CZECH ADMINISTRATIVE PROCEDURAL LAW – APPEAL COMMITTEES AND THEIR POWERS

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Abstract: The article is from the field of administrative procedural law. It deals mainly with the topic of appeal. The appeal is a proper remedy in administrative proceedings in the Czech Republic. The text covers several neglected problems concerning the functioning of the quoted committees, such as the bias of the members of the appeal committees. Or the accessibility of information on the composition and functioning of the committees.
Among other things, the author presents some of his *de lege ferenda* considerations.

Keywords: public administration; administrative procedural law; remedies; administrative proceedings

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INTRODUCTION

This article is from the field of administrative procedural law in the Czech Republic, but it may be inspiring for lawyers from other countries as well. It deals mainly with the topic of appeal. The appeal is a proper remedy in administrative proceedings in the Czech Republic.

In the following, we will try to reflect on the topic of appeal committees and some related issues. The author, who is otherwise mainly a university lecturer, is also a member of the Czech National Bank's Appeal Committee and the Office for Personal Data Protection. In the past, he also participated in the Appeal Committee of the Office for the Protection of Competition. He has attempted to reflect on his experience and knowledge gained since 2012 in the present text.

Concerning the administrative-law institution of the appeal, it should be briefly noted at the outset that it is a long-existing ordinary (not extraordinary) remedy in Czech (or Czechoslovak) law, which is applied to first-instance decisions issued by a central administrative authority, a minister, a state secretary of a ministry, or the head of another central administrative authority.

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Together with P. Mates, a leading administrative specialist and also a long-standing member of several appeal committees, let us remind you that although this is an ordinary appeal, it is included in Part Three of the Administrative Code, which regulates special provisions on administrative proceedings, which in itself indicates its certain specifics. In this context, the particular emphasis is placed on the fact that an appeal has, in principle, a suspensive effect (although special laws sometimes exclude it expressly), not a devolutionary effect.[1] The absence of a devolutionary effect is entirely logical and is linked to the organisation of the public administration; simply put, there is no second-instance *supra-ministry* to which the contested decision would *roll*.[2]

Pursuant to § 152(2) and (3) of the Administrative Procedure Code, the Minister or the head of another central administrative authority decides on the appeal.[3]

The appeal committee submits a proposal for a decision to the Minister or the head of another central administrative authority. The appeal committee does not decide on the merits of the case but prepares a draft decision *only and only*, which the head of the central administrative authority (or the Minister) is not obliged to accept. If the appeal committee itself was to decide instead of the Minister (or other head of the central government body), this would be a procedure contra legem – *in concreto* a breach of functional jurisdiction resulting in the illegality of the administrative act in question.[4]

In theoretical and legal terms, the appeal procedure can be described as a special type of appeal procedure and it is significant for legal practice that the general provisions of the appeal procedure apply to the appeal procedure.[5]

The chairman and all other members of the appeal committee shall be appointed by the Minister or the head of another central administrative authority. The Minister may not delegate this power to anyone else. The appeal procedure is modified in such a way that (de facto fictitiously) there is an imaginary division of one administrative authority into two instances. The clear implication is that the power to select the members (or even the chairman) of the appeal committee must not be transposed to the first instance body.

In order to strengthen its relative independence and impartiality, in the interests of objectivity and to implement the principle of substantive truth, the majority of the members of the appeal committee shall by law be composed of experts who are not employees of the central administrative authority in which the appeal committee carries out its activities.

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1 Quote: MATES, P. Řízení o rozkladu [Procedure on appeal]. *Právní rádce* [Legal advisor]. 2007, Vol. 15, No. 7, pp. 39–44.

2 In the context of the complexity of the view, it must be stated that the absence of a devolutionary effect reduces the objectivity in the assessment of the first-instance decision. However, it is not 100%, which is helped, inter alia, by the participation of external members of the Boards of Appeal.

3 E.g., Chairman of the Office for the Protection of Competition.

4 See Judgment. High Court in Prague – SJS 410/1999, the mentioned court decision was still in the *old* Administrative Code, however, it is relevant for today's legal situation.

5 Cf. VEDRAL, J. *Správní řád: komentář* [Administrative Code: Commentary]. Prague: Bova Polygon, 2006, p. 864.

It should be added that one expert can be a member of several appeal committees of several central administrative authorities at the same time. No current legislation prohibits this or limits in any way the number of boards of appeal on which the same person may sit.

