SUABILITY OF A RECTOR'S DECISIONS TO SUSPEND A STUDENT'S RIGHTS

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DOI: 10.26399/iusnovum.v16.2.2022.18/a.ziolkowska

INTRODUCTION

The right to appeal, which originates from Article 78 of the Constitution of the Republic of Poland and remains in conjunction with Article 176 of the Constitution of the Republic of Poland, shows a considerable link with suability interpreted as admissibility of a demand for a review of a decision by an authorised entity. Depending on the model of instance supervision adopted, in case a judgement appealed against is found inappropriate, it shall be repealed, amended or substituted by a new one. The right constitutes a procedural opportunity, which a party or another authorised entity can but does not have to use, which is also applicable to appeals against a rector's decision to suspend a student's rights.

A university rector is an organ of public administration, however, not in a systemic[1] but functional sense (a governing organ), i.e. plays the function of an organ of public administration within the meaning of Article 5 § 2(3) Code of Administrative Procedure [CAP] in situations in which it is by virtue of law designated to adjudicate on individual matters by means of an administrative decision.[2] The opinion is in conformity with the autonomy of the institutions of higher education and the judgements of the Constitutional Tribunal, which emphasise that "It is thus not possible, in the light of the Constitution, to give the organs of a public university, in cases concerning the essence of functioning of this school, the nature of organs of public authorities, including organs of state

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1 Supreme Administrative Court's judgement of 10 September 2013, I OSK 1377/13, Legalis No. 1924820; Kopacz, M., 'Pozycja procesowa rektora uczelni publicznej w indywidualnych sprawach studenckich', *Zeszyty Naukowe Sądów Administarcyjnych*, 2011, issue 1, p. 30.

2 See Klat-Wertelecka, L., 'Organy szkoły wyższej w postępowaniu administracyjnym', in: Blicharz, J., Chrisidu-Budnik, A., Sus, A. (ed.), *Zarządzanie szkołą wyższą*, Wrocław, 2014, p. 124.

administration. (...) The Constitution stipulates that state universities pursue public goals referred to in Article 70 Constitution. (...) The analogy to administrative-legal relationships cannot lead to giving a rector or any other university organ a status of an organ of state administration".[3]

A rector's tasks have been laid down in a non-enumerative way in the provision of Article 23 Law on Higher Education and Science [LHES]. In accordance with the content of this provision, a rector's tasks include matters concerning a university with the exception of the matters that are regulated otherwise by statute or belong to other university organs' competence. As a result, it should be assumed that a rector is a monocratic organ of a university that is the right one to adjudicate on individual matters within the scope of public administration laid down by statute by means of administrative decisions within his/her competence,[4] which includes a decision to suspend a student's rights. This is due to the fact that students constitute the biggest group of university users who can be subject to a rector's administrative powers, including the right to suspend a student's rights. A rector has the right to exercise this power before an explanatory proceeding in a disciplinary one against a student as well as in connection with a disciplinary proceeding in progress. A rector's right to use this measure is laid down in Law on Higher Education and Science of 20 July 2018,[5] Part VII, Chapter Two: Article 312(5) and Article 316(4) LHES.

The starting point for the analysis of the issues discussed in this article includes first of all the consideration of the types and consequences of the suspension of a student's rights as well as the legal form of this suspension; and only then, secondarily, there are findings, the issue of instance supervision and one conducted by administrative courts in relation to a rector's decision. The catalogue of appellate measures that a student has the right to use against a rector's decision to suspend his/her rights is mainly determined by its legal form. However, it must be *in principio* emphasised that the legislator does not *expressis verbis* indicate that it is an administrative decision, which considerably influences a student's procedural position and rights.

1. SUSPENSION OF A STUDENT'S RIGHTS BY A RECTOR

Universities, as organisational units designated to pursue public goals and enter into administrative-legal relationships, are treated as administrative entities whose most numerous users are students and where management is assigned to a one-man organ: a rector, *ut supra*. The legal relationship between a student and a university is an administrative-legal one, i.e. a corporate one. It starts the moment a student, after making an oath and matriculation, joins the academic community. A person admitted to studies is granted student rights the moment he/she makes an oath

[3] Constitutional Tribunal's judgement of 8 November 2000, SK 18/99, OTK ZU 2000, No. 7, item 258.

[4] Voivodeship Administrative Court's judgement of 4 December 2020, III SA/Łd 430/20, Legalis No. 2509041.

[5] Consolidated text, Journal of Laws of 2021, item 478, as amended.

(Article 83 LHES). It is a legal relationship, which is temporary in nature, i.e. lasts until graduation or the occurrence of circumstances that result in its termination for other reasons, e.g. a student's withdrawal from studies or death. The relationship may also be modified in its course as a result of the suspension of a student's rights.

It should be pointed out that the doctrine indicates that the management of a university is based on the rules of a public law corporation,[6] which, within executive authority, result in the right to issue individual administrative acts also in relation to students. The recognition of universities as public law corporations considerably influences the empowerment of this group within the academic environment because it results in the abandonment of their treatment as company users whose position is 'rather passive' but as members of public law corporations exercising certain rights.[7]

The essence of company authority consists in "the scope of a company organs' authorisation to unilaterally develop legal relationships with the users of a company (in this case with students)".[8] As a result, this means that "the moment a given person becomes one of the users of a company, he/she becomes subject to the rights and duties of the users of a given company. Those rights and duties result from both the provisions of commonly binding regulations (statutes and normative executive acts) and company statutes as well as rules and regulations".[9] Within the scope of his/her company authority, which is necessary to achieve company goals, a rector adjudicates not only on admitting a user to company services but also on depriving a user of the possibility to use them in case he/she infringes or does not comply with the rules of commonly binding law as well as company regulations, or on limiting them temporarily by means of suspending a student's rights.

