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SILENCE OF THE ADMINISTRATION IN THE CURRENT MACEDONIAN ADMINISTRATIVE DISPUTE LEGISLATION AND THE NECESSITY OF AMENDMENTS

Abstract

The Assembly of the Republic of North Macedonia (hereinafter: Macedonia or North Macedonia) adopted a new Law on Administrative Disputes in May 2019, thus commencing the third phase of the administrative dispute development in the country. The respective Law on Administrative Disputes came into force one year later, precisely on the 25th of May 2020. Generally speaking, multiple novelties in the administrative dispute regime were introduced with the adoption of the referenced law: (*) the scope of the administrative dispute was broadened; (*) new principles on which the administrative dispute is based upon were introduced; (*) the administrative judiciary was bound to pay attention to the consistency of adjudications (which, one might argue, is a step closer to developing a case-law system); (*) the administrative judiciary can now fine the public authorities which do not cooperate; (*) the new institutes of model-procedure and model-decision were introduced, etc. In that context, the Law of Administrative Disputes from 2019 may serve as a point of reference when speaking of positive reforms in terms of judicial oversight over the public authorities. However, the Law on Administrative Disputes also changed the rules for filing a lawsuit in the cases of "silence of the administration", that is situations when the administration does not adopt the decision (individual administrative act) within the statutory deadlines. The objective of this article is to explain the new rules for filing a lawsuit due to silence of the administration are less favourable for the citizens. The relevant provisions of the Law on Administrative Disputes from 2019 should be restructured so that they fit the old regime for silence of the administration. While it is certain that the topic at hand is indeed narrow, it is of utmost importance that the relevant provisions of the Law on Administrative Disputes are amended as soon as possible since they would harm citizens interests in a scale rather difficult to foresee.

Key words: *silence of the administration, administrative dispute, Law on Administrative disputes, lawsuit*

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I. INTRODUCTION

An administrative dispute is the legal mechanism of judicial oversight over the administration.[1] In other words, an administrative dispute is a dispute which is resolved in a special administrative-judicial procedure,[2] a form of providing judicial control over the legality of the decisions of public authorities and their officials […].[3] Thus, it becomes vivid that the administrative dispute is a mechanism for providing individuals and legal entities protection against the unlawful decisions of the administration. However, the term "decision" is not to be understood as any type of decision of the administration, rather as an individual legal act with which the authority decides on the party's rights, obligations or legal interests. Nowadays, administrative disputes can be initiated not only against decisions of the administrative authorities but also against individual legal acts of other public authorities and private entities with public powers which tangle the party's rights and obligations (such as the regulatory bodies, the State Commission for Prevention of Corruption, Doctor's Chambers, etc.).[4]

However, an administrative dispute can be initiated not only against a specific administrative act but also in the case when the administration remains "silent". This means that an administrative dispute can be initiated in the cases of administrative inactivity as well;[5] if the authority has received a request/appeal and has failed to issue a decision within the statutory deadlines, the party can submit a lawsuit-initiate an administrative dispute. This is the case of silence of the administration.

While the notion of silence of the administration is widely elaborated upon in the literature, the Macedonian Law on Administrative Disputes from 2019[6] introduced some changes *vis-à-vis* the traditional manner of regulating it. This is specifically related with the existence of a deadline for submitting a lawsuit in the cases when the administration remains silent upon the party's request/appeal. The objective of this article is to shed some light on the referred provisions, construing that this new regime of the silence of the administration is less favourable for citizens and legal entities.

II. SILENCE OF THE ADMINISTRATION: A BRIEF INTRODUCTION

As already indicated in the introduction, the case of silence of the administration is the case when the administration fails to adopt, in a timely manner, an individual legal act/perform an administrative action upon a request/appeal by the party. Administrative silence is indeed devastating for citizens and/or legal entities striving to exercise their rights. As put in one of the most detailed studies[7] of this issue, "[a]dministrative silence is an issue that lies at the intersection of legal and managerial aspects of public administration, a concept that is both reflecting and