The appeal committee may act and adopt resolutions in panels of at least five members, and a majority of the members present must also be external experts who are not employees of the central administrative authority.

The initiation of the appeal procedure is governed by the principle of disposition. It is initiated on the basis of an application (in this case a statement of appeal) lodged by a party, which thus asserts its subjective interest in the proceedings. The general provisions of the Administrative Procedure Code relating to the initiation of proceedings on an application are applied to determine when the opposition procedure is initiated, according to which it is initiated on the date on which the opposition is received by the competent administrative authority (i.e., the competent central administrative authority). Of course, the party to the proceedings also has at its disposal the possible withdrawal of the opposition, which has the legal consequence of terminating the administrative procedure.

BIAS OF A MEMBER

Definition of bias: bias is such a relationship of an official (to the parties, their representatives, or to the subject matter of the proceedings) that may raise doubts as to the objectivity of the hearing and decision-making in the case. Any official who may reasonably be presumed to have a personal interest in the outcome of the proceedings is to be excluded from the administrative (or appeal) proceedings on grounds of bias. A party to an administrative proceeding may challenge the bias of an official.

The author considers that it follows from the last sentence of Section § 152(3) and Section § 14(1) of the Administrative Procedure Code that the members of the appeal committee must also be legitimately regarded as officials, with all the consequences that this entails.

If we consider the members of the appeal committee to be the aforementioned officials, the parties are, in my opinion, entitled to object to their bias. It could be argued that the reverse is – the case since the appeal committee does not itself decide the merits of the case, but only prepares a draft decision that the head of the central body is not obliged, as stated above, to accept. Another counter-argument is that the members of the appeal committee are not, and usually cannot be by the nature of the legislation, employees of the central authority concerned.

However, as the Supreme Administrative Court found in 2009 that: *"*[A]*n official person is any employee of the defendant who is directly involved in the proceedings. In addition to the person who approves and signs documents in the proceedings, it is also those who prepare documents for decisions or perform individual procedural acts in the case. Conversely, by the nature of the case, the official persons are not those who*

merely technically handle the case file, transcribe individual documents according to a draft or issue documents." [6]

From the nature and systematics of the appeal procedure, we must view the members of the appeal committee as officials who prepare the proposal for a decision on the appeal. They are thus logically directly involved in the exercise of the powers of the administrative authority. The members of the Board of Appeal mainly carry out technical, analytical, and evaluative operations, so that they certainly cannot be regarded as non-official persons who *"merely technically manipulate the file, rewrite individual letters according to a draft or issue documents"*.

Therefore, the members of the appeal committee must be considered as official persons within the meaning of § 14(1) of the Administrative Procedure Code and the parties must be allowed to legitimately object to their bias with the consequence of their exclusion from the hearing and decision-making (or *pre-decision-making*) in the case.

As aptly expressed by the Regional Court in Brno in its decision 62Af 1/2011: *"if the official person is considered to be the one who prepares only the documents for the decision, it must be a member of the appeal committee who prepares the draft decision directly"*. He can interfere in the sphere of a party more strongly than the person who only prepares documents or only takes procedural steps in the case. In other words, the position of a member of the appeal committee is stronger than it might at first sight appear.

The objection that the majority of the members of the commission are not employees of the central body to which the appeal is made also cannot be regarded as relevant to exclude the possibility of objecting to their bias. This objection is too formalistic in nature and goes against the spirit of the legislation guaranteeing the objectivity of the procedure and aiming to implement the principle of substantive truth in the appeal procedure. The fact that someone is not an employee of the central administrative authority does not, of course, mean that they cannot have a personal interest in the outcome of the proceedings.

The Minister or the head of a central administrative body other than the ministry should decide on the objection of bias directly, not the appeal committee itself. This should take the form of a resolution on the objection of bias of a member of the appeal committee.[7]

The principle of legitimate expectation (or predictability) should also be applied when assessing bias on the part of the Minister, i.e., the Minister or the head of the central administrative authority should take care not to create unjustified differences when deciding identical or similar cases of bias. This means that the legal certainty of both the members of the appeal committee and, above all, of the parties to the administrative proceedings is not undermined.