Thus, the content of a corporate relationship consists in a company's and its users' mutual rights and duties. A student's rights are laid down in Part II Chapter 3 LHES and are diverse in nature. They include those concerning directly studying (e.g. transfer and recognition of ECTS points, change of the field of studies, repetition of some classes because of insufficient leaning outcomes), the right to a leave of absence, the right to scholarship and other student benefits (e.g. a rector's grant, a scientific or sports scholarship funded by a natural or legal person that is not a state or local government institution, a student loan, the right to accommodation in a university hostel or board in a university canteen, the right to 50% discount on municipal public transport). It is also worth pointing out the classification of student

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[6] Przybysz, P., 'Sytuacja prawna jednostki w zakładzie oświatowym', in: Ura, E. (ed.), *Jednostka wobec działań administracji publicznej*, Rzeszów, 2001, p. 367. There are also opinions in the doctrine that universities are public law corporations – see e.g. Ochendowski, E., 'Pozycja prawna studenta uniwersytetu – użytkownik zakładu publicznego czy członek korporacji publicznej', in: Filipek, J. (ed.), *Jednostka w demokratycznym państwie prawa,* Wyższa Szkoła Administracji, Bielsko-Biała, 2003, pp. 457–462; Dolnicki, B., 'Pozycja prawna studenta i doktoranta', in: Szadok-Bratuń, A. (ed.), *Nowe prawo o szkolnictwie wyższym* a *podmiotowość studenta*, Wrocław, 2007, pp. 91–93; Szadok-Bratuń, A., 'Trójwymiarowość przestrzeni podmiotowości prawnej studenta', in: Szadok-Bratuń, A. (ed.), *Nowe prawo*..., op. cit., pp. 194, 197.

[7] Dolnicki, B., 'Pozycja prawna studenta i doktoranta…', op. cit., p. 93.

[8] Decision of Voivodeship Administrative Court in Kielce of 17 October 2017, II SA/Ke 600/17, Legalis No. 1684321.

[9] Ibidem.

rights proposed by J. Borkowski,[10] who distinguishes the rights in the course of studies, the rights during a leave of absence, the rights after a leave and the rights after graduation. Taking into account a normative act that is the source of student rights, one can also point out those student rights that result from the commonly binding law and company regulations, inter alia, rules and regulations.

The suspension of a student's rights may constitute a disciplinary penalty imposed after a disciplinary proceeding conducted by a disciplinary commission in the mode and following the rules laid down in Law on Higher Education and Science and analogous application of Code of Criminal Procedure.[11] It can also be a type of coercive measure imposed by a rector's decision preceding an explanatory proceeding or in connection with a disciplinary proceeding conducted. A rector's decision on the suspension of a student concerns the sphere of student rights and duties and causes that the company relationship, as a result of the decision issued, "has been considerably changed".[12] Moreover, this causes an affliction preventing a student from learning at university and, as a result, completing studies on time. Although there is no clear statutory regulation, *de lege ferenda* it is suggested that the suspension of a student's rights should first of all be temporary, interim in nature and it seems it should not exceed the period of a disciplinary penalty, i.e. one year (Article 308 LHES). A longer suspension period might discourage a student from continuing studies. Secondly, suspension should concern particular student rights. It should not be the suspension *in genere*.

1.1. SUSPENSION OF A STUDENT'S RIGHTS BEFORE AN EXPLANATORY PROCEEDING

The suspension of a student's rights by a rector may be applied in case of a justified suspicion that a student committed a crime.[13] A rector may at the same time order the instigation of an explanatory proceeding and suspend a student (Article 312(5) LHES). Thus, there is a close link between a (justified) suspicion of a crime commission and the suspension of a student and the instigation of an explanatory proceeding and possibly a disciplinary proceeding to follow. *Ratio legis* of the use of this measure by a rector may result from the need "to ensure the sense of safety

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[10] Borkowski, J., *Organizacja zarządzania szkołą*, Wrocław–Warszawa–Kraków–Gdańsk, 1978, p. 269.

[11] Code of Criminal Procedure of 6 June 1997, consolidated text, Journal of Laws of 2021, item 534, as amended.

[12] Supreme Administrative Court's judgement of 17 November 2015, I OSK 1383/15, Legalis No. 1396007.

[13] However, it is not only an act referred to in Article 287(1) (1)–(5) LHES. For the issue of a rector's duty to report an offence of plagiarism committed by a student see Kajfasz, J., 'Rektor jako osoba zobowiązana do zawiadomienia o podejrzeniu popełnienia plagiatu (rozważania na gruncie odpowiedzialności dyscyplinarnej studentów)', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2018, issue 2, pp. 121–131. For relation between an offence and a disciplinary tort committed by a student see e.g. Sroka, T., 'Przestępstwo jako przewinienie dyscyplinarne w perspektywie celów postępowania dyscyplinarnego wobec studentów', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2011, issue 1, pp. 137–147.

at university and to protect its good reputation".[14] The placement of this regulation in the chapter dealing with students' liability indicates that the suspension of a student's rights by a rector is an element of proceedings concerning a student's disciplinary liability although such a decision is not issued within a disciplinary proceeding or a preceding explanatory proceeding. As a result, it should be assumed that Code of Criminal Procedure is not applicable in such cases. Thus, the use of this instrument by a rector is treated as a preventive measure and not a surrogate for a disciplinary penalty.

