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Gloss on the Judgment of the Higher Court of Lawyers (Anwaltsgerichtshof) of the Land of North Rhine-Westphalia of 11 November 2015, Case 1 AGH 23/15

Abstract. The gloss refers to a judgment of the Higher Court of Lawyers (Anwaltsgerichtshof) of North Rhine-Westphalia Land of 11 November 2015 (1 AGH 23/15), in which the Court ruled upon the decision of a bar association to revoke the permission to use the professional title of "Fachanwalt" (specialist lawyer) due to a breach of the professional obligation to undergo compulsory continuing professional development. The Court correctly recognized that, firstly, the Bar had made its decision on the wrong basis and, secondly, that there was nevertheless no reduction of its discretion to zero, since despite the existence of the reason for revocation – at least in this specific case – discretion still had to be exercised by the Bar. In this way, the Court corrected the Bar's doubly erroneous decision.

The law applicable in this case has been reformed since the decision with the aim of harmonizing the way the bars use their discretion by issuing decisions concerning the revocation of permissions to use the title "Fachanwalt" – the harshest sanction in this context. By these means, erroneous decisions such as the one at hand shall be minimized. However, the new regulation is also fraught with uncertainty and the extent to which it will provide a remedy will only become apparent with time.

Keywords: obligation of professional training – compulsory continuing professional development – specialized lawyer – revocation – discretionary decision

Theses

1. Discretion misapplied and reformed: Unlawful decision to revoke the permission to use the "Specialist Lawyer" title by Bar associations based

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upon missing further professional training and subsequent amendment of the law.
2. If an authority's discretionary decision is based on incorrect facts or an erroneous legal interpretation, and provided its discretionary power is not reduced to zero, the Court has to repeal it and refer it back to the authority, which in turn must deliver a new decision, even if it ultimately reaches the same conclusion.

1. Facts

The judgment commented upon[1] was issued as a consequence of the action of annulment filed on 2 June 2015 by the plaintiff, in which he challenges the defendant's revocation order of the plaintiff's permission to use the professional title of "Fachanwalt" (specialist lawyer) for social law.

The plaintiff is a lawyer and mediator and also works as a lecturer at the University of N. Until spring 2015, he was permitted to use two specialist lawyer titles: "Specialist lawyer for medical law" and "Specialist lawyer for social law." By the decision dated 28 April 2015, the defendant – the competent regional Bar – revoked the plaintiff's permission to use the latter title, justifying the decision with the lack of 0.5 hours of compulsory continuing professional development for specialist lawyers according to § 15 of the Law pertaining to Bar-approved Specialist Lawyers[2] in 2013 and no training at all in 2014. The legal basis for the revocation was § 43c para. 4 of the Federal Code for Lawyers (Bundesrechtsanwaltsordnung, BRAO[3]) under which this permission may be revoked upon failure to undertake a course of continuing professional development (§ 43c para. 4 S. 2 BRAO). In particular, the defendant did not recognize as sufficient the other evidence submitted by the

[1] 1 AGH 23/15.

[2] Fachanwaltsordnung as last revised on 1 X 2023, hereinafter: "FAO." The FAO is a statute of the German Federal Bar (BRAK), which is adopted by the so-called 'Statutory Assembly' and published in the *BRAK-Mitteilungen* under "official announcements." Amendments have to be submitted to the Federal Ministry of Justice for review (§ 191e BRAO). If the Ministry does not raise any objections, the statutes enter into force after three months (§ 191e para. 3 sentence 2 BRAO). The current version is available online at https://www.brak.de/fileadmin/02_fuer_anwaelte/berufsrecht/BORA_Stand_01.10.2023.pdf (accessed: 30 X 2024).

[3] Act of 1 VIII 1959 BGBl. I p. 565; last amended by Art. 13 of the Act of 23 X 2024 BGBl. 2024 I no. 323.

plaintiff for the purpose of recognition as suitable evidence of further development in accordance with § 15 FAO, namely, his publications, lectures and records documenting his mediator training. This decision of the defendant was based upon the assessment according to which the plaintiff's publications and lectures, on the one hand, do not relate specifically to social, but to medical law, and, on the other, do not reach, from the defendant's point of view, the scientific level of necessary further training in accordance with § 15 para. 1 FAO too, because they were intended for doctors and dentists. Again, from the defendant's point of view, mediator training does not correspond to the further training requirements that apply to a specialist lawyer for social law. As a result, and taking into account the discretion granted to it, the defendant decided that the plaintiff's absences could only be sufficiently sanctioned by revoking his permission to practice as a specialist lawyer for social law. The plaintiff appealed against the revocation to the Higher Court of Lawyers and challenged the defendant's assessment that his other evidence was insufficient within the meaning of § 15 FAO.