[1] Zoran Tomić, *Opšte upravno pravo* (13th edition, Faculty of Law, University of Belgrade 2020), p. 365.
[2] Borče Davitkovski, Ana Pavlovska Daneva, *Administrative Law – Second Book Procedural Law* – (Ss. Cyril and Methodius University in Skopje), p. 76.
[3] Lana Ofak, "Administrative Disputes in Civil Law Jurisdictions" [2017] Max Planck Encyclopedia of Comparative Constitutional Law.
[4] More on this in the previously cited books and articles.
[5] Dobrosav Milovanović, "The Subject Matter of the Administrative Dispute" [2020] Collection of Papers 150th Anniversary of the Administrative Dispute in Serbia 1869-2019, p. 81.
[6] Official Gazette of the Republic of North Macedonia 96/2019.
[7] Dacian C. Dragos, Polonca Kovač and Hanna D. Tolsma (ed.) *The sound of Silence in European Administrative Law* (Palgrave Macmillan, 2020).

testing the principles of legal certainty, legality, good administration, legitimate expectations, and effectiveness". Administrative silence is a serious breach of the rule of law principle, i.e. an impediment to effectively enjoying rights. In such cases, the landowner is preventing from building on his/her property (he/she cannot obtain a constructing permit), the business owner cannot obtain a license for placing products on the market, the individuals who have found themselves in a situation of social risk cannot receive a monthly financial aid, etc. The administration not performing the tasks it is legally obliged to perform is placing the entire state apparatus and its *raison d'être* in question.

For that very reason, the case of silence of the administration is dealt by utilizing legal fictions. The most widely accepted fiction is the one of negative silence or denial. As authors put it "[i]f the public authority who decides in first instance does not comply with the legal deadlines […] it shall be considered that the party's request has been denied".[8] This legal fiction allows the party at hand to pursue its rights in a second-instance administrative procedure (file an appeal within the administrative system, if such an appeal is allowed) or initiate an administrative dispute right away. Of course, there are cases where the first-instance administrative authority has issued a decision in a timely manner, but the second-instance authority does not decide upon the appeal within the statutory deadlines. In those cases, applying the same legal fiction, the party can file a lawsuit and initiate an administrative dispute against the second-instance authority. Even furthermore, "[i]f the interested party involved suffers damages because of the decision that fails to occur in many legal systems the governmental body can be held liable for these damages."[9]

Facing with the (negative) legal fiction of a denied request, the next question arising is related to the deadline for filing a lawsuit in cases of administrative silence. For comparison, in cases when the request/appeal of the party has been denied, it is widely accepted that the party can initiate an administrative dispute within 30 days from the day when the administrative act was delivered to it. However, in cases of silence of the administration, this is a more complex issue. If there is no decision at all, when should the party be able to submit the lawsuit? The following chapters will focus on precisely this topic.

III. THEORETICAL CONSIDERATIONS: DEADLINE FOR FILING A LAWSUIT IN THE CASES OF SILENCE OF THE ADMINISTRATION

There is a general consensus, especially amongst the leading theoreticians within the region of Southeastern Europe, that in the cases of silence of the administration when the legal fiction of denial exists the lawsuit can only be premature, but never overdue. Simply put, the party can file a lawsuit against the administrative authority to which it has submitted a request/appeal prematurely—before the statutory for issuing such a decision has elapsed. For example, if the deadline for issuing a construction permit is 30 days, the party's lawsuit shall be dismissed if submitted before the respective number of days has passed. However, if the deadline of 30 days passes, the party can file submit a lawsuit for silence of administration at any point in the future (the lawsuit cannot be overdue).[10]

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[8] Borče Davitkovski, Ana Pavlovska Daneva, *Administrative Law – Second Book Procedural Law* – (Ss. Cyril and Methodius University in Skopje), p. 80.

[9] Oswald Jansen, "Silence of the administration" [2016] in Jean-Bernard Auby (ed.) *Droit comparé de la procédure administrative* (Bruylant 2016).

[10] This is written in multiple university textbooks such as: Naum Grizo, Simeon Gelevski, Borče Davitkovsi and Ana Pavlovska Daneva, *Administrative Law* (Faculty of Law "Iustinianus Primus", Ss. Cyril and Methodius

The logic behind this position is that the party (individual or legal entity) is already in an unfavourable position, where it is not certain whether there shall be a possibility for exercising his/her/its rights. In the example used above, the individual who has requested a construction permit is already uncertain of the reasons why the administrative authority has not issued, and whether he/she will be able to fulfil his legal interests. Thus, once the deadline for issuing the decision (issuing a construction permit) has passed, the party can decide to submit a lawsuit at any point it finds fit. This is quite reasonable, as it is vivid that the administrative-judicial procedure (i.e. the administrative dispute) is a reflection of the rule of law principle and serves as a protection mechanism for the citizens;[11] as an implication, citizens should have a broad legal ground upon which they can initiate an administrative dispute.

