

ROLE OF EXPERTS AND THEIR OPINIONS IN ADMINISTRATIVE PROCEEDINGS IN LIGHT OF CURRENT JUDICIAL DECISIONS

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Abstract. Due to the increasing specialization in various areas of our life and science and the extremely rapid development of technology and civilization, it is necessary to consult an expert with special knowledge in administrative proceedings. Therefore, expert's opinion is an important means of evidence in administrative proceedings and its importance is constantly growing. Unfortunately, the institution of experts in administrative proceedings is currently under-regulated in the provisions of the Code of Administrative Proceedings, which raises a number of factual and legal problems. They concern not only who can be an expert, but also what is the subject of an expert opinion, what is the significance of an expert opinion in administrative proceedings, in what form it should be prepared and what elements it should contain. Due to the lack of legal regulations, these issues are resolved by the case law, which achievements could be the basis for legal regulations. The role of an expert in administrative proceedings is to provide professional assistance to administrative authorities in cases that require special knowledge. However, the opinion of an expert appointed in administrative proceedings is not binding on the authority conducting the proceedings, but like other evidence, is the subject of free analysis by the authority taking into account all the evidence collected in the case. It is the authority, not the expert, to decide the case.

Keywords: expert, opinion, administrative proceeding, evidence proceeding

INTRODUCTION

Hearing of evidence is a major part of administrative proceedings, designed to clarify facts influencing decision in a case. The duty to collect and consider entire evidence is incumbent on an administrative authority, charged with active searching for evidence to arrive at objective truth. The legislation binds an authority to use all and any lawful means of establishing facts of a matter, including assistance of individuals with specialist knowledge in a field where an authority's knowledge is insufficient.

Facts in a case are to be established and evidence to be collected properly by an authority that conducts proceedings and decides if an expert opinion is necessary and, if so, to what extent.¹ Expert opinions and assessments are sometimes required by regulations in place [Kurek 2011]. In any case, possession of special knowledge is required to take evidence in this manner. Since expert evidence is

¹ Judgement of the Supreme Administrative Court [hereinafter: SAC] in Warsaw of 14 October 2016, ref. no. II OSK 3358/14, Legalis no. 1534501.

very vaguely regulated in the Code of Administrative Proceedings,² this study will analyse the institution of experts in depth, stressing their role in administrative proceedings on the basis of current judicial decisions.

1. EXPERTS AS PARTIES TO EVIDENCE HEARING

A number of entities take part in administrative proceedings. The doctrine distinguishes those whose presence is prerequisite to instigation of proceedings. These entities are termed “obligatory participants” [Gołaszewski 2018; Chorąży, Taras, and Wróbel 2002, 40] and they include a party and a public administrative authority. Entities whose presence is not a condition for proceedings to be conducted are the other group. They may but do not have to take part in administrative proceedings. These entities are known as “entities as parties.” The third group comprises “other participants in proceedings” [Gołaszewski 2018] who take part in certain stages of preliminary investigations, as a rule called by an authority. They participate in hearing of evidence, having certain rights and duties, yet are not interested in results of proceedings [Kmieciak 2003, 109]. This group encompasses witnesses and experts, their roles in administrative proceedings vary, however. Witnesses supply information about facts based on what they have heard and seen, whereas experts provide information based on their special knowledge and practical experience [Knysiak–Molczyk 2015, 575; Ereciński 2006, 510].³

If a witness possesses special knowledge and has observations about facts essential to a case, their statements remain information about facts they have noted and assessed. Rationality of these assessments, however, requires expert opinions to be submitted in a format that allows parties to control and influence methods of presenting specialist issues present in a case. An individual with special knowledge who has observations inaccessible to others should normally be heard as a witness, whereas duties of an expert should be entrusted to another person who has had no earlier contact with facts important to resolution of a case.⁴

Expert evidence is unique in that facts requiring special knowledge cannot be substituted with other evidence, e.g. gathered from witness statements.⁵ In spite of these differences between expert and witness evidence, provisions on hearing

² Act of 14 June 1960, the Code of Administrative Proceedings, Journal of Laws of 2020, item 256 as amended [hereinafter: CAP], governs expert evidence solely in the provisions of Article 84.

³ Judgement of the Court of Appeals in Cracow, 1st Civil Division of 5 June 2019, ref. no. I ACa 87/19, Legalis no. 2285076.