In practice, interpretational difficulties occur in relation to the expression 'at the same time' used by the legislator as the moment of issuing the decision in question by a rector. The application of the linguistic interpretation may lead to a conclusion that the suspension of a student's rights and the order to instigate an explanatory proceeding coexist. However, court judgements[15] emphasise that the term indicates the earliest moment of the suspension of a student's rights in this mode, i.e. in other words, it may take place without a preceding order to instigate an explanatory proceeding. As a result, it means that the application of this measure is also possible in the course of an explanatory and a disciplinary proceeding.[16]

The legislator does not strictly determine the period of a student's rights suspension in this case. According to Article 312(5) LHES *in fine*, the maximum suspension period shall last until a disciplinary commission issues a judgement. A rector's use of this right may be justified especially when it is probable that a disciplinary commission will impose the most severe penalty of striking a student off.

Moreover, unlike in case of a disciplinary penalty laid down in Article 308(4) LHES, the legislator does not indicate particular rights subject to suspension but all the rights in general. It should be emphasised, however, that a suspended student is not deprived of the status of a student[17] but cannot exercise his/her rights resulting from his/her administrative-legal relationship with a university. In particular, a suspended student may continue to benefit from the discount on public transport (including some airline fees for students who have ESN – Erasmus Student Network – cards), discounts on tickets to cultural institutions, cinemas, water parks, sports events, discounts in bookshops, restaurants and even some banks offering student accounts and special credit cards provided a student still has a valid student ID.

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[14] Judgement of Voivodeship Administrative Court in Lublin, of 19 December 2019, III SA/Lu 498/19, Legalis nr 2288914.

[15] Judgement of Voivodeship Administrative Court in Lublin, of 5 April 2013, III SA/Lu 104/13, Legalis No. 1927603; also see Giętkowski, R., 'Zawieszenie studenta w prawach', *Administracja: teoria, dydaktyka, praktyka*, 2015, No. 2, pp. 9–11.

[16] Wojciechowski, P., in: Woźnicki, J. (ed.), *Prawo o szkolnictwie wyższym i nauce. Komentarz*, Warszawa, 2019, p. 877.

[17] Giętkowski, R., 'Zawieszenie studenta...', op. cit., p. 13.

1.2. SUSPENSION OF A STUDENT'S RIGHTS IN THE COURSE OF A DISCIPLINARY PROCEEDING

A rector can also exercise the right to suspend a student's rights in case of his/her persistent unjustified failure to appear before a disciplinary representative for student affairs in the course of an explanatory proceeding or before a disciplinary commission despite the receipt of a proper notification (Article 316(4) LHES). The essence of this measure is that it ensures a student's participation in an explanatory proceeding or a sitting of the commission. Thus, the legislator regulated a preventive measure in the course of a disciplinary proceeding against a student. The possibility of suspending a student's rights under Article 316(4) LHES may be treated as a coercive measure to make a student appear in case of his/her permanent, persistent absence. At the same time, it should be emphasised that a rector's decision issued based on the provision discussed may be addressed to any student, also a student playing the role of a witness and not only the one against whom an explanatory or disciplinary proceeding is conducted.

The regulation authorising a rector to suspend a student's rights in the course of a proceeding, like in case of suspension before an explanatory proceeding, does not determine the maximum period of suspension or the scope of rights suspended.

2. LEGAL FORM OF THE SUSPENSION OF A STUDENT'S RIGHTS

The provisions of the Act: Law on Higher Education and Science regulating admissibility of a rector's decision to suspend a student do not stipulate its legal form. In such cases, it is assumed that as the legislator authorised an administrative organ to adjudicate on an individual's matter without clearly indicating a legal form of that organ's action, one should follow the so-called presumption of a case resolution in the form of an administrative decision. The adoption of this presumption depends on whether the act is issued in the circumstances giving authority to issue a decision based on substantive legal grounds and whether it includes an authoritative adjudication on an individual's matter.[18] What is more, it is emphasised in case law that "In present systemic conditions of functioning of public administration, the presumption of a case resolution in the form of an administrative decision is a consequence of 'the right to an administrative proceeding', which results from the constitutional principle of a democratic state ruled by law (Article 2 Constitution)".[19]

The adoption of the presumption of the form of an administrative decision in case of a rector's adjudication on the case of the suspension of a student requires that not only it should be established whether the legislator did not envisage the form of

[18] Resolution of seven judges of the Supreme Administrative Court of 16 December 2013, II GPS 2/13, ONSA and WSA 2014 No. 6, item 88, p. 17, and judgement of Voivodeship Administrative Court in Gdańsk, of 3 February 2021, I SA/Gd 824/20, Legalis No. 2553509, Supreme administrative Court's decision of 26 May 2021, III OSK 143/21, Legalis No. 2626200.

[19] Judgement of Voivodeship Administrative Court in Warsaw of 11 February 2021, I SA/Kr 1283/20, Legalis No. 2557628.

an organ's action, *ut supra*, but also it should be considered whether the adjudication is authoritative and unilateral in nature concerning an individual administrative matter. The judicature uniformly[20] indicates that the suspension of a student belongs to the category of individual students' affairs to which administrative procedure shall be applied and which require the issue of an administrative decision in order to be resolved. The conclusion is especially significant because it enables a student to exercise the right to procedural protection and ensures relevant procedural guarantees of the protection of a student's own legal interest.[21] Moreover, it is essential for the issues of the supervision of a rector's decision within the instance (because pursuant to Article 23(4) LHES, a rector's administrative decision can be subject to application for reconsideration) as well as the review by an administrative court. In case of the latter, it is also important that the decision issued in accordance with Article 315(5) Act on Higher Education and Science as well as Article 316(4) LHES, is discretionary, *ut infra*. However, a rector's action within the scope of administrative adjudication does not mean complete freedom because "The scope of adjudication is always determined by competence norms, provisions concerning administrative procedure and the regulations of substantive law. Issuing a decision that is discretionary in nature, an organ is always bound by a provision and an aim of a particular regulation".[22]

