

REVIEW SCIENTIFIC PAPER

NEW FACTS AND NEW EVIDENCE AS THE BASIS FOR
REOPENING AN ADMINISTRATIVE DISPUTE IN THE
REPUBLIC OF SRPSKA

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Abstract: *According to the Law on Administrative Dispute of Republic of Srpska, new facts and new evidence present a legal basis that provides the possibility for the dissatisfied parties to request a reopening of an administrative dispute even after a legally binding decision. However, although the parties justifiably and frequently try to use this legal remedy, in practice, it is rarely allowed to apply it. This paper deals with the causes of such actions.*

Key words: *new facts, new evidence, administrative dispute, judgment.*

1. INTRODUCTION

New facts and new evidence as the basis for reopening an administrative dispute is defined in the special legal remedy, to be known as *proposal on reopening of the procedure*. This special legal remedy has existed even since the adoption of the first Administrative Disputes Act of the FPRY from 1952² and it has not changed significantly since its creation when compared to the positive law of the Republic of Srpska³. Originally, it was called the *Renewal of the procedure* and later, by the 1976 amendment, it changed the title to the proposal for reopening the procedure⁴. The proposal for reopening the procedure, as a special remedy, found its place in all legal systems that were created by the disintegration of the former Yugoslavia with only slight modifications⁵.

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2 The Administrative Disputes Act, Official Gazette of FNRJ, 23/52.

3 An amendment was made in 1965, which introduced paragraph 6 as a special basis for the reopening of the dispute. See: Official Gazette of FNRJ, 16/65.

4 Zoran R. Tomic, *Komentar Zakona o upravnim sporovima sa sudskom praksom* (Beograd: 2010), 555.

5 Compare with: Art. 48 of the Administrative Disputes Act of Montenegro, Official Gazette, 54/2016; Art.33 of the the Administrative Disputes Act of the Republic of Serbia, Official Gazette, 111/2009; Art.

Pursuant to Article 41 of the Administrative Disputes Act of the Republic of Srpska⁶, a procedure which is concluded by the judgment or by the decision of the competent court shall be reopened on request of a party:

- (1) If a party discovers new facts or finds or obtains the opportunity to use new evidence on the basis of which the dispute would have been resolved more favorably for the party if these facts or evidence had been presented or used in the previous court procedure,
- (2) If the court decision was adopted as a result of a criminal offence committed by the judge or a court employee, or if the decision was adopted as a result of a fraudulent act of the attorney or representative of a party, their opponent or the opponent's attorney or representative;
- (3) If the decision was based on a judgement adopted in a criminal or civil matter and that judgement was later revoked by another legally binding decision;
- (4) If the document on the basis of which the decision was made was false or fraudulently amended, or if a witness, expert witness or party gave false testimony at the hearing in court and the court decision was based on that testimony;

If a party finds or obtains the opportunity to use a previous court decision adopted in the same administrative dispute;

If a party or party in interest was not given the opportunity to participate in the administrative dispute.

The next part of the paper will deal with the first and in practice most frequently used basis for reopening of the administrative dispute in the positive law of Republic of Srpska – new facts and new evidence.

2. CONDITIONS FOR APPLYING NEW FACTS AND NEW EVIDENCE AS THE BASIS FOR REOPENING THE PROCEDURE

Pursuant to Article 41, paragraph 1, of the Administrative Disputes Act of the Republic of Srpska, a procedure concluded by the judgment or by the decision of the competent court shall be reopened on request of a party if the party discovers new facts or finds or obtains the opportunity to use new evidence

76, the Administrative Disputes Act of the Republic of Croatia, Official Gazette, 20/10, 143/12, 152/14, 94/16, 29/17; Art. 42 of the Administrative Disputes Act of Bosnia and Herzegovina, Official Gazette, 19/02, 87/07, 83/08, 74/10.

6 The National Assembly of the Republic of Srpska adopted the Administrative Disputes Act in 2005 and the Act entered into force as of December 16, 2005. See: Official Gazette of Republic of Srpska, 109/05 and 63/11.

on the basis of which the dispute would have been more favorably resolved for the party if these facts or evidence had been presented or used in the previous court procedure.