⁴ Judgement of the Supreme Court of 8 November 1976, ref. no. I CR 374/76, OSNC 1977, No. 10, item 187, and judgment of the Court of Appeals in Lublin, 1st Civil Division of 28 May 2013, ref. no. I ACa 124/13, Legalis no. 1025088.

⁵ Judgment of the Supreme Court Civil Chamber of 24 November 1999, ref. no. I CKN 223/98, Legalis no. 46185.

witnesses apply to experts as appropriate.⁶ Due to the above: 1) persons unable to perceive or communicate their observations; 2) persons bound to keep confidential any secret information who are not released from the duty of confidentiality by way of prevailing regulations; 3) religious ministers as to facts subject to the seal of confession are incapable of serving as experts (Article 82 CAP).

As a rule, an individual appointed an expert cannot refuse to present their opinion. As provided for by Article 83(1–2) CAP, an expert may refuse to submit an opinion or to answer specific questions. In addition, pursuant to Article 84(2) CAP, an expert may be exempted under Article 24, that is, like employees of an authority. This exemption is based on likely circumstances that may give rise to doubts about impartiality of an expert. The Regional Administrative Court in Warsaw is of the opinion, though, it is sufficient for these circumstances to arouse doubts as to an expert's impartiality and thus to an uncertainty whether such expert will discharge their duties impartially.⁷ It is no longer necessary to demonstrate the expert is in fact partial.

Both facts and legal circumstances can be evaluated with regard to an expert's impartiality. As a matter of principle, any circumstances can be raised connected with an expert's relation to a case in administrative proceedings involving the expert. Whether this will be an effective reason for exclusion and if doubts as to an expert's impartiality are reliable are other questions.⁸ Infringements on the principle of impartiality undermine citizens' trust in public authorities.⁹

2. CONDITIONS OF APPOINTING AN EXPERT

Administrative proceedings are conducted by specialised authorities. Nevertheless, they can rely on a variety of evidence to determine certain occurrences, including expert evidence. Experts can be appointed under Article 84(1) CAP, according to which a public administrative authority may request experts to issue opinions where special knowledge is required that is outside the routine competence of authorities.¹⁰

Judicial decisions assume special knowledge may comprise knowledge in the fields of construction, agriculture, water management, nature and environment protection, engineering, medicine, arts, art history or radiesthesia.¹¹ Admini-

⁶ Judgment of the Regional Administrative Court [hereinafter: RAC] in Warsaw of 30 November 2006, ref. no. VII SA/WA 1072/05 and in Cracow of 23 November 2007, ref. no. II SA/KR 965/06, Legalis no. 270245.

⁷ Judgments of the SAC of 31 January 2018, ref. no. I OSK 613/16, Legalis no. 1731793 and of 11 May 2018, ref. no. I OSK 1589/16, Legalis no. 1790755.

⁸ For instance, working for a party to proceedings can be objectively seen by another party as casting reasonable doubt on an expert's impartiality (ref. no. I OSK 1589/16).

⁹ Ref. no. VII SA/Wa 1072/05.

¹⁰ Judgment of the SAC of 12 December 2008, ref. no. II GSK 361/08, Legalis no. 219681 and of 14 January 2014, ref. no. II GSK 1681/12, Legalis no. 909883.

¹¹ Judgments of the RAC in Poznań of 12 October 2011, ref. no. IV SA/Po 731/11, Legalis no. 870888 and of 23 October 2012, ref. no. I SA/Bd 763/12, Legalis no. 544646.

strative courts emphasise this is knowledge not possessed by staff of authorities,¹² since this unique knowledge is beyond the general standard of education.¹³ This is not only scientific knowledge in particular disciplines that can be acquired as part of specialist studies of a subject, but also practical expertise based on years' worth of experience.¹⁴

Occurrence of such circumstances is determined by an authority conducting proceedings, which is literally worded in Article 84(1) of the CAP and its expression 'an authority may' appoint an expert. Thus, the provision leaves to an authority's discretion determination whether an opinion is necessary. It is only an authority that is capable of assessing whether its knowledge is insufficient for solution to a given factual problem in a case whose solution is necessary for the case to be resolved.¹⁵ Everything depends on circumstances of a given case, that is, the extent of preliminary investigation to be undertaken.¹⁶ The fact an authority resolving a case has two sets of contradictory evidence does not predetermine the need for expert evidence, either.¹⁷