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[6] See Jud. 2 As 83/2008-124 (online available e.g., at: www.nssoud.cz).

[7] Similar opinion VEDRAL, *c. d.*, p. 864.

IS IT POSSIBLE TO FIND OUT THE NAMES OF THE MEMBERS OF THE APPEAL COMMITTEE?

The previous issue is logically linked to the question – does a party to the administrative proceedings have the right to find out the names of the members of the appeal committee? Popularly written, it is difficult to argue bias against someone whose identification cannot be realistically determined.

I am of the opinion that on the basis of Act No. 106/1999 Sb., on free access to information, it has this authority. According to this legal regulation, which serves to implement the constitutional right to information, it is valid that any information is primarily intended to be provided, unless there is a relevant legal reason for not providing it. Information on the composition of the appeal committee does not fall under any of the restrictions contained in the 106/1999 Sb., and is therefore compulsorily disclosable under the regime of the cited law. In my opinion, the information is *simple* and therefore must be provided within the basic time limit – without undue delay, no later than 15 calendar (not working) days from the date of receipt of the request.[8]

I do not think it is necessary to emphasize to the professional public that central state administration bodies are undeniably obliged subjects under Act No. 106/1999 Sb. The right to information is directly a constitutional right, i.e., a right of the highest legal force.

Let us add that the right to request information according to the cited law is not only for the participant in the administrative proceedings, but for everyone; the applicant may be a foreigner or even a minor.

Therefore, if everyone has the right to know the composition of the appeal committees, then of course the participant in the administrative proceedings has this right as well, as per Act No. 106/1999 Sb., on free access to information, as well as by the interpretation of the Administrative Code itself. As we have already indicated above, if a participant did not have such a right, its defence against the bias of the members of the appeal committee would become completely unworkable, and the provisions preventing bias of the members, and thus improper bias, obsolete.

The right to information about the members of appeal committee is also closely related to the principle of democratic public scrutiny of public administration, which is particularly true for central administrative authorities, where appeal proceedings are conducted as a special type of appeal procedure.

CONCLUSION ON BIAS

As we have already stated above, an appeal as a proper remedy is linked to the decision-making of ministries and other central government bodies, for which increased caution and control bias must be exercised.

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[8] Cf. § 14 para. 5 of Act No. 106/1999 Sb., on free access to information; or FRUMAROVÁ, K. – GRYGAR, T. – POUPEROVÁ, O. – ŠKUREK, M. *Správní právo procesní* [Administrative Procedural Law]. Prague: C. H. Beck, 2021.

For the reasons set out above, we consider that it follows, in particular from the last sentence of § 152(3) and § 14(1) of the Administrative Procedure Code, that the members of the appeal committee must also be regarded as officials. It is therefore perfectly legitimate to argue that they are biased, with the consequence that they are excluded from the hearing and decision in the appeal proceedings. The quoted possibility to argue bias is also fully in the line with the principle of substantive (objective) truth[9] and the principle of legality[10] on which administrative proceedings (and its subset appeal proceedings as a special type of appeal process) in the Czech Republic are based.

In the actual assessment of the objection of bias by the Minister or other head of the central administrative body, the principle of legitimate expectation (or predictability) should be fulfilled, i.e., that the application should not create unjustified differences that undermine the legal certainty of both the members of the appeal committees and the participants in the administrative processes. Finally, it should be recalled that, in accordance with the principle of speed and economy, the heads of central administrative authorities should do so without undue delay.

In order to strengthen the theoretical and legal perspective, we will conclude by briefly looking at the matter at hand through the lens of the increasingly popular so-called fuzzy logic.[11]

The core of fuzzy logic is, as P. Molek has aptly written, the resignation to the age-old requirement of formal propositional logic, according to which every proposition has only one of two truth values: truth and falsity. According to P. Molek, the aforementioned fuzzy logic[12] loosens these two values and makes them not absolute, but polar values, and between them it delineates a range of intermediate values, which makes it possible to label statements not only as (completely) true or (completely) false, but also as very true, not completely true, not completely false or very false.[13]

In the context of looking through *fuzzy logic glasses* at the issue of bias of the members of the appeal committees, we will set two extreme points of the FL-scales: Impossibility to object bias – Possibility to object bias.[14] Since this is a relatively simple problem, we will set a scale of 0 (minimum) to 10 (maximum).[15]

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[9] On the issue of the principle of material (objective) truth, e.g., SKULOVÁ, S. et al. *Administrative Procedural Law*. Pilsen: Aleš Čeněk, 2008, p. 70 ff; or HORZINKOVÁ, E. – NOVOTNÝ, V. *Správní právo procesní* [Administrative Procedural Law]. Prague: Leges, 2024, p. 45.