The Higher Court of Lawyers (Anwaltsgerichtshof) of the Land of North Rhine-Westphalia followed the opinion of the Bar and judged the defendant's publications and lectures in question either not subject-specific or in any case not corresponding to the level required for the further training of a specialist lawyer for social law. Likewise, the mediator training did not, in the opinion of the Court, meet the requirements of the law, and thus cannot be seen as fulfilment of the requirements concerning the further training of a specialist lawyer for social law. Nevertheless, the action was upheld and the Court ruled in favour of the plaintiff.

The Court based its judgment on the opinion that (at least according to the law in force at the time of the decision) it was not permissible under the FAO to make up for absences from one calendar year in the following year and to compensate for this missing time with further training in the following year. With this assessment, the Court followed the established case law of the Federal Court of Justice (Bundesgerichtshof, BGH), which ruled already in 2014 that a retroactive cure of the breach of the training obligation of § 15 FAO by catching up is not provided for by law[4]; the Court expressly referred in its judgment to this decision.

[4] BGH NJW-RR 2014, 1083 et seq.

In consequence, the defendant's calculation of the absences of the plaintiff were incorrect: the correct calculation without inadmissible reactive crediting of absences should result in an amount of 5 – and not only 0.5 – missing hours of further vocational training for the 2014 calendar year. Consequently, the Bar's decision, having been made on the wrong basis (the existence of 5 instead of 0.5 missing hours), was an error of judgment and as such unlawful. Hence, it should be annulled, regardless of the fact that the law recognizes absences expressly as a reason for revocation without specifying their scope in detail.

2. Assessment of the AGH opinion

At first glance, the ruling of the Court seems to be rather strange, not to say abstruse: The Bar's assessment was confirmed insofar as the plaintiff's failure to demonstrate the required further vocational training as a specialist lawyer is concerned and yet it was ordered to reverse its revocation of the permission to use the title of specialist lawyer, as it had, due to the incorrect application of § 15 FAO, a calculation error was made in favour of the plaintiff regarding the extent of its absences. According to this judgment, the Bar is obligated to reverse its decision based on the finding presented, but at the same time, as might be the first cursory assessment of the legal situation, it is authorized to issue the same decision in terms of outcome with the sole difference that the new decision would be based on 5 missing hours instead of 0.5.

Therefore, the Court's decision calls for some commentary and a closer examination of the main provisions – namely § 43c para. 4 and § 15 FAO – as well as an in-depth analysis of the most important doctrines in German administrative law, that of discretionary error (Ger. *Ermessensfehlerlehre*).

According to § 43c para. 4 sentence 2 BRAO, the permission to use the professional title of "Fachanwalt" "may be revoked upon failure to undertake a course of continuing professional development as prescribed in the rules of professional conduct." Whereas § 43a para. 8 BRAO merely prescribes a general obligation "to engage in continuing professional development" to every lawyer, the FAO, which is exclusively aimed at specialist lawyers in the sense of § 43c BRAO, formulates far more concrete requirements.

Under § 15 para. 1 sentence 1 FAO, specialized lawyers are obliged to publish academically in the specialist field concerned each calendar

year or participate as a lecturer in subject-specific training or events concerning continuing professional development. Thereby, § 15 para. 1 sentence 1 FAO defines a concrete timeframe for this duty, which is supplemented by para. 3, which specifies the scope of the obligation: "The total duration of the continuing professional development must be no less than 15 hours per specialist area; the fulfilment of the training obligation must be proven to the Bar by means of certificates or other suitable documents without a request to do so" (§ 15 para. 5 sentence 1 FAO). According to the old legal situation, which was relevant in the case at hand, no legal provision regulated the question of whether missing hours in the legally described volume of continuing professional development may be made up or not. The opinions in the literature on this issue vary[5]; therefore, the case law[6] of the Federal Court of Justice (Bundesgerichtshof, BGH) was crucial in this context. The BGH made a significant differentiation: Firstly, it ruled that the calendar-based obligation of continuing professional development for the specialist lawyer according to § 15 FAO in its old version, cannot be fulfilled retroactively. In other words, subsequent fulfilment was according to the old legal situation not possible.[7] The background to this interpretation of the law was that § 15 FAO was regarded as a kind of time-based quality safeguard intending to ensure that specialist lawyers are always equally well qualified over time.[8] But, secondly, the BGH held that one single violation of the duty of § 15 FAO does not necessarily entail the revocation the professional title of "Fachanwalt,"[9] a decision which assumes such an quasi-automatism has to be regarded as incompatible with the wording of § 43c para. 4 sentence 2 BRAO ("may").[10] For instance, the temporary inability to participate in events of continuing professional development through no fault on his/her part, e.g. due to illness or an insufficient range of suitable events, may not lead to revocation.[11] Thereby, the failure to provide evidence of the fulfilment

[5] S. Offermann-Burckart, in: *Fachanwaltsordnung: FAO. Kommentar*, eds. M. Henssler, H. Prütting, 6th ed., München 2024, § 15, marg. no. 66 et seq.

