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Analysis of the Double Defendant System of Administrative Reconsideration

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ABSTRACT

Since 2014 Administrative Procedure Law revised and established the administrative reconsideration Double Defendant System, the reconsideration "Maintenance meeting" phenomenon although has changed, but all kinds of problems come one after another, such as confusion of function orientation, violation of the principle of "Evidence before judgment", increasing the burden of litigation and impairing the plaintiff's right of free choice. Article 10 of the Administrative Review Law of the People's Republic of China (revised)(draft for consultation) , published by the Ministry of Justice on November 24,2020, even abolished thedouble defendant System, although it was reinstated in the new law on Administrative Review adopted at the fifth session of the Standing Committee of the National People's Congress on September 1,2023, but this kind of system's repetition reflects undoubtedly double defendant System has not developed mature, needs to continue consummates.

KEYWORDS

Administrative Reconsideration; Reconsideration Maintenance; Double Defendant System.

1. THE ORIGIN AND DEVELOPMENT OF DOUBLE DEFENDANT SYSTEM

1.1. The Origin of the Double Defendant System

In the period of maintaining"Single defendant" in reconsideration, many reconsideration organs, in order to avoid taking responsibility, lead to the prevalence of"Maintenance meeting" in practice, which greatly undermines the authority of administrative organs. During this period, if the party concerned does not accept the result after the decision of the review organ is upheld, he can only bring the case to the People's court with the former administrative organ as the defendant, and the review organ need not accept judicial review, therefore, the majority of review organs, in order to avoid the risk of litigation, prefer to make a decision to maintain. In order to change the status of"Maintenance meeting" of administrative reconsideration, the Double Defendant System came into being. After the implementation of this system, the"High maintenance" rate of administrative reconsideration has indeed decreased, and the co-defendant system has achieved some results, but this kind of end-to-end solution does not solve the original problem in the system of reconsideration, and some new problems arise due to the lack of supporting system.

1.2. The Development of the Double Defendant System

Article 25 of the 1989 administrative procedure law of the People's Republic of China (hereinafter referred to as"The administrative procedure law") stipulates that the review organ shall be the

defendant only if it makes a change to the original administrative act; The double defendant system was formally established in 2014 after the“Administrative Procedure Law” was amended, and in 2017 the amendment continued this mode; This model has been consolidated by the further interpretation of the system in Article 22 of the 2018 interpretation of the Supreme People's court on the application of the administrative procedure law of the People's Republic of China, it not only expands the practical connotation of“Maintaining the decision”, but also covers most of the acts of rejecting the application for reconsideration or request, it also clarifies the ways of adding co-defendants, the distribution of responsibilities, the burden of proof and the scope of evidence between the original organ of conduct and the organ of reconsideration[1].

Before the amendment, many scholars questioned the double defendant system: some people think that this system has a strong problem-oriented, from the actual operation point of view, double defendant system will have a great collateral effect on both parties, but in reducing the maintenance rate of the role of limited, from a theoretical point of view, there are some unresolved internal conflicts[2]; some scholars believe that the main function of administrative reconsideration is to provide relief for the administrative parties, and that it should be abolished and restructured according to the functional orientation of administrative reconsideration in the New Era, the maintenance of this act by reconsideration does not add to the burden of rights of the parties, and therefore it is not justified in theory to list them as co-defendants[3], some scholars think that the mode of double defendant may lead to the repeated submission of evidence by the review organ, even to reinforce the original action after the administrative action is finished, which violates the principle of adducing evidence first and then deciding[4]; Other scholars have argued that the system does not respect the right of the parties to dispose of, and imposes additional co-defendants, and that the probability of being a defendant when it fails to act or is inadmissible under the law is significantly reduced, it is likely to encourage the negative reaction of the review organs[5].

As mentioned above, this system has been controversial since its establishment, the Administrative Review Law of the People's Republic of China (revised)(draft for consultation) , promulgated by the Ministry of Justice on November 24,2020, makes an all-round adjustment to the system of Administrative Review, article 10 is directly related to the survival of the two-accused system, although this amendment was not adopted, but it can be seen from thedouble defendant system is not complete, it should be revised and improved.