[10] On the issue of the principle of legality, e.g., SKULOVÁ, *c. d.*, p. 57 et seq; or HORZINKOVÁ – NOVOTNÝ, *c. d.*, p. 59.

[11] It is currently popular in Czech doctrine, especially among younger legal scholars and lawyers.

[12] Furthermore also FL.

[13] Quote: MOLEK, P. *Právní pojem "pronásledování" v souvislostech evropského azylového práva* [The Legal Concept of "Persecution" in the Context of European Asylum Law]. PhD. thesis. Brno: Masaryk University, 2009, p. 145 ff. And the literature referred to hereafter e.g., (in particular): CRYAN, D. – SHATIL, S. – MAYBLIN, B. *Logika* [Logic]. Prague: Portál, 2002; MCCAWLEY, J. D. *Everything that Linguists Have Always Wanted to Know about Logic… But Were Ashamed to Ask*. Chicago: The University of Chicago Press, 1981.

[14] With the consequence, of course, that they will be excluded from hearing and deciding the case in the appeal proceedings.

[15] A rating scale of 0–100 would be unnecessarily detailed and could confuse the reader. Similarly, it would be inappropriate to use values after the decimal point.

Given the above arguments, the author concludes that it is a relatively rare case where a value of 10 can be circled on the FL scale – i.e., maximum polarity: the possibility of arguing bias. This assessment also leads to the answer as to whether the party to the administrative proceedings has the right to discover the names of the members of the appeal committee, as I have argued above, this right is legitimately vested in it.[16]

DEFINITION OF THE NEXT ISSUE – VOTE OF THE APPEAL COMMITTEE

We now come to another research question concerning the work of the appeal committee. Who can realistically be present at the vote of the above-mentioned appeal committee? As we have found out *from the public law field* the application practice here is inconsistent. Which must be considered as a bad state of affairs, especially since this is the central level of the Czech public administration.

The Administrative Procedure Code, in the provisions of § 134(1), authoritatively sets a condition – unless a special law provides otherwise, only members of the collegial body may be present during the deliberation and voting. The only legal exception is ex lege the person who is entrusted with drawing up the minutes, i.e., in our case if it is not signed directly by a member of the appeal committee.[17]

In practice, the problem arises whether this provision should also be applied in the case of the appeal committee, which is not an administrative body issuing administrative decisions but, as mentioned above, *only* an advisory body to the Minister or the head of another central administrative authority.

Let us recall that the proceedings before a collegial body are regulated in administrative law by the provisions of § 134 of the Administrative Procedure Code.

We are of the view that if the provision of Section §134 is to be applied by analogy under § 152(3), it is quite legally impermissible for other persons – non-members of the appeal committee – to be present during the voting. In practice, it happens that it is mainly the employees of the Central Administrative Authority who are present during the voting (or discussion before the actual voting), this practice has to be rejected as inconsistent with the positive law of the day.[18]

CUI BONO?

The purpose of this provision is obvious, it is to protect (or strengthen) the independence of the appeal board. It also helps to more fully implement the principle of

[16] As the more attentive reader will notice, the author attempts to demonstrate that the FL is useful and applicable even for so-called *unambiguous* or *clear-cut* cases and makes no secret of the fact that he is trying to popularize it in wider legal circles.

[17] Cf. JEMELKA, L. *Správní řád* [Administrative Code]. 3rd ed. Prague: C. H. Beck, 2011, p. 556; or MATES, P. – KOPECKÝ, M. *Mimořádné opravné a dozorčí prostředky ve správním řízení* [Extraordinary corrective and supervisory means in administrative proceedings]. Prague: Leges, 2022.

