting patients with an ambulance, including the “S” type one. If such a procedure existed, its disclosure was requested, and if no such a procedure was developed, a request was made to get a written explanation of the rules in force for transporting patients with an ambulance, including in the “S” type one, and to name the people who carried out the intervention on 3 January 2015 and 28 January 2015 in the Nursing Home for Adults, hereinafter referred to as the NHA, in B. Next, in a communication dated 10 August 2015, the legal counsel acting in the name of the NHA in B, lodged a complaint with the Voivodeship Administrative Court in Gliwice, concerning the inactivity of the Director of the Emergency Medical Services in K., requesting to have the application for disclosing the public information investigated, stating such an inactivity took place with a gross violation of the applicable law and having the legal costs reimbursed. In that complaint, it was stressed an application to have the public information disclosed was made on 5 February 2015 and the information was not received by the time when the complaint was made.

In response to the complaint, the Director of the Emergency Medical Services in K. applied for the mediation proceedings in this case.

The representative of the NHA in B. considered this proposal unacceptable and stressed it was a Court task at that stage to decide if the administrative body stays inactive, but the Voivodeship Administrative Court in Gliwice appointed the mediation meeting and obliged the parties to the proceedings to send their representatives authorized to make declarations of intent

to that meeting. On the appointed date, the representative of the Emergency Medical Services in K. came with a relevant Power of Attorney, while the representative of the complainant came with no relevant Power of Attorney and thus the proceedings could not take place. The case was sent for the investigation in a simplified procedure. The Voivodeship Administrative Court in Gliwice checked the legality of activities undertaken by the public administration body which revealed the criteria for considering the lodged complaint concerning the administrative body's inactivity were fulfilled in principle.

After the detailed analysis of all the administrative files submitted was completed, the adjudication panel in the said case decided this inactivity did not take place with a gross violation of the law.

The Voivodeship Administrative Court in Gliwice, having examined, in a simplified procedure on 4 November 2015, the case resulting from the complaint of the Nursing Home for Adults in B. concerning the inactivity of the Director of the Voivodeship Emergency Medical Services in K. with respect to disclosing public information:

- 1) obliged the Director of the Voivodeship Emergency Medical Services in K. to investigate the application of the complainant within 14 days after the files were submitted;
- 2) decided the body's inactivity did not take place with the gross violation of the law;
- 3) decided the Director of the Voivodeship Emergency Medical Services in K. should pay the amount of PLN [...] to reimburse the costs of the court procedure.

The court expressed also its disapproval of the conduct of the Nursing Home representative as they displayed poor knowledge of legal regulations and no respect for the Court in this procedure.

Poor knowledge of legal regulations was evidenced when the complaint was lodged with the administrative court as the professional representative should know such a complaint is to be placed by the agency of the administration body. What is more, the representative in their communication presented arguments against mediation which ignored the wording of the Law of procedure in administrative courts and the possibility to carry out mediation *ex officio* provided in them.

The disrespect for the Court was proved by directing a representative to the mediation meeting with no relevant empowerment to make binding declarations of intent in the complainant's name, though both parties were instructed in that aspect.

The court expressed a view that the mediation procedure was conducted at the body's request and did not lead to a settlement due to the absence of the Power of Attorney to make declarations of intent by one party. Consequently, the case was sent to the examination in a simplified procedure and a decision considering the complaint was issued.

Based on the analysis carried out, it may be claimed the mediation tool in the public administration and administrative court area is not popular, as corroborated by the number of cases sent for mediation by the court in the Silesian Voivodeship. Answering the question if using the mediation tool in dispute resolution contributes to their faster completion, it can be

declared with full confidence this is the case when mediation is effected. This is evidenced by shorter duration of the mediation procedure when compared to the time when the court meeting, hearing is appointed and when possible cassation proceedings take place in the Supreme Administrative Court.

## **Conclusions and recommendations**

Administrative mediations are an innovative dispute resolution tool which stands a chance of gaining popularity in the public sector. It enables to develop a settlement fast and efficiently with relatively small resources used for that purpose. At present, mediation is used successfully in other areas of law, i.e. mediation in business law, civil law, employee affairs, and also family or criminal law. In those areas, mediation is used in the whole territory of Poland and this form of procedures is more and more popular.

In the public sector, the introduction of new provisions to the Code of Administrative Procedure governs mediation in the area of law and administrative procedure so this instrument needs not be governed in other acts where the conflict between parties to the administrative procedure or between a party and the body took place. It can be declared new regulations in the administrative law area make it possible to use the mediation instrument in public organizations where the body may both initiate and participate in the mediation. An important success factor when using this tool is the absence of any adverse consequences brought about by terminating the mediation by its participants. Moreover, the mediation procedure is a less expensive alternative to the court proceedings.

Unfortunately, mediation is not highly popular yet in administrative procedures and in administrative court proceedings. At present, in the analyzed period, mediation proceedings were carried out only once in the Silesian Voivodeship by the Voivodeship Administrative Court in Gliwice, but this may change thanks to the widely advocated idea of dealing with any disputes and such a way of dispute resolution means no domineering measures are required towards the citizens.

To make this institution popular in the public institutions sector, it would be important to introduce exemption from the mediation procedure costs to the CAP provisions. Such a possibility exists in the court procedure, but CAP has not provided for exemption from the costs in the mediation proceedings. Also, the public administrative bodies' orientation toward promoting the mediation instrument to increase the awareness of both the society and the public institution employees in this respect is important.

To conclude, mediation is an innovative tool with numerous advantages. This solution is undoubtedly a beneficial alternative particularly to court proceedings resulting from appeals against administrative decisions. As the public administration has only recently received legal

grounds to employ mediation in administrative procedure, mediation is not fully used yet. It should be stated that thanks to its positive aspects, mediation is likely to become a broadly used tool in the future.

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