1.3. Data Evaluation after the Implementation of the Double Defendant System

According to the statistics released by the Department of Justice, the double defendant system did alleviate the“High maintenance” situation to a certain extent, the maintenance rate overall downward trend. However, it should also be taken into account that this stage is also accompanied by a large-scale reform of administrative reconsideration, such as the improvement of the reconsideration procedure and the exploration of an expert mode of hearing cases, it can be said that the implementation of various measures together to promote the current review of the maintenance rate has declined, so it is difficult to review the maintenance rate of the decline can only be attributed to the double defendant system[6]. Others argue that attention needs to be paid to the“Stress response” that new reforms can bring and the resulting“Fake improvements” that can be made immediately[7].

2. THE DILEMMA OF THE DOUBLE DEFENDANT SYSTEM

2.1. The Compound Type of Functional Positioning

From its historical development, the function orientation of administrative reconsideration at the beginning is a kind of supervision system of self-correcting mistakes in administrative organs[8]. The Administrative Review Regulations of 2007 make different provisions at the institutional level, and in Article 1 it is clearly stated that the purpose of the regulations is to give full play to the role of

administrative review in the settlement of administrative disputes, in essence, it expands its function, makes administrative reconsideration have certain social relief function besides internal supervision, and changes the original function orientation[9]. In the following years, resolving disputes gradually became the core function of the administrative reconsideration system, in 2020, the Central Committee for the comprehensive rule of law deliberated and passed the“Administrative Review system reform plan” mentioned that“Administrative Review has a fair and efficient, people-friendly system advantages and the main channel to resolve administrative disputes”; In 2021, the CPC Central Committee, the state council issued the“Rule of law government construction implementation program (2021-2025)” also put forward the same requirements; Article 1 of the Law on Administrative Review, which came into effect on January 1,2024, while clarifying the role of Administrative Review as the main channel for resolving administrative disputes, it points out that it also has the function of supervising and guaranteeing the administrative organs to exercise their functions and powers in accordance with the law. Thus it can be seen that the administrative reconsideration system of our country has always had the dual system functions of social relief and internal supervision, and has not taken the road of single function, the dual nature of this function is reflected in the process of examination, that is, the content of the request of the applicant for reconsideration is not completely consistent with the content of the examination by the reconsideration organ, but is a comprehensive examination of the legality of the original administrative act, in order to realize its supervisory function.

In this case, if the administrative reconsideration act is considered to be a new act different from the original Administrative Act, the administrative reconsideration organ can be listed as the defendant when it makes the decision to maintain the reconsideration However, if the right relief is regarded as the primary function of the system of administrative review, and its behavior is characterized as similar to the court's decision in order to resolve the administrative dispute, then the review organ should not become the defendant, because it does not add a new burden of rights to the administrative counterpart[10]. In the formerDouble Defendant System, the review organ plays different roles in different stages: in the administrative review stage is the judge, into the litigation stage and then turned into the defendant, that is, the examinee. Such a change of identity undoubtedly makes it more difficult for the reconsideration organ to carry out all kinds of work, and too frequent role changes may also become a breeding ground for corruption, this creates a cover-up between the staff at the review stage and those at the litigation stage.

2.2. To Create a Sense of Unreasonableness on the Spot

The Double Defendant System makes the defendant powerful and is an end-of-the-line solution. In practice, the review organ, as the dominant party, is likely to modify parts of the original act to meet the requirements of legality without changing the original result, under such circumstances, if only the original administrative organ is the defendant, it will be more difficult for it to provide evidence, and improve the success rate of the administrative counterpart; however, if the reconsideration organ is taken as the defendant, it is possible to provide corroborating evidence, the two organs may cooperate and help each other in the trial, which will result in a wide gap in the litigation status between the plaintiff and the defendant, the opposite party will face greater litigation pressure, from the procedural point of view does not comply with the“Evidence first after the ruling” principle of administrative procedures.