We can conclude that reopening of the procedure can be allowed only on the basis of the request of the party that participated in the procedure that ended by the court decision. This is the first and basic condition for the use of this special legal remedy. This group of people includes: the plaintiff, defendant and the interested party. This legal position was confirmed in the case law of Republic of Srpska and the surrounding countries. For example, we refer to the verdict of the Supreme Court of Serbia: ‘Only the persons who were recognized as a party in the administrative procedure are entitled to request reopening of the administrative dispute.’ The explanation of this judgment states: ‘As it can be seen from the filed lawsuits, the plaintiff’s legal basis for submitting lawsuit for reopening the administrative dispute is represented by provisions of Article 51, paragraph 1, point 6, of the Law on Administrative Disputes, which stipulates that the procedure concluded by the judgment or by the decision shall be reopened on request of a party if the interested party is not given the opportunity to participate in the administrative dispute. The status of an interested party in an administrative dispute, according to the Supreme Court’s judgment, is obtained by recognizing the status of a party in the concluded administrative procedure, and only the person who was in the administrative procedure which preceded the implementation of the administrative dispute in which the verdict was issued, whose reopening of the procedure is requested, which, in this concluded administrative procedure, has the status of a party, the status of an interested person in an administrative dispute, and if they are not given the opportunity to take part in the administrative dispute, they have a legitimacy to file a lawsuit for reopening procedure against the judgment adopted in the concluded administrative dispute. Since it is visible from the case-file of the administrative dispute in this court, in which the judgment was issued in the procedure requesting the reopening of the administrative court procedure, that the plaintiffs have not been granted the status of a party in the concluded administrative procedure which preceded the administrative dispute in which the cited judgment was passed and the verdict was adopted on the basis of the facts from the administrative procedure, the plaintiffs cannot be considered authorized persons for filing a lawsuit for the reopening of the administrative dispute, and for the reasons mentioned above, the Supreme Court of Serbia dismissed the filed lawsuits as submitted by an unauthorized person’⁷. Reopening of an administrative dispute cannot be done *ex officio*. This fact distinguishes between the administrative dispute and the administrative procedure because

7 Ruling of the Supreme Court of Serbia U - 3776/00 as of December 20, 2000.

there is a special remedy in the administrative procedure called ‘reopening of the administrative procedure’ which gives the authority the opportunity to reopen the administrative procedure *ex officio*.⁸

Sometimes court fails to deliver a lawsuit to the interested party for a response. In this case, a judgment would be issued that would be obligatory for the parties, and since the interested party was not a party in the dispute in the previously described case, such judgment would not be obligatory for them. In order to avoid these situations, interested parties are given the opportunity to request reopening of the administrative dispute. On request, the court will determine whether the interested party participated in the procedure or not. If not, the court will examine whether the interested party was invited to participate in the procedure. If they were invited, and did not participate in the procedure at their will, the proposal for reopening will not be adopted. But if they were not called, it will be a reason for reopening.⁹

By interpreting Article 41, paragraph 1, of the Law on Administrative Disputes of Republic of Srpska, we can conclude that the proposal for reopening of the procedure may not be used during an administrative dispute, i.e. as long as there is a possibility to annul or revoke a certain decision through a regular legal remedy. Pursuant to the Administrative Disputes Act of the Republic of Srpska, there is no regular legal remedy against a court decision in an administrative dispute. In this context, the administrative dispute ends with the ruling, since the appeal, as a regular legal remedy, is excluded (unless it is allowed by a special law), and against such judgement a reopening of the administrative dispute can be requested. If the appeal is allowed by a special legal regulation, the ruling becomes a legally binding decision by issuing a decision on the appeal and serving it to the party. Reopening of the procedure may be requested against a legally binding decision. It should be emphasized that a judicial judgement in this sense implies a court ruling and a decision by which the administrative dispute is completed.¹⁰

The ‘new facts’ legal standard implies facts that existed at the time of the administrative dispute, but they were not known then, but after the end of the

⁸ See: Article 235 of the General Administrative Procedure Act of the Republic of Srpska, Official Gazette of the Republic of Srpska, 13/02, 87/07 and 50/10.

⁹ Compare with: Bogdan Majstorović, *Komentar Zakona o upravnim sporovima, treće izdanje* (Beograd: 1965) 142-143.