[18] As mentioned above, the only exception is a non-member – the recorder of the CoR.

substantive truth on which the Czech administrative process is based. The relevant threat to the cited principle of substantive truth and independence is to be seen in particular if the officials who participated in the adoption of the contested decision at first instance were to take part in the vote. If the quoted persons interfered or in any way influenced the proceedings, the provisions on the independence of the appeal committee would become obsolete. It is here that I see the main raison d etre for the existence and proper application of the provisions of § 134(1) of the Administrative Procedure Act (applied by reference from § 152(3) of the Administrative Procedure Act).

ANOTHER ISSUE – THE PARTICIPATION OF THE MINISTER

In our text, we address in particular the problem of who can realistically be present at the vote of the appeal committee, so as not to jeopardise the independence of this collegial (advisory) body. The more thoughtful reader will have already thought of the follow-up question of whether the, and in particular during the voting, the Minister themselves or the head of another central administrative authority.

Taken purely in the mode of grammatical interpretation of the above-analysed provision § 134(1) of the Administrative Procedure Code, their participation in the deliberation and voting of the appeal committee should be ex lege excluded. No exception is provided for in the Administrative Procedure Code.

However, by a teleological and systematic interpretation of the Administrative Procedure Code, we can arrive at and come to the opposite conclusion. As mentioned above, the appeal committee is an advisory body to the Minister. We consider that, from the very nature and meaning of the issue at hand, it would be more appropriate if the Minister's participation in the deliberations and voting of the appeal committee were permissible.[19]

The legal responsibility for the decision of this commission rests with the Minister, or the head of another central administrative office, so I do not see the prohibition of their participation as meaningful, although of course the pure grammatical interpretation of the provisions § 134(1) of the Administrative Code sometimes (partially) leads to it. We also do not consider it appropriate for the Minister to be perceived de facto in this matter in the same way as the employees of the administrative authority – to which they would de facto be assigned if the same prohibition arising from the quoted provision §134(1) of the Administrative Procedure Code were applied to them.

De lege ferenda, I would argue for an amendment of § 134(1) of the Administrative Procedure Code, in the sense of explicitly allowing the participation of the Minister, or the head of another central administrative authority, in the deliberations and voting of *their* appeal committee.[20] Respectively, they would not be subject to the restriction imposed by the analysed provision § 134(1) of the Administrative Procedure Code.

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[19] L. Jemelka comes to a similar (though not so explicit) conclusion (JEMELKA, *c. d.*); and MATES – KOPECKÝ, *c. d.*

[20] Naturally, it is completely unacceptable for a minister to participate in a meeting of a *foreign* appeal committee – e.g., at another ministry or other central government body.

CONCLUSION

We take the strong view – applying the provisions of § 134(1) and § 152(3) of the Administrative Procedure Code – that it is de lege lata legally excluded that other persons – non-members of the appeal committee – should be present during the voting.

If a central state administration authority does not respect the aforementioned limitation (in whole or in part) in its application practice, it acts contra legem. In particular, care must be taken to ensure that the official persons involved in issuing the contested administrative decision are never present at the vote. The decision in the so-called first instance.

We further conclude unequivocally that the provision of § 134(1) of the Administrative Procedure Code and the conto of the prohibition of participation in the deliberations and voting of the appeal committee do not apply to the Minister or the head of another central administrative authority. Since the appeal committee does not decide the merits of the case ex lege but prepares *only* a draft decision which the head of the central administrative authority (or the Minister) is not obliged to adopt, we see no relevant logical reason why the Minister cannot be present during the voting. As we have stated above, a more comprehensive teleological and systematic interpretation seems preferable here to a purely grammatical interpretation of the provisions of § 134(1) of the Administrative Procedure Code.

At the very end of the text, I would like to point out one more neglected problematic fact. The deliberations of the appeal committee are conducted in accordance with the rules of procedure of the central administrative authority concerned. The legal regulation of the Administrative Procedure Code does not explicitly stipulate who is to approve the rules of procedure in question – whether the collegial body (the appeal commission) or the body establishing the collegial body (the Minister or the head of the office). To some extent, therefore, both options are possible, however, given the nature of the appeal committee, I am of the opinion that the rules of procedure should be adopted exclusively by the Minister or the head of the office. The Rules of Procedure, as a de facto legal regulation of the lowest legal force, must not be in conflict with the law (or constitutional law), for which the head of the administrative authority is also responsible.

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