A rector's decision should contain the following minimum of elements necessary to its qualification as an administrative decision: the indication of an administrative organ that issues an act (a rector), the indication of an addressee of an act (a student), the adjudication on the essence of the case (an authoritative determination of a particular administrative-legal relationship) and a rector's signature. Pursuant to Article 107 CAP, a rector's decision to suspend a student's rights must meet the requirements set in it, i.e. apart from the above-mentioned ones, the indication of the date of issue, reference to legal grounds (substantive grounds of the decisions include Article 312(5) AHES and Article 316(4) LHES), and actual and legal justification. What should be emphasised here are additional requirements for discretional decisions in the field of justification because their content should include a comprehensive analysis of evidence and exhaustive reasoning behind the organ's stand. Moreover, they should result in comprehensiveness and completeness of consideration and evaluation of all circumstances important for the case.[23] A rector's decision should also contain information whether and in what mode it can be appealed against and about the right to renounce application for reconsideration of the case and the consequences of it,[24] a rector's signature with the indication of his/her full

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[20] Judgement of Voivodeship Administrative Court in Lublin, 5 April 2013, III SA/Lu 104/13, Legalis No. 1927603.

[21] Supreme Administrative Court's judgement of 17 November 2015, I OSK 1383/15, Legalis No. 1396007.

[22] Supreme Administrative Court's judgement of 25 March 2009, I OSK 1535/08, Legalis No. 221026.

[23] Supreme Administrative Court's judgement of 17 March 2010, II GSK 491/09, Legalis, No. 229991, and Supreme Administrative Court's judgement of 20 July 2011, I OSK 2006/10, Legalis, No. 360778.

[24] A student may declare he/she renounces the right to use this measure pursuant to Article 127a CAP in the course of running of the time limit to lodge a motion to reconsider a case.

given name and surname, information about admissibility of a complaint to an administrative court and the fee amount for lodging a complaint, as well as about the possibility of applying for exemption from costs or for financial support. Taking into account the nature of the decision and circumstances of its issue, a rector may order its immediate enforceability (Article 108 CAP). In particular, it may concern a decision issued pursuant to Article 316(4) LHES because it constitutes a specific type of a measure ensuring an efficient course of a disciplinary proceeding

3. INSTANCE AND INSTANCE SUPERVISION IN THE CONTEXT OF A RECTOR'S DECISION TO SUSPEND A STUDENT

Suspending a student, a rector issues a non-final first instance decision. However, the issue of the instance system is not treated in a uniform way in the doctrine of law.[25] It is sometimes interpreted as a legal, hierarchical relationship between organs or courts of different levels, as well as a hierarchical dependence between some internal units of organs or courts that conduct proceedings.[26] But, as a rule, the instance system is procedural in nature because it is a mechanism with the use of which the state guarantees proper and just judgements; and an instance (in the light of Article 78 Constitution) has a conventional character. The doctrine of law defines the concept of the instance system by emphasising the meaning of various features that are connected with it. According to M. Żbikowska, "the principle of the instance system *in generale* is not characterised by supremacy of one procedural organ over another one but is marked by clear independence of organs and 'better preparation' of an authorised organ to hear appellate measures against procedural decisions issued by an organ of first instance",[27] with the exception of a horizontal instance. Andrzej Wróbel[28] expresses an opinion that the instance system of proceedings and suability of judgements are not identical concepts. M. Michalska-Marciniak gives the same opinion and points out that it is necessary to distinguish between the two terms because, regardless of the indissoluble relation between them, an instance unlike the instance system is an autonomous concept.[29] The instance system of a proceeding assumes the existence of an instance course (dynamics), i.e. the movement of a case

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[25] For more on the issue of instance and the instance system see e.g. Ziółkowska, A., *Postępowanie międzyinstancyjne w postępowaniu sądowoadministracyjnym,* Katowice, 2019, pp. 15–47.

[26] See Zieliński, A., 'Konstytucyjny standard instancyjności postępowania sądowego', *Państwo i Prawo,* issue 11, p. 3.

[27] Żbikowska, M., 'Właściwość funkcjonalna Sądu Najwyższego do rozpoznania zażaleń w postępowaniu około kasacyjnym', *Prokuratura i Prawo*, 2016, No. 6, p. 127.

[28] Wróbel, A., 'Niektóre aspekty realizacji zasady dwuinstancyjności w administracyjnych postępowaniach w sprawach z zakresu własności przemysłowej', in: Wikło, E. (ed.), *Księga pamiątkowa z okazji 85-lecia ochrony własności przemysłowej w Polsce*, Warszawa, 2003, p. 256.

[29] See Michalska-Marciniak, M., *Zasada instancyjności w postępowaniu cywilnym*, Warszawa, 2012, p. 66 and literature referred to therein. For different views see Osajda, K., 'Zasada sprawiedliwości społecznej w orzecznictwie Trybunału Konstytucyjnego', in: Ereciński, T., Weitz, K. (eds.), *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego. Materiały Ogólnopolskiego Zjazdu Katedr i Zakładów Postępowania i Cywilnego*, 1st issue, Warszawa, 2010, p. 446 et seq.

on the initiative of an authorised entity from one instance to the other (next one) in order to review a judgement and protect a party's interest.[30] There is an indissoluble dependence between the instance system and the course of an instance: the instance system could not be implemented without the course of an instance.