It is assumed in the doctrine expert evidence should be admitted only where a full evaluation of evidence requires a more in-depth knowledge of rules prevailing in a field [Wróbel 2016, 494; Bochentyn 2020, 18]. Even where an authority possesses specialist knowledge, therefore, requesting an expert to submit an opinion for the purpose of a more complete clarification of facts is not excluded.¹⁸ This corresponds to the principle of determining evidence collection by an authority by way of selecting appropriate means of gathering evidence, as adumbrated in Article 77(2) CAP. This implies the legislation does not introduce obligatory taking of expert evidence even where explanation of a case requires above average knowledge in a field.¹⁹

An authority's freedom of expert appointment is restricted by the principle of objective truth, which implies an authority is bound to take all steps necessary for a thorough clarification of facts, collection and review of entire evidence.²⁰ The view of the doctrine and judicial decisions that, in complex cases that can only be

¹² Judgment of the SAC of 24 March 2015, ref. no. I GSK 407/13, *Legalis* no. 1310922.

¹³ Judgment of the RAC in Olsztyn of 28 November 2013, ref. no. I SA/Ol 646/13, *Legalis* no. 872808; judgment of the SAC of 9 January 2019, ref. no. I GSK 3363/18, *Legalis* no. 1876449, and of 15 January 2020, ref. no. II OSK 442/18, *Legalis* no. 2287615.

¹⁴ Judgment of the RAC in Lublin of 29 January 2010, ref. no. I SA/Lu 601/09, *Legalis* no. 221397.

¹⁵ Judgments of the SAC of 6 December 2017, ref. no. II GSK 16/17, *Legalis* no. 1698462; of 15 January 2019, ref. no. II OSK 2667/17, *Legalis* no. 1882157, and of 15 May 2018, ref. no. II OSK 2765/17, *Legalis* no. 1812861; judgment of the RAC in Cracow of 18 May 2018, ref. no. II SA/Kr 313/18, *Legalis* no. 1782607.

¹⁶ Judgment of the SAC of 23 May 2019, ref. no. II OSK 1707/17, *Legalis* no. 1951157.

¹⁷ Judgment of the SAC, Szczecin Branch of 31 January 2002, ref. no. SA/Sz 1731/00, *Legalis* no. 98495.

¹⁸ *Ibid.*

¹⁹ Judgment of the SAC Court of 26 October 2016, ref. no. II OSK 950/15, *Legalis* no. 1554109.

²⁰ Cf. Articles 7 and 77(1) CAP and judgment of the SAC of 5 August 1997, ref. no. V SA 1926/96, *Legalis* no. 41124.

explicated with the aid of special knowledge, an authority is obliged to resort to expert evidence, should be upheld, therefore.²¹ Omission of such evidence may result in gathering of incomplete evidence, which violates the principle of objective truth. It should be also remembered the duty of admitting expert evidence can also arise from special legislation.²² A decision without prior submission of an expert opinion is a gross violation of law then and grounds for finding a decision invalid.²³

An expert may be appointed *ex officio* or at a party's request. The latter is not binding on an authority, though, which shall consider the request under Article 78(1) CAP, i.e. accepting it only where evidence related to circumstances is essential to a case [Kędziora 2014, 599].

Judicial decisions stress public administrative authorities are not bound by parties' requests for expert appointments if a given circumstance can be explicated by means of other evidence or statements.²⁴ If an authority determines a party's demand relates to a circumstance that has been exhaustively established beyond any doubt on the basis of other evidence collected in a case, the demands will be rejected. An authority should object to requests of parties which are not substantiated. Otherwise, it might lead to protracted and obstructed proceedings.²⁵ An authority is bound by such a request only where specialist information needs to be verified in order to properly establish facts of a case.

In view of the above, a complaint against an administrative decision cannot be effective only because an authority has not resorted to expert assistance. Only incorrect establishment of facts can provide reasons for a complaint.²⁶ Failure to take advantage of an expert opinion does not prove facts of a case have not been accurately clarified, however.²⁷ Lack of expert evidence can only be evaluated with regard to whether an authority has clarified all circumstances essential to a case. Not every absence of a request for expert opinion can be treated as a violation of law, therefore.²⁸ Lack of expert opinion is a defect of administrative proceedings that can affect outcome of a case only where facts are not properly established and an expert opinion may be of use in this respect.²⁹ On the other hand,

²¹ Ref. no. I SA/Lu 601/09; judgments of the SAC of 23 May 1997, ref. no. SA/Lu 1487/95, Lex no. 30247; of 24 October 1997, ref. no. I SA/Po 492/97, Lex no. 30890.