In addition, the Double Defendant System will also increase the court's trial pressure. After the implementation of the administrative reconsideration co-defendant system, the court will exercise judicial power to supervise and try the reconsideration organ and the original behavior organ at the same time. The level of the review body is higher than that of the original conduct body, and the possibility of interference with the judiciary is higher, which increases the pressure on the courts. The judicial power is in a relatively weak position compared with the original administrative power, and it is difficult for the grass-roots courts to guarantee the impartiality when they try the administrative

organs at the same level, especially the People's government, this leads to the problem of the credibility of the existing remedies in administrative dispute resolution. Moreover, the administrative review organ and the original behavior organ belong to the same system of superior and subordinate, the two are closely related in their work, and basically the same in their value orientations and interest choices, therefore, when entering the administrative reconsideration procedure, the administrative counterpart often harbors the suspicion of“Official protection”.

2.3. It Violates the Right of Free Choice of the Parties Concerned

The existing system ofdouble defendant violates the principle of“Disposition right” and denies the right of the litigants to choose the accused independently. In this case, the principle of disposition right means that the parties concerned can dispose of their own substantive and procedural rights according to their will, except when major interests are involved or there are legitimate reasons for doing so, according to Article 134(1) of our country's“Explanation of action”, the original administrative organ or the decision-making organ should be added as a co-defendant by force, even if the plaintiff based on various factors, after the People's court has informed it that it should add to the lawsuit against another organ, the plaintiff can only choose to agree to add the defendant, otherwise the people's court can add directly according to law. This practice of forcibly adding co-defendants actually damages the plaintiff's right of free choice.

Therefore, the improvement ofDouble Defendant System should pay attention to the protection of the right of free choice of the parties. In practice, the parties may be willing to take the original agency as the defendant because the administrative act which harms their rights and interests is from the original agency and is more familiar with the original agency May also be more dissatisfied with the work of the review organ and prefer the future review organ to be the defendant. In this regard, the will of the plaintiff should be respected and the plaintiff should freely choose the defendant, rather than being legally mandated as co-defendants.

3. RECONSTRUCTION OF THE RECONSIDERATION SYSTEM UNDER THE NEW SYSTEM

3.1. To Establish a Unified Organization for Administrative Reconsideration

On the one hand, it is necessary to centralize the power of administrative reconsideration to a special administrative reconsideration organ The model of Yiwu in Zhejiang province, which advocates the integration of the responsibilities of administrative reconsideration and the establishment of an“Administrative reconsideration bureau”, and the model of Shandong province, which“Establishes only one administrative reconsideration organ at one level”[11], these models all reflect the tendency of centralized exercise of administrative reconsideration power. In practice, the city of Yiwu in Zhejiang province established the country's first substantive administrative reconsideration bureau in 2015, which has jurisdiction over the vast majority of reconsideration cases. Other relevant departments no longer accept administrative reconsideration cases. This“Administrative Review Bureau” model in Zhejiang is a good reflection of the advantages of the specialized agencies, enabling the review bureau to have independent case handling space beyond the subordinate relationship and daily administrative work, greatly improving the fairness of the case. In essence, this centralized and specialized way of solving the problems is to change the orientation of the reconsideration system from an internal supervision system which only includes“Administration” to an administrative reconsideration system which includes both“Judicature” and“Administration” and mainly protects the rights of citizens, this can not only realize the protection of civil rights, the supervision of administrative behavior, but also improve the acceptance of the results of administrative review.

On the other hand, to establish a unified administrative review system also needs to resolve the reconsideration personnel and disputes do not match, the imbalance of resources and lack of professionalism. At present, the construction of administrative reconsideration team in our country is not complete, which is far from the construction of judge and procurator team, and lacks the corresponding legal norms, there is no systematic regulation on the post conditions and professional norms of the reconsidered personnel, and there is a lack of professionalization and professionalization of the reconsidered personnel. In this regard, the independent working status of administrative review personnel should be established to ensure that they exercise their functions and powers independently and in accordance with the law, without interference from other organs, and the entry threshold for staff should be raised, in addition to the basic legal education background, differentiated access conditions should be set according to factors such as different regions and levels of economic development, so as to improve the overall professional quality of administrative review personnel.