¹⁰ There are several examples in practice when the court dispute ends with a decision; these are situations when a party withdraws the submitted lawsuit, or when the lawsuit is rejected by the decision. The only exception to the described situation in which it would not be possible to request the reopening of a procedure is the decision by which the complaint is rejected as disorderly (see Article 21 of the Law on Administrative Disputes).

administrative dispute.¹¹ The facts that arose after the end of the administrative dispute cannot be the reason for using this special legal remedy¹². Strictly speaking, these facts could be characterized as *new*, but they cannot be a reason for the reopening of the procedure because they are not an integral part of the previous factual situation, which was the basis for the decision-making process. As a proof of the above-mentioned standpoint, we will quote the judgment of the District Court of Banja Luka: ‘The new facts that occurred after the end of the administrative dispute may not be the reason for the reopening of the administrative dispute pursuant to Article 41, paragraph 1, point 1, of the Law on Administrative Disputes, but possibly for reopening of the administrative procedure’¹³.

In addition to *new facts*, the law also uses the *new evidence* legal standard as the basis for the reopening of the procedure. Evidence is a way to establish a certain fact. When, in addition to *new facts*, the law mentions *new evidence*, it can be concluded that it is a case where in the previous procedure it was emphasized that there was a certain fact that could have an impact on the solution of the matter, but that there was no evidence of that fact at the time, or that the party was unable to use such proof in the dispute.¹⁴ We conclude that *new evidence* as the reason for the reopening of an administrative dispute can only be evidence that the party did not know about, and therefore could not use it in the concluded administrative dispute, or evidence the party knew about, but had no opportunity to use it. For example, in case that a party, only after the administrative dispute, found out that there was a person who could testify to an important fact, or that they had known that such a person existed and could be a witness, but they could not, until the end of the procedure, find out their place of residence.¹⁵ In order to be a valid reason for the reopening of an administrative dispute, *new facts and new evidence* must be legally relevant in the sense that the dispute would be positively resolved for the party under these new facts and evidence if they had been used at the time of the procedure. Whether they are of such quality, the court decides. As a proof of the previously mentioned standpoint we refer to case law: ‘On request of the party, the procedure will be reopened if the party, in the previous court procedure, did not have the possibility of presenting the facts, which, if it could have been presented, the dispute would have been probably resolved more favorably for the party’¹⁶.

11 Duško Bojović, „Ponavljanje upravnog (upravno-sudskog) spora“, *Bilten Okružnog suda u Banjoj Luci*, br. 17-18 (2012), 115.

12 Ibid.

13 Judgment of the District Court of Banja Luka, U-951/05 as of February 17, 2006.

14 See: Majstorović, *Komentar Zakona o upravnim sporovima*, 141.

15 Tomic, *Komentar Zakona o upravnim sporovima sa sudskom praksom*, 555.

16 Federal Supreme Court, judgment number: U.88 / 52 as of September 09, 1952.

It should be noted that the reopening of the procedure can be requested only in relation to factual matters, and not in legal matters. This attitude has been taken since the adoption of the Administrative Disputes Act from 1952 and has not been changed yet¹⁷. Namely, the judgment or decision in each procedure is made by applying the relevant legal rule contained in the law to the established factual situation. In order for that decision to be correct, the facts must be exactly and completely determined. The procedure that precedes the ruling or the decision, is conducted in order to determine the factual state to which the law applies. Therefore, the reopening of the procedure, as a rule, means establishing the factual state, and those facts that existed at the time when the decision was made, not the ones that were created later. This is the reason why the procedure can be reopened only in terms of facts, and not in terms of legal issue. Only the facts and evidence discovered after the adopted judgment or decision, and which existed before, could be the reason for the reopening of the procedure¹⁸. The reopening of the administrative dispute cannot be requested if the court in the concluded procedure adopted the party's claim and annulled the administrative act which is the subject of the administrative dispute¹⁹.

3. PROBLEMS IN PRACTICE

The administrative dispute is preceded by an administrative procedure that determines the facts of the concrete case in order to apply the relevant legal regulation and adopt a legal act that defines the legal status of a party. When an administrative dispute has been started against the administrative act, the competent court shall, inter alia, verify that the facts are fully and properly established by the administrative authorities in the administrative procedure. The Administrative Disputes Act of the Republic of Srpska authorizes the court to determine the facts of the case itself. If, after the end of the administrative procedure and the administrative dispute, a new fact is discovered which can be a reason for the reopening of the procedure, it raises the question of which procedure to reopen, whether administrative or judicial? If the fact which was the reason for the reopening of the procedure affected the factual state which the administrative authority had established in the administrative procedure, then the new fact could be the basis for the reopening of the administrative procedure. In the second case, if the fact affected the factual situation established by the court

17 For example, we refer to the Federal Supreme Court's ruling: 'The reopening of the procedure cannot be requested due to a wrong interpretation of the legal matter' SVS, U-57/52 as of September 11, 1952.