The guarantee of the review of first instance judgements results from Article 78 and Article 176(1) Constitution of the Republic of Poland. The former provision gives a party the right to appeal against them, and the latter introduces the rule of a two-instance proceeding. There are close links between the above-mentioned provisions. The provision of Article 176(1) Constitution indicates the minimum number of instances, on the other hand, Article 78, "using the term 'right to appeal', mandates taking the substantive meaning of this right into consideration in the provisions on court procedure".[31] Adopting this point of view, one should agree that: "the introduction of a properly shaped instance system constitutes a guarantee of the exercise of the right to a fair trial".[32] The provision of Article 78 and the provision of Article 176(1) Constitution do not shape a constitutional right to appeal against second instance judgements.[33] The Constitutional Tribunal repeatedly emphasised in its judgements that "The constitution-maker did not precisely determine the shape of instance supervision and gave the legislator much freedom; however, it is not unlimited and does not allow for introducing arbitrary solutions that can restrict the procedural rights of the parties to a proceeding".[34] Considering the shape and number of instances, the legislator should take into account that the multi-instance system of a proceeding, apart from undoubted benefits including the increased chance that the judgement will be in conformity with law, the elimination of mistakes made in the lower instance and higher degree of proficiency of the adjudicating bench, also has a disadvantage, which is extended time of a proceeding. One of the ways of eliminating this consequence is the introduction of legal regulations making the instance system more flexible.[35]

The intensity of instance supervision and the scope of powers of the second instance organ are determined by the instance model adopted by the legislator. Taking into consideration the above statement, two types of the instance system can be distinguished: the vertical and horizontal ones; at the same time it should be emphasised that the vertical organisation of organs guarantees more independence and proficiency.[36] Devolutivity, which origins from constitutional law, where it means an upward movement of competence (competence devolution), is a determinant of the vertical instance system. However, devolutivity as a category of procedural

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[30] See Zimmermann, J., *Administracyjny tok instancji*, Kraków, 1986, pp. 12 and 15.

[31] Zieliński, A., 'Konstytucyjny standard instancyjności postępowania sądowego', *Państwo i Prawo*, 2005, issue 11, p. 8.

[32] Ibidem, p. 9.

[33] Grzegorczyk, P., in: Gudowski, J. (ed.), *System Prawa Procesowego Cywilnego, Środki zaskarżenia*, Vol. III, Part. 1, Warszawa, 2013, p. 45.

[34] See judgement of 28 July 2004, P 2/04, OTK ZU No. 7/A/2004, item 72, and Constitutional Tribunal's judgement of 8 April 2014, SK 22/11, OTK-A 2014/4, item 37.

[35] Cf. Zieliński, A., 'Konstytucyjny standard...', op. cit., p. 4.

[36] See e.g. Stahl, M., 'Uwagi o toku instancji organów odwoławczych w postępowaniu administracyjnym', *Zeszyty Naukowe Uniwersytetu Łódzkiego*, 1974, Seria I, Łódź, issue 106, pp. 63–64.

law means the movement of a case between instances in the course of an instance and constitutes a feature of appellate measures. On the other hand, the horizontal instance course (the so-called 'flattened' or 'limited'[37] instance course) allows for verification of a judgement by another organ of the same level, or the same organ that issued a judgement. The course should be treated as an exception and its admission constitutes a specific type of two-instance system surrogate. It should be signalled that the use of the term 'horizontal instance' in relation to appellate measures in a situation in which they do not have a legal consequence in the form of movement of a case to a higher instance organ misleads and is semantically inappropriate, results in a semantic noise because it allows for having an erroneous opinion that lodging an appeal will make another court (organ) that is at a higher level of court (organ) structures hear the case. Thus, as it is rightly emphasised in the doctrine of law,[38] if an organ or a court bench that is at the parallel or equivalent level as the supervised one or the same organ is authorised to supervise, one cannot speak about the instance system because in such a situation there is no competence devolution necessary to review a judgement. A horizontal appeal would be a more appropriate term, which is validating in case of a rector's decisions.

3.1. INSTANCE SUPERVISION IN THE COURSE OF A PROCEEDING OF SUSPENDING A STUDENT BY A RECTOR

A rector's decisions on suspending a student's rights pursuant to Article 312(5) AHES as well as Article 316(4) LHES are first instance decisions, which can be appealed against by means of a standard non-devolutive appellate measure (which is stipulated in the content of Article 16 § 1 first sentence CAP), which is a remonstrance. In case law it is indicated that "lodging a motion to reconsider a case does not initiate instance supervision of the decision appealed against but only its self-review by the organ that issued it. Thus, it is a review that due to its nature cannot give a party all the procedural guarantees that are given by instance supervision".[39] What is more, in case of an appellate measure in the form of a motion to reconsider a case, a rector "acts as a 'substantive' organ, i.e. one that is obliged to deal with and resolve the essence of the case taking into account all general rules of administrative procedure and detailed regulations that constitute

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[37] See the Supreme Court resolution of 13 February 1996, III AZP 23/95, OSP 1996, No. 12, item 219. It is worth drawing attention to Z. Kmieciak's opinion. According to him, in an administrative proceeding, in some categories of cases heard by local government units, there are no obstacles to give up devolutive appeals and admit a motion to re-examine a case, which starts a horizontal instance course – Kmieciak, Z., 'Samorządowe kolegia odwoławcze a formuła instancyjności postępowania administracyjnego (na tle prawnoporównawczym)', *Samorząd Terytorialny*, 2015, No. 6, p. 64.

[38] See Świecki, D., in: Świecki, D. (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warszawa, 2017, p. 44; Michalska-Marciniak, M., *Zasada instancyjności*..., op. cit., pp. 93–94.