[6] BGH NJW 2001, 1945; BGH NJW 2013, 2364; NJW-RR 2014, 1083.

[7] BGH NJW-RR 2014, 1083, marg. no. 9.

[8] S. Offermann-Burckart, in: *Fachanwaltsordnung*…, § 15, marg. no. 66.

[9] H. Scharmer, in: *Berufs- und Fachanwaltsordnung: BORA/FAO. Kommentar*, eds. W. Hartung, H. Scharmer, 8th ed., München 2022, § 43c BRAO, marg. no. 80.

[10] BGH NJW 2001, 1945, marg. no. 9; A. Vossebürger, in: *Bundesrechtsanwaltsordnung: BRAO. Kommentar*, ed. D. Weyland, 11th ed., München 2024, §43c, marg. no. 42.

[11] BGH NJW 2001, 1945.

of continuing professional development alone "does not necessarily mean that the permission to practice as a specialist lawyer must be revoked if this evidence is not provided once."[12] This applies all the more if a corresponding "deal," as in this given case, has been made between the specialized lawyer and the Bar.[13]

Thereby, non-compliance with the obligation to undergo professional training in the sense of § 15 para. 1 sentence 1 FAO or the obligation to provide full evidence about this does not lead, in the language of the doctrine of discretionary errors,[14] to a situation where the Bar's discretion is regularly assumed to be reduced to zero (Ger. *Ermessensreduktion auf Null*).[15] In such situations, the bar must rather exercise its discretion under § 43c para 4 sentence 2 BRAO and take into due consideration the behaviour of the lawyer concerned, especially any action of "subsequently catching up on the obligation."

So, summing up: Failure to undertake or to provide full evidence of 15 hours of continuing professional development required by law indeed constitutes a reason (or is more precisely the only reason) for revoking permission to use the professional title of "Fachanwalt." Nevertheless, the decision to actually revoke this permission remains a discretionary one. In other words, the bar still has to exercise its discretion and thereby take into account the behaviour of the lawyer concerned, possibly his efforts to fulfil his obligation post hoc, and the question of whether he can be accused of fault.[16] Hence, even if formally there has not been, according to the BGH, such a thing as making up for missing hours, *de facto* this possibility already existed.[17] Nevertheless, the affected party had no entitlement to be given the opportunity to fulfil his obligation retroactively, and the Bar might still, upon comprehensive evaluation of the circumstances and in compliance with the principle of proportionality, ultimately arrive at the conclusion of revoking the lawyer's permission to use the title.

This situation has changed now: with the new version of para. 5 of § 15 FAO, the bar in charge must give the specialist lawyer the

[12] BGH NJW-RR 2014, 1083, marg. no. 10 (own translation).

[13] S. Offermann-Burckart, *Fortbildung – eine Pflicht nur für Fachanwälte und Spezialisten?*, "Neue Juristische Wochenschrift" 2017, vol. 70, no. 23, p. 1656.

[14] Comprehensive on this: J. Ruthig, in: *Verwaltungsgerichtsordnung: VwGO. Kommentar*, eds. F.O. Kopp, W.-R. Schenke, 30th ed., München 2024, § 114, marg. no. 7 et seq.

[15] See also J. Ruthig, op. cit., § 114, marg. no. 6.

[16] S. Offermann-Burckart, in: *Fachanwaltsordnung…*, § 15, marg. no. 83.

[17] H. Scharmer, op. cit., § 43c BRAO, marg. no. 84.

opportunity to make up for missing hours of continuing professional development within a reasonable period of time, if this professional training cannot be proven or cannot be proven in full.

If the given case is considered in the light of the above, the following emerges: although the Court did not set out all these aspects of the relevant case law of the BGH in its judgment, the decision is fully in line with it and also highlights the fundamental principle inherent in the legal concept of discretionary decisions, namely, that administrative discretion must be grounded on a sound factual basis and correct interpretation of the law for the decision to be lawful.

Although the lawyer in the present case violated his obligation of continuing professional development not only once but in two consecutive years, the Bar contributed significantly to these circumstances by granting the plaintiff's requests for an extension of the deadline for the fulfilment of the professional training obligation. By doing so, the defendant created a situation, in which the plaintiff may have assumed that such a "subsequent fulfilment" of his professional training duties was possible under the current law. However, as illustrated above, this was not the case; at least not formally. Consequently, it cannot be stated that the plaintiff's failure to fulfil his obligation under § 15 FAO was due to his sole fault.