18 See more: Majstorović, *Komentar Zakona o upravnim sporovima*, 139.

19 The Plaintiff cannot request reopening of the administrative dispute in which he is fully satisfied with the response to his claim. See the ruling of the Supreme Court of Serbia, U-248/82 as of July 17, 1982.

in the court procedure, it may only be the basis for requesting the reopening of the administrative dispute. It appears that new facts and new evidence can be used as the basis for the reopening of the administrative dispute only if the court had determined the facts in the administrative dispute and if the procedure had been ended on the basis of the same facts. If the court settled the dispute on the basis of the facts established in the administrative procedure, new facts and new evidence cannot be used as the basis for reopening of the administrative dispute, but only of the administrative procedure.

The Administrative Disputes Act of the Republic of Srpska stipulates that ‘the court will resolve the dispute, *as a rule*, on the basis of the facts established in the administrative procedure’.²⁰ Due to this legal solution, the practical possibility of using new facts and new evidence as the basis for the reopening of the administrative dispute is considerably limited because the courts mostly resolve administrative disputes on the basis of the factual situation established in the administrative procedure. It turns out that the courts do not have to determine the facts of the concrete case at the hearing, but they base their decisions on the facts established in the administrative procedure²¹. The result of such treatment is that the parties cannot use new facts and new evidence as the basis for the reopening of the administrative dispute, but only for the reopening of the administrative procedure. The product of such judicial activity is that, after new facts and new evidence about the rights, obligations and legal interests of individuals are discovered, it cannot be argued in front of the court as an independent and impartial entity, but only and exclusively in front of the administrative body whose treatment of a party was previously subject to review by the competent court in the administrative dispute. We will mention several examples from the case law that speak in favor of the above-mentioned.

‘Since the court itself did not determine the facts of the case, but solved the administrative dispute on the basis of the facts established in the administrative procedure, it was necessary to dismiss plaintiff’s proposal for the reopening of the administrative dispute on the basis of new facts and evidence, since these facts and evidence may possibly be used only as a reason for the reopening of the administrative procedure in front of the respondent authority’²².

‘Awareness of the new facts and acquisition of the opportunity to use new evidence can be a reason for the reopening of the administrative dispute only

20 Art. 29 the Administrative Disputes Act of the Republic of Srpska.

21 Compare with: Bojović, *Ponavljjanje upravnog (upravno-sudskog) spora*, 112.; Strahinja M. Curković, *Komentar Zakona o upravnim sporovima, prvo izdanje* (Sarajevo: 2010), 219.

22 District Court of Banja Luka, ruling number: 11 O U 00652 08 Uvl, as of January 19, 2009.

if the facts were established, that is, if the evidence were determined in the administrative dispute and the court decision is based on such facts'.²³

'There are no conditions for the reopening of the administrative dispute if the court was not determining the facts on hearing while adopting the previous judgment'. From this judgement it follows: 'Resolving to a lawsuit filed for reopening administrative dispute in the sense of the provisions of the Administrative Disputes Act, the Supreme Court of Serbia found that the lawsuit should be rejected. During the adoption of the contested verdict, the Supreme Court did not determine the facts on hearing, pursuant to the provision of Article 38, paragraph 3, of the Law on Administrative Disputes, nor did it perform the evidentiary procedure, but the judgment was adopted on the basis of the facts established in the administrative procedure, so the reasons set out in the lawsuit cannot be the basis for requesting the reopening of the procedure concluded by the verdict in the administrative dispute with this court. The facts mentioned in the lawsuit cannot be the reason for the reopening of the procedure in front of this court, nor did rights of the plaintiff were violated by a contested ruling, adopted on the basis of the facts established in the administrative procedure, and the plaintiff may request the reopening of the procedure in front of the competent administrative authority pursuant to the provisions of Article 239-250 of the Act, under the conditions prescribed by those provisions'.²⁴

'If the court did not determine the facts in the administrative dispute, then the court cannot do so in the procedure for the reopening of the administrative dispute. That is why it is of no importance what kind of evidence the party submits, and whether it is really new facts that call into question the existing factual conclusion. This evidence can only be the reason for the reopening of the administrative procedure, and not the administrative dispute'.²⁵