²² Article 130(2) of the Act of 21 August 1997, the Real Estate Management, Journal of Laws of 2020, item 1990, according to which value of compensation for expropriated real estate can only be determined upon valuation by a real property expert appraiser, is an instance of such provisions.

²³ Judgment of the Supreme Court of 4 June 1998, ref. no. III RN 38/98, OSN 1999, No. 6, item 194.

²⁴ Judgment of the SAC of 27 April 2012, ref. no. I GSK 197/11, Legalis no. 778240, and judgment of the RAC in Wrocław of 11 April 2013, ref. no. IV SA/Wr 794/12, Legalis no. 796100.

²⁵ Judgment of the RAC in Wrocław of 22 January 2013, ref. no. II SA/Wr 534/12, Lex no. 1330354.

²⁶ Judgment of the SAC of 1 February 2006, ref. no. II FSK 512/05, Legalis no. 74059.

²⁷ Ref. no. II OSK 442/18.

²⁸ Judgment of the SAC of 6 December 2018, ref. no. II OSK 104/17, Legalis no. 1869466.

²⁹ Judgment of the SAC of 6 March 2019, ref. no. II OSK 3323/18, Legalis no. 1898650.

an authority's view appointment of an expert is redundant should be based on evidence collected in a case and then reflected in stated reasons for a decision.³⁰

An expert is appointed by force of a decision and only such a formal appointment involves an expert in proceedings. This is an authority that elects an expert and determines the object and extent of their opinion. A decision to appoint an expert may also include detailed questions that must be addressed in the opinion to be presented [Guzek 2003].

3. ENTITIES THAT CAN BE APPOINTED AS EXPERTS

The Code of Administrative Proceedings does not envisage formal conditions to be fulfilled for someone to act as an expert. Thus, an individual educated in a given field, holding specific and legally certified qualifications, as well as persons with actual expertise needed by an authority to resolve a case may become experts. They have appropriate knowledge and experience to submit opinions as ordered by an authority.³¹ This is corroborated by judicial decisions that stress experts are persons possessing special knowledge. They are not necessarily listed with specific authorities, though. Everyone with specialist knowledge may be appointed an expert in a case, unless special regulations designate a specific category of individuals [Suwaj 2005, 76].³²

Verification whether an appointed expert has the required knowledge is the responsibility of an authority³³ whose selection needs to be guided by object of the opinion to be compiled by the expert. The Code of Administrative Proceedings does not contain a detailed regulation that would instruct authorities to appoint specific individuals in a given area of science [Kmieciak 2008, 196]. It is generally assumed a private individual, not a research institute, can become experts. The Supreme Administrative Court has found, though, an opinion from a research institute corresponds to an expert opinion as its object may encompass a set of facts belonging in special knowledge [Chmielewski 2019].³⁴

No connection to a case in question is another condition of expert appointment. It is important, therefore, that an individual appointed as expert have no material or legal interest in the case as well as issue of an opinion. Since only individuals possessing special knowledge can be appointed experts, appointment of

³⁰ Judgment of the SAC of 29 October 1996, ref. no. SA/Łd 975/95, *Legalis* no. 52607.

³¹ Judgment of the Supreme Court of 24 June 1981, ref. no. IV CR 215/81, *OSPika* 1982, No. 7, item 121, glossed by W. Siedlecki.

³² Experts in areas of science are governed by special regulations. Construction experts, occupational health and safety experts, and fire safety experts can be distinguished. Ref. no. I SA/Lu 601/09.

³³ Judgment of the Court of Appeals in Lublin, 1st Civil Division of 12 October 2020, ref. no. I AGa 90/19, *Legalis* no. 2496477.

³⁴ Judgment of the SAC of 7 February 2018, ref. no. II OSK 896/16, *Legalis* no. 1740493 [Chmielewski 2019]. The Code of Administrative Proceedings stipulates otherwise, pointing out clearly the court can request an opinion of an appropriate scientific or research institute (Article 290).

someone without such knowledge and admission of their opinion as evidence is a defect of proceedings.