3.2. Promote the Establishment of a Public System of Administrative Reconsideration

The continuous development of digital government provides a highly efficient and convenient platform for the public. The establishment of database and the application of big data technology reduce the cost of administrative reconsideration, at the same time, it also promotes the public handling of administrative reconsideration decisions on the Internet, which further promotes the standardization of administrative reconsideration decisions, the new administrative reconsideration law clearly requires the reconsideration organ to strengthen the information construction and use modern information technology. In addition, relevant experts, practising lawyers and senior administrative judges may be invited to evaluate the administrative reconsideration case files after the conclusion of the administrative reconsideration procedure, and evaluate and commend the administrative reconsideration files, it is also included in the performance evaluation of the Administrative Review Body to improve the awareness of the administrative review personnel in handling the review cases and the quality of the cases.

On the other hand, under this kind of omni-directional supervision, the reconsideration organ is bound to carry out more detailed and clear reasoning when making the reconsideration decision, in order to prove the legality of its behavior, having increased the authority of its decisions and the level of public trust, and having a detailed and concrete decision of reconsideration, once it enters the stage of litigation, is also conducive to the prompt understanding of the facts of the case by the judge and is more conducive to the clarification of the case, the trial is more convenient.

3.3. The Scope of Accepting Cases for Administrative Reconsideration Shall Be Further Expanded

On the one hand, since we want to play the role of the main channel of administrative reconsideration to resolve disputes, we need to further expand the scope of its cases. Administrative reconsideration has institutional advantages that administrative litigation does not have, so some cases can not be resolved through administrative litigation or can not enter the administrative litigation process, should also be included in the scope of administrative review cases. In addition, the new law on administrative review requires the administrative review organ to examine the formal and substantive legality of the administrative act applied for. Therefore, we should ensure that the scope of administrative reconsideration is larger than that of administrative litigation, so as to solve the administrative disputes substantively through administrative reconsideration.

On the other hand, administrative reconsideration can not solve all administrative disputes, and its scope of acceptance should also be limited. Although pre-review can ensure that the administrative review body filters out most of the disputes that are not suitable for administrative litigation, it can also cause the Administrative Review Body to face a large number of disputes to a certain extent, it

will increase the operating costs of the administrative organs. If all disputes are allowed to be included in the scope of review, it will inevitably weaken the comparative advantage of administrative review. At present, the main function of administrative reconsideration is to resolve disputes and give consideration to both right relief and internal supervision, some acts that do not have a substantial impact on the rights and interests of the parties can be excluded from the scope of Administrative Review, which is also in line with the need for resource allocation and efficiency.

3.4. Learn from the Extra-territorial Ombudsman System

The ombudsman system is a specialized legal system for monitoring and providing remedies for administrative misconduct, in the form of a system that relies mainly on independent investigations by the Ombudsman to arrive at conclusions, moreover, it is an alternative dispute resolution mechanism that only examines whether a party's complaint is substantiated and does not adjudicate a dispute. At present, the Ombudsman in each country is generally independent of the executive branch in the world, and has a head-office system. Its members are mostly judges or lawyers, with a certain level of work experience and professional level, mostly people who uphold justice and enjoy a certain reputation in the community.

It can be seen that the authority, legality and independence of the ombudsman system is just the remedy for the defects of our review system, which can be used for reference to supervise and perfect the current administrative review system. The ombudsman system has become universal and international organizations have established the International Ombudsman Association for this purpose, and article 71 of our constitution also leaves room for the establishment of such a ombudsman system, if an administrative appeals board could be established, it would provide better oversight of administrative authority and a forum for appeals in the event of an impasse in the review process.

4. CONCLUSION

The system of administrative reconsideration has been updated and perfected by generations of legislators in the past decades. There are still many practical problems to be solved, and theDouble Defendant System is one of them. Under this mode, the review organ is both the reviewer and the author of an administrative decision. On the one hand, this system is set up to solve the malpractice of high maintenance rate of review and low correction rate, on the other hand, it is also to urge the reconsideration organ to play the role of supervising the administrative behavior of the lower organs and relieving the citizens' rights But there are also some problems in this system, such as violating the procedure of“Evidence first, judgment later”, infringing on the right of free choice of the parties and the dual identity transformation of the reconsideration organ, etc. , the current revision of the law can not solve all the problems in reality overnight, and the interpretation of the new administrative review law will continue to advance steadily, which is also in the context of the constant changes in our society, the increasing demand of citizens for the protection of their rights and the diversification of the claims of the administrative counterpart.

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