Bemiddelend bestuur
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Summary

Administrative decision-making frequently leads to disputes with citizens. Since in many cases conflicting interests are involved in the decisions to be made, disputes are inevitable. In the Netherlands, as in other countries such as England, France and Germany, administrative authorities are to an increasing extent turning to mediation to avoid or resolve disputes. The reasoning is that if a dispute can be solved at the decision-making stage, court proceedings can be avoided and decisions can be implemented more quickly. Then the administrative authority and the citizen in question can both be spared the costs of bringing a court action and the time it takes. The restoration of citizens’ trust in the government is seen as an additional benefit of mediation.

Mediation by administrative authorities is the topic of this study. In this context mediation means that during the decision-making process the administrative authority in question takes a conflict resolution approach. For example, a public servant handling a case or an administrator involved in the case may attempt to find a satisfactory solution. Another possibility is for a mediator to assist the administrative authority and the citizens involved in negotiating a solution. This study focuses on a few legal aspects of mediation in the context of administrative decision-making. As well as discussing theoretical issues, the study also examines mediation in practice. This is not a quantitative empirical study but an exploration of practice in order to supplement theory. The information about mediation in practice is derived from evaluation reports of mediation projects at the Employees’ Insurance and Benefits Office (UWV), the provincial administrations of Overijssel and Groningen, and the municipal administration of Zwolle. In addition, practical examples of successful mediation have been found by examining case files. This summary presents the most important conclusions of the study.

Conflicting interests of citizens or certain groups are regulated by the government by means of laws and rules. When making decisions, administrative authorities should base these decisions on existing regulations. In what circumstances may a mediating role be required? It is difficult to imagine that an administrative authority should mediate in every case in which a citizen has an objection or a different view. This study examines to what extent an administrative authority can be expected to assume a mediating role during decision-making.

The conclusion is that legislation, literature and case law provide avenues of approach for mediation by administrative authorities. Mediation during deci-
tion-making is not entirely a matter of choice; in certain cases an administrative authority may be required to mediate. By virtue of Article 3.2 of the General Administrative Law Act (Awb), in certain circumstances an administrative authority has a statutory duty to investigate the possibility of a settlement. This duty to investigate the possibility of a settlement does not entail going beyond the relevant facts and interests which may be taken into account in the decision-making process pursuant to Article 3.4 of the General Administrative Law Act. By virtue of Paragraph 2 of Article 4.2 of the General Administrative Law Act, the interested party’s own responsibility to provide information also plays a role in the scope of the authority’s duty to investigate the possibility of a settlement. To a greater extent than in the past, the administrative court will have to draw administrative authorities’ attention to their duty to investigate the possibility of a settlement. Mediation in the process of administrative decision-making is possible and permissible, but in certain circumstances it is actually required.

Administrative authorities may also take a conflict-resolution approach during the decision-making stage in cases in which Articles 3.2 and 3.4 of the General Administrative Law Act do not require them to do so. For example, mediation may be advisable in the interests of proper administration or of efficiency or effectiveness. I do not consider that compulsory mediation prior to the judicial stage, as has been advocated in the German literature, is to be recommended. In my opinion it makes no sense to impose mediation on parties if those parties themselves do not have the intention of finding an amicable solution to a conflict.

Sometimes explaining a decision or offering an apology is enough to resolve a conflict. Mediation may also provide an opportunity to negotiate a solution to a conflict. Substantive law must provide space to reach legally valid consensus regarding a solution to a conflict. This study explores the border areas associated with the principle of legality and the rule of speciality. Because of these two administrative principles, administrative authorities are not free to involve any interests they wish in decision-making processes. However, one of the points of departure in mediation is that all aspects of a conflict should be involved in negotiating a solution, including interests which are not legally relevant. The study examines to what extent the principle of legality and the rule of speciality are at odds with this core element of mediation.