Thus, in the language of the doctrine of discretionary errors,[18] the Bar's decision contains a discretionary error in the form of a misuse of the discretion: it based its decision on a misinterpretation of the legal requirements[19] concerning the possibility to make missing hours up in the next calendar-year. Since, as a result, one cannot claim the reason for the revocation was solely due to the fault of the plaintiff, there is no situation in which a reduction of discretion to zero is given; in such situations, only the Court could decide instead of the Bar. If this were the case and only one substantively correct decision could be made, the Court could have taken the revocation decision in lieu of the Bar – something that would otherwise constitute a violation of the principle of the separation of powers. Since this was not the case here, the Court had to annul the decision and refer the case back to the Bar, which in turn is required to issue a new decision based on a correct interpretation of the legal situation and by taking due account of its own erroneous

[18] Comprehensive on this: J. Ruthig, op. cit., § 114, marg. no. 7 et seq.
[19] Ibidem, § 114, marg. no. 12.

previous assessment of the legal situation. However, nothing in the judgment prevents the Bar from reaching a decision with the same outcome, but this time accounting for all relevant facts and interpreting of the law correctly.

The legal situation has now changed: since 2023, § 15 para. 3 FAO contains a new sentence three. It provides that if proof of continuing professional development cannot be provided or cannot be provided in full, the bar must give the specialized lawyer the opportunity to make up the missing hours within a reasonable period of time (§ 15 para. 5 sentence 3 FAO). Thus, under the current law, in cases such as the one at hand, the bar is obliged to give the lawyer concerned the opportunity to catch up on their missed training obligations. Granting this opportunity is no longer at the discretion of the competent bar.[20] The amendment was motivated by the fact that the practice of different Bar associations in Germany in exercising their discretion when applying § 43c para. 4 BRAO was not uniform, on one hand, and the judgments of Higher Courts of Lawyers assumed in cases like the one analysed here a reduction of discretion to zero on regular basis on the other. In view of the fact that the revocation of a permission is the most severe sanction, the amendment may be regarded as a welcome harmonization in this matter, although it remains questionable to which extent the new provision will lead to more legal clarity and certainty. Even though the bars are now obliged by law to somewhat enter into "negotiations" with the lawyer in question about possibilities to "catch up" with his training within a "reasonable period" of time, surely, it will take some time before it is sufficiently clear which specific period is meant by this indeterminate legal term. Moreover, it is also questionable how the bars will in the future fulfil their obligation to exercise discretion in comparable cases, on one hand, and make a binding decision by giving the lawyer in question the opportunity to "make up" for his absences, on the other.[21]

The first, cursory assessment of the judgment thus proves to be incorrect; its understanding only becomes apparent on a second reading. The decision is in line with applicable law, as well as the relevant case law of the BGH. This is worth noting, as the Court succeeded in "not falling into the trap" and recognizing the lack of a reduction in discretion

[20] S. Offermann-Burckart, in: *Fachanwaltsordnung*…, § 15, marg. no. 68a et seq.

[21] In this sense, see also: S. Offermann-Burckart, in: *Bundesrechtsanwaltsordnung: BRAO. Kommentar*, eds. M. Henssler, H. Prütting, 6th ed., München 2024, § 43c, marg. no. 82.

to zero. However, it can be argued that, by these means, the Court merely applied the law correctly and thus simply fulfilled its own task. But by doing so, one has to take into account that so many courts have apparently failed to do so that the legislator decided to reform the law.

Nonetheless, a persistent sense of irritation remains. The decision illustrates the intricate interplay between errors in law and errors in fact, on one hand, and the exercise of discretion, on the other. Although the plaintiff did indeed fail to satisfy the professional training requirements, the Bar's decision proved untenable, as it was predicated on an erroneous foundation. Consequently, the plaintiff's appeal against the revocation of his title was successful. However, the Bar might still issue an identical decision based on a correct interpretation of the facts and the law.

This risk in respect thereof may have been mitigated: the amendment to § 15 FAO now imposes an obligation on the bars to provide affected lawyers with the opportunity to compensate for missed professional training. This may lead to a reinterpretation of when a "failure to undertake continuing professional development" exists (cf. § 43c para. 4 sentence 2 BRAO), potentially affecting the practice of revocation. Whether this will ultimately be the case will become clear over time. In any case, this legal amendment constitutes a significant advancement in harmonizing legal practice with the legal framework, thereby enhancing legal certainty.

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