The surrounding countries have eliminated this problem by imposing an obligation on the competent courts to resolve administrative disputes on the basis of the facts which they have to establish at their own hearings. In this context, the Administrative Disputes Act of the Republic of Serbia²⁶ determined that the court determines the facts on the hearing.²⁷ The Administrative Disputes Act of Croatia specified that the court in the administrative dispute decides on the

23 Supreme Court of Serbia, judgment number: U.425 / 5 as of March 03, 1975.

24 Decision of the Supreme Court of Serbia, U.4493 / 05 as of November 17, 2005.

25 Supreme Court of Yugoslavia, number: U-1580/70 as of July 14, 1971.

26 The Administrative Disputes Act of the Republic of Serbia, Official Gazette, 111/2009.

27 Art. 33 of the Administrative Disputes Act provides for: 'In an administrative dispute, the court shall decide on the facts established at the oral hearing'. See more: Art.33 and 34, of the Administrative Disputes Act of Serbia.

basis of oral, direct and public hearing²⁸. These solutions have created a legal opportunity for the parties to use new facts and new evidence as the basis for the reopening of the administrative dispute in order to protect their rights because the courts are obliged to determine the facts on their own hearings.²⁹

Before reaching a conclusion on the inevitability of amending the Administrative Disputes Act of the Republic of Srpska, based on the example of the countries in the region, it should be pointed out what resources the Republic of Srpska has in relation to the matter of administrative disputes. In this context, we point out that the Republic of Srpska does not have specially organized administrative courts as Serbia and Croatia do, which the settlement of lawsuits in administrative disputes is entrusted to the five district courts and only the District Court of Banja Luka has a special administrative department that solves only administrative disputes. District courts in Republic of Srpska do not have a sufficient number of judges who would work on administrative departments considering the number of cases to be resolved.³⁰ Apart from administrative departments, some judges also deal with other types of court dispute. A specific problem represents the fact that the areas of judicial protection through the administrative dispute in Republic of Srpska are constantly expanding. In such relations, before amending the Administrative Disputes Act, an adequate court network should be first provided through amendments to the Law on Regular Courts³¹ in order to respond to modern legal requirements. Under modern legal requirements we mean, primarily, all the principles proclaimed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which imposes an obligation to ensure fair and public hearing when deciding on civil rights and obligations³². It would be extremely unreasonable to amend the Administrative Disputes Act in such a way as to prescribe the obligation for judges to hold hearings and determine the facts in resolving administrative disputes without previously creating resources for adequate work.

The reopening of an administrative dispute pursuant to the Administrative Disputes Act of the Republic of Srpska is requested by a proposal. Some authors point out the terminological remark on the name of the act requiring the reopening

28 Art. 7 of the Administrative Disputes Act of the Republic of Croatia, Official Gazette 20/10, 143/12, 152/14, 94/16, 29/17.

29 Compare with: Ljubodrag B. Pljakić, *Praktikum za upravni spor, sa komentarima, sudskom praksom i obrascima za primjenu u praksi* (Beograd: 2011), 364.

30 More on judicial norms see: Pravilnik o orijentacionim mjerilima za rad sudija i stručnih saradnika u Bosni i Hercegovini - consolidated text, Official Gazette of Bosnia and Herzegovina 2/14 and amendment of the consolidated text, Official Gazette of Bosnia and Herzegovina 8 / 14.

31 The Courts Act of the Republic of Srpska, Official Gazette 111/04, 109/05, 37/06, 119/08 and 58/09.

32 Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Bosnia and Herzegovina signed and ratified the Convention on 22 April 2002.

of the procedure, because the *proposal*, by its semantic meaning, is not the same as the lawsuit which, in this case, would be linguistically the most correct term. According to this viewpoint, the lawsuit is an adequate term and corresponds to the specificities of the administrative dispute, since, in the case of respecting this lawsuit, the judgment that is also adopted under the lawsuit is annulled. It is not logical that a proposal for reopening of the procedure is adopted and the judgment issued on the lawsuit is being annulled³³. The term *proposal*, as the name of the act by which the reopening of the procedure is requested, is not supported even by the fact that this special legal remedy has the same name in other procedures too (litigation and criminal procedure)³⁴. In this context, some authors explicitly claim that the reopening of the procedure is requested by a lawsuit rather than a proposal or a request.³⁵