[39] Supreme Administrative Court's judgement of 12 June 2018, I OSK 1803/15, Legalis No. 1798538.

their extension",[40] including those guaranteeing statutory rights of a party and maintaining the autonomy of a higher education institution.[41]

The motion to reconsider a case should be lodged within 14 days from the date of the receipt of a decision. An appellant does not have to formulate particular objections to a rector's adjudication or select any elements of its content. It is enough to indicate in the content of the motion that a student is not satisfied with the decision issued. In an administrative proceeding based on CAP, *gravamen* is not required as a condition for the effective lodging of an appellate measure or making a particular plea. In case of formal deficiencies, a rector should issue a decision on inadmissibility of a remonstrance, "which ensures the protection of a party's rights in a proceeding in a better way than when an application is left not dealt with".[42]

In a proceeding initiated by a motion to reconsider a case, the provisions concerning appeals against decisions are applicable respectively (Article 127 § 3 CAP). Such a legal construction means that the provisions concerning: an indirect mode of lodging an appellate measure (Article 129 § 1 CAP), the first instance organ's rights to self-supervision (Article 132 CPA), substantive-technical activities consisting in the obligation to transfer an appellate measure together with the case files (Article 133 CAP), the mode of conducting an additional supplementing explanatory proceeding (Article 136 *in fine* CAP), or the higher instance organ's right to rule a cassation[43] and issue a cassation decision pursuant to Article 138 § 2 CAP or a cassation decision cancelling the decision appealed against and obliging the first instance organ to issue a particular decision (Article 138 § 4 CAP) are not applicable

A motion to reconsider a case is suspensive in nature because until the deadline for lodging it, and in case it is lodged on time, until a new decision is issued, the implementation of the decision appealed against is suspended.[44]

Ratio legis of providing a student with an imperfect appellate measure against a rector's decision to suspend a student in the form of a motion to reconsider a case consists in a university's autonomy,[45] which is expressed in its independence from

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[40] Supreme Administrative Court's judgement of 15 May 2019, II GSK 1909/17, Legalis No. 1976124.

[41] Judgement of Voivodeship Administrative Court in Szczecin of 13 September 2018, II SA/Sz 523/18, Legalis No. 1828280.

[42] Judgement of Voivodeship Administrative Court in Warsaw of 9 December 2015, VII SA/Wa 707/15, Legalis No. 1383100.

[43] Cf. Supreme Administrative Court's judgement of 3 October 2011, II GSK 1062/10, Legalis No. 389319, Supreme Administrative Court's judgement of 7 October 2015, I OSK 1223/15, Legalis No. 1387242. For different views see judgement of Voivodeship Administrative Court in Warsaw of 30 May 2011, VI SA/Wa 766/11, Legalis No. 391407. For different views see Chróścielewski, W., in: Chróścielewski, W., Tarno, J.P., Dańczak, P., *Postępowanie administracyjne i postępowanie przed sądami administracyjnymi*, Warszawa, 2021, p. 226.

[44] Judgement of Voivodeship Administrative Court in Warsaw of 7 July 2011, VI SA/Wa 822/11, Legalis No. 387200.

[45] For the issue of university autonomy and its limits see e.g. Rybkowski, R., 'Autonomia a rozliczalność – polskie wyzwania', *Nauka i Szkolnictwo Wyższe*, 2015, No. 1 (45), pp. 95–112; Syryt, A., 'Kształtowanie systemu szkolnictwa wyższego w Polsce w drodze aktów wykonawczych i wewnętrznych – zakres dopuszczalnej regulacji', *Krytyka Prawa*, 2018, Vol. 10, No. 2, pp. 323–324. Also see Dańczak, P., *Decyzja administracyjna w indywidualnych sprawach studentów i doktorantów,* Warszawa, 2015, pp. 27–29.

state authorities, especially the limitation of the powers of a minister for higher education and science also within the scope of instance supervision of a rector's individual decisions concerning students (Article 9(2) LHES in conjunction with Article 70(5) of the Constitution).

4. REVIEW OF A RECTOR'S DECISION TO SUSPEND A STUDENT BY AN ADMINISTRATIVE COURT

The regulation of Act of 7 April 2017[46] introduced to the provision of Article 52 Act: Law on Proceedings before Administrative Courts [LPAC]) allows a party to choose an appellate measure (Article 52 § 3 LPAC). Thus, in the case discussed, the legislator gave a student the choice of an appellate measure: a motion to reconsider a case or a complaint about a non-final administrative decision lodged to a court. It is a party who decides whether they demand protection in the course of an administrative proceeding or an administrative court's proceeding. However, lodging a motion to reconsider a case and a complaint to an administrative court at the same time results in the recognition of the latter as inadmissible.[47] The moment that opens the running of the time limit for lodging a motion and a complaint is the date of the delivery of a rector's non-final decision to a student.[48] There are opinions in case law that admissibility of lodging a complaint to a court instead of lodging a motion to reconsider a case means that the legislator assumed that both legal measures protect legal interests of entitled entities in a similar way,[49] but the choice is given to a party to a proceeding.

The above-mentioned regulation that allows a student to choose an appellate measure does not change the fact that a rector's adjudication issued as a result of hearing a motion to reconsider a case may constitute the subject matter of a complaint to an administrative court (Article 3 § 2 LPAC). Undoubtedly, a rector's final decision on suspending a student can be subject to an administrative court's review. Nevertheless, what is of key importance for the scope of an administrative court's supervision of those decisions is their discretionary character. However, in relation to decisions of this type, a court's supervision consists in the examination whether the proceeding conducted by a rector was appropriate and if the adjudication was formally proper, as well as in establishing whether the organ's assessment was not arbitrary and was within the limits laid down by legal norms, and whether

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[46] Act amending Code of Administrative Procedure and some other acts, Journal of Laws of 2017, item 935.

[47] Cf. Supreme Administrative Court's decision of 13 November 2019, I OSK 2727/19, Legalis No. 2251293. By the way, it is worth mentioning that in the proceeding discussed, because of one party to the proceeding (a student), a situation in which it would be possible to apply the regulation of Article 54 a LHES concerning the collision of a motion to reconsider a case and a complaint to an administrative court is excluded.