4. OBJECT, FORM, AND NATURE OF EXPERT OPINIONS

Dictionaries define opinions as convictions about something, views on a matter, the way others see someone, specialist decisions on a subject [Drabik and Sobol 2007, 504]. Specialist literature notes an expert opinion is a view expressed by an individual unconcerned with a case under administrative proceedings who can provide an authority with special information for the purpose of determining circumstances of a case as they have specialist knowledge and professional experience [Ochendowski 2014]. Article 84 CAP states it is an expert opinion issued by someone appointed as expert by an administrative authority as part of proceedings. An opinion issued prior to proceedings does not have this function, even if ordered by an authority and required by legal regulations.³⁵ In this sense, an opinion drafted by someone who does possess special knowledge but who is not appointed as expert by an authority and has compiled their opinion as requested by a party is not an expert opinion [Wróbel 2000, 492].

The legislation provides for the possibility of admitting expert evidence yet fails to designate its specific form. Judicial decisions point out absence of regulations in this respect means an expert may present their opinion orally or in writing.³⁶ Minutes are drafted of oral expert evidence which are then read and submitted to be signed by the expert (Article 67(2) part 2 CAP and Article 69(1) CAP). Any authorial corrections should be permanent and confirmed by the opinion author.³⁷

The legislation fails to identify essential parts of an opinion, either, which it does with reference to the civil procedure [Jaśkowska, Wilbrandt–Gotowicz, and Wróbel 2021]. Judicial decisions indicate³⁸ a correct expert opinion in a case should designate and clarify reasons for its conclusion so that an authority is able to assess the motivations without going into specialist knowledge. If an opinion fails to answer questions set, therefore, an authority conducting proceedings should require it to be supplemented, particularly if parties raise specific objections to the same opinion.³⁹ A party is entitled to criticise an expert opinion and fight any available evidence.⁴⁰

In addition, judicial decisions are right to note an expert opinion should con-

³⁵ Judgment of the SAC of 24 September 1992, ref. no. I SA 807/92, Legalis no. 2474951.

³⁶ Judgment of the SAC of 24 May 2001, ref. no. II SA/Gd 233/99, Legalis no. 123137.

³⁷ Judgment of the RAC in Gliwice of 20 July 2016, ref. no. II SA/GI 375/16, Legalis no. 1541579.

³⁸ Judgment of the RAC in Rzeszów of 28 March 2012, ref. no. II SA/Rz 1172/11, Legalis no. 471779.

³⁹ Judgment of the RAC in Poznań of 4 December 2013, ref. no. IV SA/Po 419/13, Legalis no. 950224. The requirement of an oral or written addition to or clarification of an opinion, as well as additional opinion from the same or other experts is explicitly provided for by the CAP in Article 286.

⁴⁰ Judgment of the SAC of 22 May 2014, ref. no. I OSK 2706/12, Legalis no. 1042866.

tain reasons for its position, indicating research undertaken and clarifying any doubts.⁴¹ Its wording should be comprehensible to parties, authorities, and court, who do not possess special knowledge reserved for experts.⁴² Lack of clear reasons for conclusions in an expert opinion prevents an adequate evaluation of its probative value and causes a decision based on such an opinion to be issued in violation of discretionary evaluation of evidence.⁴³ Therefore, an authority should dismiss an expert opinion without a statement of reasons.⁴⁴

The doctrine also assumes an expert should indicate what they were guided by, what sources they used, and what literature they relied on when providing reasons for their opinion [Daniel 2013, 169–70]. Therefore, an authority presented with an opinion full of general statements, without scientific assessments of the problem or identification of source materials to help evaluate its theses, as well as containing declarations the problem is hard and complex and conclusions appended with ‘it seems’ should either instruct its author to supplement their opinion or appoint another specialist to appraise the problem in a scientific manner that does not give rise to doubts.⁴⁵