IV. HISTORICAL OVERVIEW OF THE LEGISLATION IN MACEDONIA: FROM 1952 TO 2020

The Macedonian history in terms of administrative disputes is a long-lasting one. The first law which was applied to the judicial control over the administration was the Law on Administrative Disputes of Federal People's Republic of Yugoslavia from 1952,[12] amended for the last time 1965.[13] Back then, the administrative disputes were resolved before the Supreme Court, as there was no specialized administrative judiciary. As per Article 8 of the consolidated version of this act "[a]n administrative dispute may take place in the cases where the competent state organ has not issued any act, and this Law authorizes the party to proceed as if the request was denied (Article 26)". The referred Article 26, on the other hand, regulates the deadline for submitting a lawsuit in cases of administrative silence. The provisions of Article 26 read as follows:

> "(1) If the second instance state body, within 60 days or within a shorter period determined by a special regulation, did not make a decision on the appeal of the party against the first instance decision, and did not pass it either within a further period of seven days upon repeated request, the party may initiate an administrative dispute as to have her appeal rejected.
> (2) In the manner prescribed in paragraph 1 of this Article the party may also act when, upon its request, the first instance body has not made a decision against which there is no place for appeal.
> (3) If the first instance body against whose act there is a place of appeal within 60 days or in a shorter period determined by a special regulation has not made any decision on the request, the party has the right to address with his request to the second instance body. Against the decision of the appellate body, the party may initiate an administrative dispute, and may under the conditions from paragraph 1 of this article to initiate and if this authority did not make a decision."

University in Skopje, 2011), p. 612; Zoran Tomić, *Opšte upravno pravo* (13th edition, Faculty of Law, University of Belgrade 2020), p. 382; Predrag Dimitrijević, *Upravno pravo* (5th edition, Medivest, 2019), p. 409.; Marko Šikić, "Pitanja uređenje i primjene pravne zaštite od šutnje uprave u Republici Hrvatskoj" [2008] Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 21(1).

[11] Ivo Borković, *Upravno pravo* (Narodne novine, 2002).

[12] Official Paper of the Federal People's Republic of Yugoslavia 23/52 and 15/53.

[13] Official Paper of the Socialist Federal Republic of Yugoslavia 16/65.

Vividly, the Law on Administrative Disputes from 1952 set out three scenarios.
The first scenario, from para. 2 of Article 26, is the one where there is no legal ground for an appeal against the first-instance administrative act. In such case, if the first-instance authority fails to issued the decision within the statutory deadlines, the party shall repeat the request to the same authority for the decision to be issued in additional 7 days. If the state authority fails to issue the decision in the additional 7 days, the party may file a lawsuit and initiate an administrative dispute.
The second scenario, from para. 3 of Article 26, is the one where there is a legal ground for an appeal against the first-instance administrative act. In such a case, if the first-instance authority fails to issue the decision within the statutory deadlines, the party may reach out to the second-instance authority and seek legal protection. In those cases, the second-instance authority shall oblige the first instance authority to deliver the decision. If the second-instance authority also fails to do so, the party may file a lawsuit against it.
The third scenario, from para. 1 of Article 26, is the one where the second-instance authority does not decide upon the appeal in a timely manner. The steps are identical to the ones in the first scenario explained.
The shared characteristic of all three scenarios is that there is **no deadline for submitting a lawsuit** once it is certain that there is a case of administrative silence. **The lawsuit could be premature, but never overdue**. For illustrative purposes, if the party in scenario one submits a lawsuit before asking the first-instance authority to issue the decision in the additional 7-day period, the lawsuit shall be premature. However, if the initial 60-day period passes, as well as the additional 7-day one, the party can submit a lawsuit at any point in the future.
The second Law on Administrative Disputes applied in Macedonia was the one from 1977.[14] This Law on Administrative Disputes had the very same provisions from the Law on Administrative Disputes from 1952. The lawsuit for silence of the administration could be premature—submitted before the constitutive elements for administrative silence are fulfilled—but not overdue. The party could submit a lawsuit at any point in the future, once it is certain that there is a case of administrative silence.
The third Law on Administrative Disputes applied in Macedonia was the one from 2006.[15] Just as in the previous Laws on Administrative Disputes from Yugoslavia, the Law on Administrative Disputes from 2006 contained Article 22 which read as follows:

> "(1) If the second instance body within 60 days or in a shorter period determined by a special regulation has not made a decision on the appeal of the party against the first instance decision, and has not made it within seven days after the repeated request, the party may initiate an administrative dispute as if the appeal was rejected.
> (2) The party may act in the manner prescribed in paragraph 1 of this Article, even when the first instance body has not made a decision upon its request, against which there is no place for appeal.
> (3) If the first instance body against which there is a place for appeal within 60 days or in a shorter period determined by a special regulation has not made a decision on the request, the party has the right to address his request to the second instance body. Against the decision of the second instance body, the party may initiate an

[14] Official Paper of the Socialist Federal Republic of Yugoslavia 4/1977.
[15] Official Gazette of the Republic of Macedonia 62/06 and 150/10.

> administrative dispute, and under the conditions from paragraph 1 of this article, even if this body has not made a decision."

The very same three scenarios existed. Generally speaking, in cases when state authorities failed to issue a decision upon a request/appeal within the statutory deadlines, the parties were obliged to repeat the requests, therefore providing an additional deadline. If the repeated requests failed, the parties were able to submit a lawsuit for silence of the administration at any point in the future. In that context, in accordance with the old Laws on Administrative Procedure (from 1952 to the one adopted in 2019 and applicable from 2020) the parties could never lose the right to seek judicial protection due to silence of the administration. They could submit a premature lawsuit, but once all deadlines for the state authorities passed the possibility to initiate an administrative dispute was not limited timewise (lawsuits for silence of the administration could not be overdue). For the purpose of illustration, the example used above shall be used once more, this time assuming that there have been no legal grounds for an appeal (to a second-instance administrative authority.) against the first-instance authority's decision. The person requesting a construction permit would have to wait for the statutory deadline (30 or 60 days, depending on the *lex specialis*) to pass. Once the deadline has passed, the person would have to repeat his/her request to the first-instance authority and ask for the decision to be issued within additional 7 days. If the decision would not have been issued in those additional 7 days either, the person requesting a construction permit would have obtained the right to seek judicial protection (file a lawsuit for an administrative dispute) in an indefinite period in the future.

V. CONTEMPORARY REGIME FOR SILENCE OF THE ADMINISTRATION IN ACCORDANCE WITH THE LAW ON ADMINISTRATIVE DISPUTES FROM 2019

The applicable Law on Administrative Disputes from 2019 differs significantly from the old Laws on Administrative Disputes in light of the deadline for submitting a lawsuit in cases of silence of the administration. Namely, **the principle that the lawsuit can be premature, but never overdue no longer exists**, as Article 26, para. 2 of the current Law reads as follows:

> "(2) When an administrative dispute is initiated due to non-adoption of a certain act within the prescribed deadline (silence of the administration), the lawsuit shall be submitted within 30 days after the expiration of the legally determined deadline for adoption of the act."

What would this provision mean, precisely? Under the assumption that there is no legal ground for appeal (before a second-instance administrative authority) the party which has requested the first-instance authority for a decision would have to wait for the initial statutory deadline (30 up to 60 days) to pass before submitting a lawsuit for silence of the administration (so that the lawsuit is not premature). Once this deadline has passed, if the administrative act is still not delivered to it, the party has only 30 days to submit a lawsuit and initiate an administrative dispute. Accordingly, once the statutory deadline for issuing an administrative act has passed, parties enter, to put it simply, in a race against time. If they do not submit a lawsuit for silence of the administration within the next 30 days they would lose the right for judicial protection altogether, i.e. they would remain without any legal remedy at their disposal. This brings individuals as well as legal entities

in a quite unfavourable position. In every case when the administrative authorities are tardy, parties would have to stress over the question—shall the administrative act be delivered within the next 30 days? Assuming that that is not the case, and the party has refrained from submitting a lawsuit, they would remain helpless.
Such an approach is not adequate in terms of the rule of law principle, and it imperils the legal certainty.
What is even more captivating is that the Draft-Law on Administrative Disputes drawn up by an expert working group (final version from 12.06.2018) did not contain such a provision. Namely, the Draft-Law on Administrative Disputes[16] which was published on the Single National Electronic Register of Regulations, which is the data-base where all draft laws are published before being adopted, contained the following provision (Article 31, para. 2):