[48] Cf. Woś, T., in: Woś, T. (ed.) Knysiak-Sudyka, H., Romanowska, M., *Postępowanie sądowoadministracyjne*, Warszawa, 2017, p. 296.

[49] Judgement of Voivodeship Administrative Court in Rzeszów of 9 May 2018, II SA/Rz 213/18, Legalis No. 2258028.

a rector justified the adjudication on a student's case providing sufficient individual reasons. Moreover, the scope of a court's supervision of lawfulness of a rector's discretionary decision includes an assessment "whether the organ taking a decision collected evidence properly, whether the conclusions drawn are justified by the collected evidence and whether the assessment is within the statutory limits".[50] This is because an administrative court examines the conformity with law and not the purposefulness of a decision and the adjudication it contains.

A student's complaint should be lodged within 30 days from the receipt of the adjudication on the case. Failure to meet the deadline for lodging a complaint results in its rejection pursuant to Article 58 § 1 subparagraph 2 LPAC. A voivodeship administrative court having venue competence to hear a complaint about a rector's decision is one where a university is based.

A complaint shall be lodged in a paper or electronic form to a competent administrative court via a rector. It should meet the requirements for pleadings laid down in Article 46 LPAC. Moreover, it should indicate the adjudication appealed against, a rector and the violation of law or legal interest, i.e. indicate reasons for lodging a complaint to an administrative court. The content of a complaint may also include a party's additional motions and requests. Unlike a cassation complaint, lodging a complaint to an administrative court does not require compulsory barrister's assistance. A complainant is obliged to pay a fee for a complaint[51] unless he/she also applies for financial support (Article 243 LPAC et seq.). A rector forwards a complaint to a court together with all documents and case files, as well as a response to a complaint in a paper or electronic form within 30 days from its receipt. A rector may also, within the scope of his/her competence, allow a complaint fully within 30 days from its receipt within the so-called process of self-supervision (Article 54 § 3 LPAC). After a complaint has been lodged to a voivodeship administrative court, its formal legal appropriateness is examined and in case of any deficiencies a remedial proceeding is initiated (Article 49 LPAC). In case the formal defects are not amended until a set deadline, a court shall reject a complaint by issuing a decision pursuant to Article 58 § 1 subparagraph 3 LPAC.

If an administrative court allows a complaint, it issues a judgement referred to in Article 145 LPAC. In case a court allows a complaint about a rector's decision, it does not have legal effects until the judgement becomes final, i.e. until the end of a 30-day period from the date of delivery of a judgement with justification for lodging a cassation complaint to the Supreme Administrative Court to a party to the proceeding, unless the court decides otherwise. On the other hand, if a court rejects a complaint as a whole or partly, it dismisses the whole complaint or a part of it (Article 151 LPAC). Administrative courts' judgements may be subject to cassation complaints to the Supreme Administrative Court.

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[50] Judgement of Voivodeship Administrative Court in Lublin, of 5 April 2013, III SA/Lu 104/13, Legalis No. 1927603.

[51] The amount is PLN 200 (§ 2 sub-paragraph 6 Regulation of the Council of Ministers concerning the amounts and the rules of charging fees in proceedings before administrative courts of 16 December 2003, consolidated text, Journal of Laws of 2021, item 535, as amended).

CONCLUSIONS

Within the scope of the present analysis, Act: Law on Higher Education and Science has loopholes that are of fundamental importance from a student's point of view. The first of them consists in non-determination *expressis verbis* of the form of a rector's decision to suspend a student, which results in the need to presume an administrative decision. In addition, it is hard to find a regulation concerning the maximum period of a student's suspension resulting from such a rector's decision in AHES. At the same time, the act succinctly stipulates that a rector's administrative decisions can be subject to a motion to reconsider a case. As a result, the legislator shaped a horizontal model of appeal against those decisions, which to a large extent is a consequence of a legal nature of a rector as a monocratic organ managing an autonomous university. AHES abandons a regulation concerning the procedure in case of a motion to reconsider a case, which means the application of the provisions of Code of Administrative Procedure by analogy, and CAP on the other hand refers to the application of the analogous provisions on appeal against a decision (Article 127 § 3 CAP). The adopted construction of cascade reference may constitute the source of problems for a student at least within the scope of methods of dealing with the appellate measure lodged and the procedural rights he/she has at this stage of a proceeding. The difficulties are raised by the right to lodge a complaint before the administrative course is exhausted, which is laid down in Law on the Proceedings before Administrative Courts. As a result of the regulations adopted, a student that is a party to a proceeding and an addressee of a decision on student suspension has been provided with legal instruments allowing him/her to use the administrative mode of appeal in the form of an imperfect appellate measure, i.e. a motion to reconsider a case or an administrative court mode laid down in Article 52 § 3 LPAC. The above-mentioned modes cannot be applied simultaneously. Nevertheless, lodging the appellate measures indicated is based on the principle of disposition of rights. A student decides not only which measure to lodge but also whether to use them at all. In case of the choice of the mode of administrative review of a rector's decision, a student has the right to appeal to an administrative court against a decision issued as a result of a motion to reconsider a case pursuant to general rules.