The proposal for reopening the procedure must include: the designation of a judgment or decision adopted in the procedure whose reopening is requested, the legal basis for reopening, evidence or circumstances that make probable the existence of the basis for reopening the procedure, evidence that the proposal has been submitted on time, the scope and direction for an amendment to the decision or ruling issued in the procedure whose reopening is requested, data on the plaintiff, the legal representative, if any, the signature of the applicant, etc³⁶. If the proposal does not contain the above-mentioned elements or lacks order, these deficiencies shall be eliminated by applying the provisions which regulate civil procedure pursuant to Article 47 of the Administrative Disputes Act of the Republic of Srpska³⁷. The court will be obliged, in each particular case, to determine the existence of these elements for the reopening of the procedure. Only when it determines that the proposal was submitted in due time, the court determines the existence of evidence and circumstances which make probable the existence of the reason for reopening of the procedure. The decision about reopening a case or not will be made by the court that adopted the court decision.³⁸

If in some case it is established that there are conditions for reopening the administrative procedure, this does not mean that the authority, under whose decision the reopening was requested, made a mistake. The court correctly established the factual situation taking into account the facts and evidence that he had at the time of adopting the decision. In this case, the facts and evidence were later discovered or existed previously, but could not be used or were not

33 Ćurković, *Komentar Zakona o upravnim sporovima*, 227.

34 *Ibid.*,

35 Tomić, *Komentar Zakona o upravnim sporovima sa sudskom praksom*, 569.

36 See: Art. 44 of the Administrative Disputes Act of the Republic of Srpska;

37 Art. 47 of the Administrative Disputes Act of the Republic of Srpska provides: 'In the procedure for the reopening of procedure, appropriate provisions of the law on civil procedure shall be applied accordingly.'

38 Ćurković, *Komentar Zakona o upravnim sporovima*, 227.

known. Since every decision must be based on a true factual situation, these subsequently discovered circumstances should also be taken into account.³⁹

Proposal for reopening the procedure shall be submitted within 30 days from the day the party discovered the reason for the reopening. This is a subjective time limit that is used when a party discovered or gained the ability to use the basis for reopening the procedure. If the party discovered new facts and new evidence before the court procedure was concluded, but could not use them during the procedure, the reopening may be requested within 30 days from the date of the delivery of the court decision⁴⁰. In this case, it is important that the party proves that it was not able to use or present new facts and new evidence during the procedure. After the expiration of 5 years from the validity of legally binding decision, reopening cannot be requested⁴¹. This paragraph prescribes an objective time limit within which the party is in a position to request reopening of an administrative dispute. Due to the fact that the legally binding does not enter into force simultaneously because all parties will not receive a court decision at the same time, the term of 5 years will not be the same for all parties. After the expiration of 5 years, the party cannot ask for reopening of the administrative dispute, regardless of the fact that the subjective time limit within 30 days has not passed. On the other hand, the decisions of the court against which the appeal is allowed become legally binding by delivering to a party a decision made by the second instance court, in which case the period would then be counted.⁴²

The judge individual shall decide on the proposal for the reopening of the procedure. The judge individual represents the court which had adopted the decision against which the proposal was filed without holding the hearing.⁴³ In this case, the judge individual, as a rule, is a judge who had not participated in the decision for which the reopening is requested, either as a member of the chamber or as an individual judge. Against this decision an appeal is allowed which is considered by the court chamber which had not taken part in the decision-making process whose reopening was requested nor the judge who had decided on the proposal for reopening the procedure⁴⁴. For example, we refer to the judgment of the District Court of Banja Luka from 2009: 'Against the decision of the court which rejected the proposal for the reopening of the

39 More on this issue: Majstorović, *Komentar Zakona o upravnim sporovima*, 139;

40 Article 42, paragraph 1, of the Administrative Disputes Act of the Republic of Srpska;

41 Article 42, paragraph 2, of the Administrative Disputes Act of the Republic of Srpska;

42 Bojović, *Ponavljjanje upravnog (upravno-sudskog) spora*, 118.

43 Art. 45, paragraph 1, of the Administrative Disputes Act of the Republic of Srpska;

44 This solution is difficult to implement in practice in courts with fewer judges, as it takes 7 judges to decide on a motion to reopening the procedure if the decision was taken by the chamber, and if it is taken by a judge individual, then 5 judges must be hired. Referenced by: Bojović, *Ponavljjanje upravnog (upravno-sudskog) spora*, 122.