> "(2) When an administrative dispute is initiated due to failure to adopt a certain act within the prescribed deadline (silence of the administration), the lawsuit shall be submitted after the expiration of the legally determined deadline for adoption of the act."

Hence, the Draft-Law on Administrative Disputes designed by the expert working group did not set out a rule that the lawsuit in case of silence of the administration can be overdue. It remains unclear in which phase of the drafting of the Law on Administrative Disputes from 2019 did the Ministry of Justice, as the authority which proposed the regulation, decide that it should deviate from the principle that a lawsuit for the silence of the administration can only be premature, but not overdue.
There can be many scenarios in which the parties could suffer from the existing Article 26, para. 2. First and foremost, even without statistical data to support the claim, it is certain that in most administrative procedures citizens and legal entities do not seek legal counsel. That way, it is highly likely that they would not assume they only have 30 days to submit a lawsuit for silence of the administration. Secondly, Article 26, para. 2 of the Law on Administrative Disputes from 2019 does not follow the logic set out in the Law on General Administrative Procedure. Specifically, the Law on General Administrative Procedure (Article 106 and 107) provides that the appeal in cases of silence of the administration cannot be overdue, only premature. Since the Law on General Administrative Procedure and the Law on Administrative Disputes are organically inter-related, it is difficult to assume why such a difference perseveres (why should there be no deadline for filing an appeal in an administrative procedure, but one when speaking of filing a lawsuit for an administrative dispute). Thirdly, the administrative servants responsible for issuing administrative acts would know that, in any case of their tardiness, the party can only sue within 30 days. Upon that deadline, the administrative servants who have not issued the administrative act in a timely manner cannot be responsible for this failure (since there is no judicial oversight for their non-fulfilment of their duties).
Having that said, it is quite vivid that the existing provision (Article 26, para. 2) of the Law on Administrative Disputes from 2019 is, indeed, unfavourable for parties (citizens and legal entities),

[16] The last version of Draft-Law on Administrative Disputes prepared by an expert working group founded by the Ministry of Justice was published on 05.09.2018 and is available at: https://ener.gov.mk/Default.aspx?item=pub_regulation&subitem=view_reg_detail&itemid=45563 (accessed on June 30, 2021).

and has to be amended as soon as possible. In order to support this claim, a comparative overview shall be given in the following text.

VI. COMPARATIVE OVERVIEW: SUBMITTING A CLAIM FOR SILENCE OF THE ADMINISTRATION IN SERBIA, CROATIA AND SLOVENIA

It seems that the Macedonian approach to limit the time period in which a lawsuit for silence of the administration can be filed is rather a rare one.
As per the Law on Administrative Disputes of the Republic of Serbia[17] contains the following provisions when speaking of silence of the administration (Article 19):

> "(1) If the second instance body, within 60 days from the day of receipt of the appeal or within a shorter period determined by law, has not made a decision on the party's appeal against the first instance decision, and does not make it within seven days after the subsequent request of the party submitted to the second instance body, the party after the expiration of that period, he may file a lawsuit for failure to pass the required act.
> (2) If the first-instance body, at the request of a party, has not issued a decision against which no appeal is allowed within the time limit provided by the law governing general administrative procedure, and does not issue it within seven days at the subsequent request of the party, the party may file a lawsuit. due to failure to pass the required act."