Finally, it should be emphasised that the right to lodge an appellate measure cannot be identified with instance procedure. Suability is a concept broader than the instance system. The right to appeal "is a kind of a party's activity with the use of which he/she exercises his/her rights (a measure of protection of their rights and freedoms) to verify a judgement or decision".[52] The right to appeal does not always mean that an organ of a higher level will perform instance supervision of a decision, which is typical of the vertical instance system based on competence devolution. A motion to reconsider a case, as a non-devolutive appellate measure, matches the issue of the horizontal instance system in the administrative procedure. A student who uses it must consider its impact

[52] Michalska, M., 'Prawo do zaskarżenia orzeczenia w postępowaniu cywilnym (uwagi na tle art. 78 i 176 ust. 1 Konstytucji RP)', in: Pogonowski, P., Cioch, P., Gapska, E., Nowińska, J. (eds.), *Współczesne przemiany postępowania cywilnego*, Warszawa, 2010, p. 181.

on the period of *lis pendens* and be aware of decisions a rector can make in this appeal mode, including upholding a former decision. On the other hand, lodging a complaint to an administrative court before a complete use of an administrative course seems to create better procedural guarantees for a student (a case is heard by an independent and impartial court) and, from the point of view of time, constitutes a solution that can lead to faster final adjudication on the case. However, skilful and efficient use of an appellate measure by a student suspended by a rector requires his/her own legal knowledge or means a necessity to use a professional procedural representative, which is undoubtedly connected with costs and may be an obstacle to the use of procedural rights. That is why, on the one hand, it is essential not to avoid calling a rector's judgements decisions and providing a student with reliable and full information about all appellate measures and, on the other hand, ensure the activities of student organisations and a student ombudsman and his/her counterparts at other universities who implement preventive activities aimed at increasing students' awareness in the field of their rights and obligations, as well as support students not only in disciplinary proceedings but also in the field of protection of student rights.

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SUABILITY OF A RECTOR'S DECISIONS TO SUSPEND A STUDENT'S RIGHTS

Summary

The present study concerns the issue of suability of a rector's decision on the suspension of a student's rights. The author tries to define the appellate measures that a student has the right to use and the consequences of lodging them. The critical issue consists in the necessity to delimit a student's suspension as a disciplinary penalty imposed as a result of a disciplinary proceeding conducted by the disciplinary commission in the mode and on terms specified in the Act on Higher Education and Science and appropriate application of the Code of Criminal Procedure and suspension as a result of an administrative decision issued by a university rector before the initiation of an explanatory proceeding or in the course of a disciplinary proceeding. The starting point was to define the legal nature of the relationship between a student and a university as an administrative institution managed by a rector. The considerations lead to the necessity to adopt a presumption that a rector's decision in a case in question is a form of an administrative decision. Only the adoption of this optics leads to the reconstruction of appellate measures that enable a student – in case of those that are not final – to use non-devolutive appellate measures in the form of a motion to reconsider a case, which is classified as a horizontal instance, or a complaint to an administrative court in accordance with Article 52 § 3 Act on Proceedings before Administrative Courts. The legislator left the choice of the legal remedy to a student. A student still has the right to lodge a complaint about a final decision to an administrative court.

Keywords: suspension of a student's rights, presumption of an administrative decision, horizontal instance, motion to reconsider a case, complaint to an administrative court

ZASKARŻALNOŚĆ ROZSTRZYGNIĘĆ REKTORA O ZAWIESZENIU STUDENTA W PRAWACH

Streszczenie

Artykuł odnosi się do problematyki zaskarżalności rozstrzygnięć rektora o zwieszeniu studenta w prawach. Autorka podejmuje próbę określenia środków zaskarżenia z których student ma prawo skorzystać i skutków ich wniesienia. Kwestią kluczową jest konieczność delimitacji zawieszenia studenta w prawach jako kary dyscyplinarnej orzeczonej na skutek przeprowadzenia postępowania dyscyplinarnego przez komisję dyscyplinarną w trybie i na zasadach określonych w ustawie Prawo o szkolnictwie wyższym i nauce przy odpowiednim stosowaniu Kodeksu postępowania karnego, od zawieszenia jako skutek decyzji administracyjnej wydanej przez rektora uczelni przed wszczęciem postępowania wyjaśniającego lub w toku postępowania dyscyplinarnego. Za punkt wyjścia uznano potrzebę określenia charakteru prawnego stosunku łączącego studenta z uczelnią jako zakładem administracyjnym zarządzanym przez rektora. Rozważania prowadzą do konieczności przyjęcia domniemania rozstrzygnięć rektora w przedmiotowej sprawie w formie decyzji administracyjnej. Dopiero przyjęcie tej optyki prowadzi do rekonstrukcji środków zaskarżenia, które umożliwiają studentowi – w odniesieniu do tych nieostateczych – wykorzystać niedewoltywny środek ich zaskarżenia w postaci wniosku o ponowne rozpatrzenie sprawy, wpisujący się w problematykę instancyjności poziomej albo skargę do sądu administracyjnego w trybie art. 52 § 3 ustawy Prawo o postępowaniu przed sądami administracyjnymi. Wybór środka zaskarżenia ustawodawca pozostawił stronie. Aktualne pozostaje przy tym prawo studenta do wniesienia skargi do sądu administracyjnego od decyzji posiadających przymiot ostateczności.

Słowa kluczowe: zawieszenie studenta w prawach, domniemanie decyzji administracyjnej, instancyjność pozioma, wniosek o ponowne rozpatrzenie sprawy, skarga do sądu administracyjnego

Cite as:

Ziółkowska A. (2022) 'Suability of a rector's decisions to suspend a student's rights', *Ius Novum* (Vol. 16) 2, 147–163. DOI: 10.26399/iusnovum.v16.2.2022.18/a.ziolkowska

Cytuj jako:

Ziółkowska A., *Zaskarżalność rozstrzygnięć rektora o zawieszeniu studenta w prawach*, „Ius Novum" 2022 (16) nr 2, s. 147–163. DOI: 10.26399/iusnovum.v16.2.2022.18/a.ziolkowska