By virtue of the principle of legality and the rule of speciality, when making decisions an administrative authority is not authorized to take into account interests which are protected by some other public-law regulation; nor is it permitted to consider the private interests of some third party if it is clear that the legislator intended to exclude the consideration of such interests. With the help of practical examples we examined how mediation relates to the principle of legality and the rule of speciality. These examples show that the principle of legality and the rule of speciality do not inhibit an integrated approach to a conflict required by mediation. For instance, the practical example ‘Water Board Sub-Plan: Re-
placement of Drawbridge’ (Deelplan waterschap: vervanging ophaalbrug) shows that external public interests can be taken into consideration during negotiations about a solution. In this case the interested party had objected to a component of the Water Board’s sub-plan. The Water Board could not take this objection into account in reaching its decision, because the objection had to do with an access road and was not related to water management interests. The Water Board has no powers with respect to access roads. Therefore a representative of Transport, Public Works and Water Management was invited to the negotiations about a possible solution. The practical example ‘Building Permit for New Residence’ (Bouwvergunning voor nieuwe woning) shows that during negotiations about a solution interests may be considered which may not be considered in the decision-making process. In this case a neighbour’s objections to a building permit had to do with fear that the planned development would adversely affect the social and residential atmosphere and the ownership situation. In view of the non-discretionary legal framework of Article 44 of the Housing Act (Woningwet), when making a decision about a building permit the administrative authority may not take these interests into account. In this case the resolution of the administrative dispute was sought in the legal relationship between private individuals under civil law.

It has become clear that mediation provides possibilities of dealing with some of the practical problems citizens experience in relation to the principle of legality and the rule of speciality. In practice citizens are confronted with compartmentalized legislation, in which each regulation has its own assessment framework and its own decision-making procedure. If one dispute is spread across a number of different legal frameworks, it can be difficult to realize the integrated approach the citizen wants. Mediation also approaches a dispute in an integrated way. Not only legally relevant interests, but any complaints at all, including complaints about the way a citizen has been treated, may play a role in the negotiations towards a solution. The administrative authority concerned must then investigate whether a negotiated solution can be implemented within the frameworks of public law.

Mediation is focused on ending disputes. After a successful mediation attempt, a new dispute may arise between the parties about the agreement which was reached. In administrative law the legal relationship between an administrative authority and a citizen is governed by a decision. When negotiations culminate in an agreement, their relationship is governed not only by the decision, but also by the agreement. This combination of legal constructions raises questions with regard to legal protection. The study shows that mediation in administrative disputes may cause legal problems relating to legal protection in the event of a dispute about a negotiated agreement. Various issues are discussed, such as the possibilities of legal protection, the confidentiality of mediation, the legal validity of waiver clauses and mediation clauses, the legal consequences of a contest-
able agreement and the possibilities of demanding compliance with an agreement.

Some legal problems can be overcome if the special aspects of negotiating in administrative disputes are taken into account in practice. For example, when the details of a settlement are set out in an agreement, reference may be made to the court – the administrative court or civil court – which should be approached in the event of a dispute. In connection with legal protection, it is advisable for the agreement to be made known to third parties who were not originally party to it. If the agreement involves a decision, the authority in question must make sure that third parties know about it, by providing a statement of the grounds on which the decision is based. Other legal issues result from the fact that administrative procedure is not designed for the settlement of disputes arising from agreements. Disputes about the interpretation or performance of an agreement about a decision are assessed by the administrative court on the basis of the principle of legitimate expectations. The court does not have the power to order the administrative authority to comply with the agreement. Whereas the law of obligations grants a right of action to contracting parties, for example on the grounds of failure by the other party to comply with the agreement, such rights of action are not included in the law of administrative procedure. In view of the increasing use of mediation in administrative law, a legal regulation of competence agreements is to be recommended. It would mean that administrative law – and procedure – would be better geared to today’s practice, in which administrative authorities not only make decisions but also enter into agreements with citizens.