administrative procedure, an appeal is allowed pursuant to Article 263, paragraph 4, of the Civil Proceedings Code in relation to Article 48 of the Administrative Disputes Act, which is considered by the chamber consisting of three judges whose member cannot be the judge who had adopted the decision which is criticized by the appeal.⁴⁵

The court will reject the proposal by a decision if it determines that the proposal was submitted by an unauthorized person, that it was not submitted in time or that the party did not make probable the existence of the legal basis for reopening⁴⁶. The proposal is submitted by an unauthorized person if the party submitted a proposal and had not previously participated in the procedure whose reopening is requested, which of course, does not apply to an interested party which is authorized to submit a proposal for a reopening procedure in accordance with Article 41, paragraph 1, point 6, of the Administrative Disputes Act if they had not participated in an administrative dispute⁴⁷. The court will also reject the proposal as untimely if it is submitted after the expiration of the time limits specified in Article 42 of the Administrative Disputes Act and the decision according to this paragraph is issued in the earlier procedure, i.e. before submitting the proposal to the opposite party and to the interested parties if any. The proposal is rejected if the party did not make probable the existence of the legal basis for the reopening of the procedure⁴⁸. In this context, we refer to rulings: ‘The submitter of the proposal for the reopening of the administrative dispute must make probable the existence of the legal basis for the reopening of the procedure, and if that is not done, the court will reject the proposal in accordance with Article 45, paragraph 2, of the Administrative Disputes Act’⁴⁹ and ‘A credible reason for the reopening of an administrative dispute has not been made if the party in the lawsuit quotes facts that have been previously disclosed.’⁵⁰ If the court does not reject the proposal for reopening the procedure, it will deliver that proposal to the opposite party and the interested parties and invite them to respond to the proposal in 15 days’ time.⁵¹

Upon the expiration of the time limit for replying to the proposal, the court decides on the proposal for reopening the procedure by delivering a verdict.⁵² If the reopening of the procedure is allowed, the previous court decision will

45 See the judgment of the District Court of Banja Luka no. Uvlz-1/09 as of October 08, 2009. Referenced by: Milan Blagojević, Haso Tajić, *Upravni spor u praksi* (Sarajevo: 2015) 613.

46 See: Dragan Milkov, *Upravno pravo II, upravna delatnost* (Novi Sad: 2003) 123.

47 Bojović, *Ponavljanje upravnog (upravno-sudskog) spora*, 123

48 Art. 45, paragraph 1) of the Administrative Disputes Act of the Republic of Srpska.

49 Judgment of the District Court of Banja Luka No. 011 - O - Uvl - 07 - 000 - 003 as of July 16, 2007.

50 Judgment of the Supreme Court of Serbia, U-3103/208 as of August 27, 2008.

51 Art. 45, paragraph 2) of the Administrative Disputes Act of the Republic of Srpska

52 Art. 46, paragraph 1) of the Administrative Disputes Act of the Republic of Srpska

be annulled, in whole or in part, depending on the request of the party because the court is obliged to respect the limits set in the proposal.⁵³ The outcome of the reopening procedure depends on the results of the conducted procedure. In this context, the proposal may be rejected as unfounded if the results of the reopening procedure show that the administrative dispute was properly resolved by the previous decision, or the court can accept the proposal when it establishes that the administrative dispute should be resolved differently by the previous decision. The previous procedural actions which are not affected by the reasons for reopening will not be repeated.⁵⁴ The verdict which allows the reopening of the procedure, will also decide on the main issue.⁵⁵ In this case, the proposal would be accepted by the verdict, the previous decision would be annulled and a certain matter would be resolved depending on its nature and the facts in the file.

4. CONCLUSION

Since the courts in the Republic of Srpska solve administrative disputes on the basis of the facts established in the administrative procedure, the parties do not have the possibility to use new facts and new evidence as the basis for reopening the administrative dispute, but only the administrative procedure. This results in the fact that, after discovering new facts and new evidence about the rights, obligations and legal interests of individuals, the hearing cannot be held in front of the court, as an independent and impartial entity, but only and exclusively in front of the administrative authority whose treatment of the party has previously been the subject of review by the competent court in the administrative dispute. The Administrative Disputes Act of the Republic of Srpska should be amended and adjusted to the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the sense that it provides the parties the right to a fair and public hearing in front of the courts when deciding on their rights. Before amending the Administrative Disputes Act, the Republic of Srpska should also create capacities that will enable efficient implementation of contemporary legal principles, i.e., based on the example of the neighboring countries, it should create special administrative courts that would be closely specialized in the matter of administrative disputes. Special economic courts were established in Republic of Srpska, whose experience should be taken over when implementing the idea of creating administrative courts.