Without the need for further explanation, Serbia has adopted the approach previously accepted in the Yugoslavian legislation. If all deadlines for issuing an administrative act/decision have elapsed, the party may submit a lawsuit and therefore initiate an administrative dispute. The said lawsuit cannot be overdue, since there is no deadline for submitting it. The parties in Serbia are in a much more favourable position than the parties in Macedonia as per the existing legislation.
The Croatian experience is essentially the same. The Law on Administrative Disputes of Croatia,[18] in Article 24, para, 2 stipulates that "When initiating a dispute due to failure to issue an individual decision or failure to act within the prescribed period, the lawsuit shall be filed with the court no earlier than 8 days after the expiration of the prescribed period". In that regard, the Croatian legislation sets out only the rule that the party should wait for additional 8 days upon the initial deadline (without even having to resubmit the request to the public authority) before filing a lawsuit for silence of the administration. However, the Law on Administrative Disputes of Croatia does not set out a deadline for filing such a lawsuit. To put it in other words, as per the Croatian legislation the lawsuit for silence of the administration can only be premature, but never overdue.
Slovenia, just as Serbia, has accepted approximately the same provisions which existed in the Yugoslavian legislation. Article 28 of the Law on Administrative Disputes[19] reads:

> "(2) If the second instance body fails to issue a decision on the party's appeal against the decision of the first instance within two months or within a shorter period determined by a special regulation, and if it does not issue a new request within a

[17] Official Gazette of the Republic of Serbia 111/2009.
[18] Official Gazette of Croatia 20/10, 143/12, 152/14, 94/16, 29/17
[19] Official Gazette of Slovenia 105/06, 107/09, 109/12 and 10/17.

> further seven days, the party may initiate an administrative dispute. as if her appeal had been rejected.
> (3) The plaintiff may also act in accordance with the preceding paragraph if the body of first instance does not issue a decision against which there is no appeal, and if the body has not issued a final administrative act within three years from the commencement of proceedings, regardless of whether regular or extraordinary remedies have already been used in this procedure unless the procedure has been discontinued.
> (4) If the body of the first instance, against whose decision the appeal is admissible, does not issue a decision on the request within two months or within a shorter period determined by a special regulation, the party has the right to address his request to the body of the second instance. in this case competent to decide. The party may initiate an administrative dispute against the decision of the second instance body; if the conditions referred to in the second paragraph of this Article are met, it may also initiate an administrative dispute when this body does not issue a decision."

Even though there are slight differences, the Slovenian Law on Administrative Disputes is also built upon the principle that the lawsuit in case of silence of the administration can only be premature, but the party never loses the right to address the court.

VII. CONCLUSIONS AND RECOMMENDATIONS

The Macedonian Law on Administrative Disputes from 2019, although a significant reform in the administrative dispute regime, has limited the possibility to file a lawsuit due to administrative silence. Namely, the widely accepted principle that in cases of administrative silence the lawsuit before the administrative judiciary can only be premature but never overdue has been derogated, stipulating that the parties have only 30 days to seek judicial protection once the statutory deadlines for issuing an administrative act have passed. This provision in Article 26, para. 2 of the Law on Administrative Disputes from 2019 puts the parties (individuals and legal persons) in an unfavourable position, one where they might lose their (constitutionally guaranteed) right to legal protection if they do not initiate an administrative dispute within the said deadline. Even though there are no statistical data to analyze—as the administrative judiciary does not keep track of all lawsuits submitted due to administrative silence, and of all the lawsuits which have been dismissed since the deadline in Article 26, para. 2 has elapsed—it is indeed rational to assume that this legal regime will harm parties more than it shall aid them in exercising their rights. Moreover, the provision set out in Article 26, para. 2 is a novelty in the Macedonian administrative dispute legislation, as the previous Laws on Administrative Dispute (from the one adopted in 1952 to the one adopted in 2006) have not limited the right to submit a lawsuit for administrative silence within a certain period of time. Such a provision does not exist in the laws regulating administrative disputes in the countries in the region either, specifically Serbia, Croatia and Slovenia which share the same legal tradition as North Macedonia.
Therefore, Article 26, para. 2 of the Macedonian Law on Administrative Disputes from 2019 should be amended; the text should read as initially drafted by the experts who draw-up the law:

> "When an administrative dispute is initiated due to failure to adopt a certain act within the prescribed deadline (silence of the administration), the lawsuit shall be submitted after the expiration of the legally determined deadline for adoption of the act."

Only in this case will the citizens of North Macedonia be able to receive the legal protection guaranteed, i.e. only then will the principle of legal certainty be duly implemented when dealing with the administrative labyrinths.

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