53 Art. 46, paragraph 2) of the Administrative Disputes Act of the Republic of Srpska

54 Art. 46, paragraph 3) of the Administrative Disputes Act of the Republic of Srpska

55 Art. 46, paragraph 4) of the Administrative Disputes Act of the Republic of Srpska

REFERENCES

- Blagojević, Milan i Haso Tajić. *Upravni spor u praksi*. Sarajevo: 2015.
- Bojović, Duško. „Ponavljanje upravnog (upravno-sudskog) spora“, *Bilten Okružnog suda u Banjoj Luci, broj: 17-18* (2012);
- Ćurković, Strahinja M. *Komentar Zakona o upravnim sporovima, prvo izdanje*. Sarajevo: 2010;
- Majstorović, Bogdan. *Komentar Zakona o upravnim sporovima, treće izdanje*. Beograd: 1965;
- Milkov, Dragan. *Upravno pravo I, upravna delatnost*. Novi Sad: 2003;
- Pljakić, Ljubodrag B. *Praktikum za upravni spor, sa komentarom, sudskom praksom i obrascima za primenu u praksi*. Beograd: 2011;
- Tomić, Zoran R. *Komentar Zakona o upravnim sporovima sa sudskom praksom*. Beograd: 2010;

LEGAL SOURCES

- The Administrative Disputes Act, Official Gazette of FNRJ, 23/52, 23/52, 16/65;
- The Administrative Disputes Act of Montenegro, Official Gazette, 54/2016;
- The Administrative Disputes Act of the Republic of Serbia, Official Gazette, 111/2009;
- The Administrative Disputes Act of the Republic of Croatia, Official Gazette, 20/10, 143/12, 152/14, 94/16, 29/17;
- The Administrative Disputes Act of Bosnia and Herzegovina, Official Gazette, 19/02, 87/07, 83/08, 74/10;
- Law on Administrative Disputes of Republic of Srpska, Official Gazette of Republic of Srpska, 109/05 and 63/11;
- Law on General Administrative Procedure of Republic of Srpska, Official Gazette of Republic of Srpska, 13/02, 87/07 and 50/10;
- The Courts Act of the Republic of Srpska, Official Gazette 111/04, 109/05, 37/06, 119/08 and 58/09;
- European Convention for the Protection of Human Rights and Fundamental Freedoms.

CASE LAW

- Supreme Court of Serbia U - 3776/00 as of December 20, 2000.
- Judgment of the District Court of Banja Luka, U-951/05 as of February 17, 2006.
- Federal Supreme Court, judgment number: U.88 / 52 as of September 09, 1952.
- Federal Supreme Court, U-57/52 as of September 11, 1952.
- Supreme Court of Serbia, U-248/82 as of July 17, 1982.
- District Court of Banja Luka, ruling number: 11 O U 00652 08 Uv1, as of January 19, 2009
- Supreme Court of Serbia, judgment number: U.425 / 5 as of March 03, 1975.
- Decision of the Supreme Court of Serbia, U.4493 / 05 as of November 17, 2005.

- Supreme Court of Yugoslavia, number: U-1580/70 as of July 14, 1971
- Judgment of the District Court of Banja Luka No. 011 - O - Uvl - 07 - 000 - 003 as of July 16, 2007
- District Court of Banja Luka no. Uvlz-1/09 as of October 08, 2009
- Judgment of the Supreme Court of Serbia, U-3103/208 as of August 27, 2008.

НОВЕ ЧИЊЕНИЦЕ И НОВИ ДОКАЗИ КАО ОСНОВ ЗА ПОНАВЉАЊЕ УПРАВНОГ СПОРА У РЕПУБЛИЦИ СРПСКОЈ

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Резиме: Према Закону о управним споровима Републике Српске нове чињенице и нови докази представљају правни основ који пружа могућност незадовољним странкама да и након правоснажних судских одлука захтијевају понављање управног спора. Међутим, иако странке оправдано и често посежу за овим правним средством, у пракси се ријетко дозвољава његова примјена. У раду се настоје објаснити узроци таквог поступања.

Кључне ријечи: нове чињенице, нови докази, управни спор, пресуда.

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