Expert evidence must be reliable, concrete, correct as to its substance, exhaustive, with logical reasoning, and thus convincing and comprehensible [Kosmalska 2016].⁴⁶ Circumstances related to facts of a case are objects of expert opinions. An expert opinion is not designed to establish facts of a case, though, as this is the job of an authority. Even more so, an expert opinion cannot evaluate evidence gathered by an authority or suggest a case resolution.⁴⁷ An opinion should only contain an expert’s statement including special knowledge that can be utilised by an administrative authority to properly establish or assess facts [Szalewska and Masternak, 2010]. An expert opinion should facilitate evaluation of evidence where special knowledge is needed to this end. Legal qualification of facts⁴⁸ and application of law⁴⁹ are the sole competence of an authority charged with making a decision. An expert appointed by an authority cannot make de-

⁴¹ Judgment of the SAC of 19 February 1999, ref. no. II SA/Wr 1452/97, ONSA 2000, No. 2, item 63; judgments of the RAC in Warsaw of 6 January 2006, ref. no. IV SA/Wa 1697/05, Lex no. 196467 and of 1 June 2006, ref. no. IV SA/Wa 440/06, Legalis no. 286858. Such a statement of reasons is an obligatory part of an opinion in civil proceedings, meanwhile.

⁴² Judgment of the RAC in Rzeszów of 3 December 2015, ref. no. II SA/Rz 676/15, Legalis no. 1399534; judgment of the SAC of 18 January 2007, ref. no. II OSK 761/06, Legalis no. 230233; judgment of the RAC in Rzeszów of 15 November 2017, ref. no. II SA/Rz 1148/17, Legalis no. 1699378.

⁴³ Judgments of the RAC in Szczecin of 29 April 2015, ref. no. I SA/Sz 18/15, Legalis no. 1274566 and in Gliwice of 6 July 2016, ref. no. IV SA/GI 1069/15, Legalis no. 1541518.

⁴⁴ Judgment of the SAC of 30 June 1981, ref. no. II SA 33/81, ONSA 1981, No. 1, item 65.

⁴⁵ Judgment of the RAC in Warsaw of 30 November 2005, ref. no. I SA/Wa 2084/04, Legalis no. 97210.

⁴⁶ Judgment of the RAC in Łódź of 26 June 2014, ref. no. I ACa 30/14, Legalis.

⁴⁷ Judgment of the RAC in Cracow of 25 August 2020, ref. no. II SA/Kr 576/20, Legalis no. 2467798.

⁴⁸ Judgment of the SAC of 13 October 2020, ref. no. I OSK 2858/18, Legalis no. 2488807.

⁴⁹ Judgment of the RAC in Gliwice of 6 February 2017, ref. no. I SA/GI 1015/16, Legalis no. 1597419; judgment of the SAC of 19 December 2013, ref. no. II OSK 1817/12, Legalis no. 1413054.

clarations about this subject matter and if they do, this part of their opinion is not binding on an authority [Pachnik 2010].⁵⁰

Judicial decisions are consistent in decreeing an opinion may not concern applicability or interpretation of law [Daniel 2013, 169–70].⁵¹ Thus, a legal opinion is not an expert opinion under Article 84(1) CAP.⁵² This view acknowledges the traditional concept of the expert's role in administrative proceedings as someone with specialist knowledge about some facts of a case and of an authority as a legal expert who must know legal regulations and interpret them in an independent capacity. Law requires special knowledge, in possession of an authority. An authority avoiding a legal evaluation and relying on an expert is deemed inadmissible. In the event, an expert opinion would replace decision of a competent authority, which should not be the case.

An isolated decision can be cited, though, that admits an expert opinion on law in administrative proceedings. It is assumed a detailed legal opinion by an independent lawyer specialised in a given area of law is acceptable as evidence that helps to assess circumstances essential to resolution of the case.⁵³ This view rests on the assumption an authority has limited specialist knowledge about all areas of law. It cannot be shared, however, since an expert opinion concerns facts of legal import to a case, not its legal status [Adamiak and Borkowski 2019].

Although an expert opinion may be executed in writing, it is universally assumed expert evidence is personal, not documentary. There are views, though, claiming an opinion in writing is documentary evidence. This is the case where legal regulations require documentation of certain facts by submission of a specialist opinion in a given field without appointing an expert pursuant to Article 84 CAP. Judicial decisions point out documentary evidence also includes expert opinions submitted by parties, expert appraisals, reports drafted by experts prior to administrative proceedings and included by an authority as evidence in a case.⁵⁴ Documentary evidence can be taken if it exists when an authority decides to admit such evidence in a case. If an authority becomes convinced as part of proceedings an expert opinion needs to be sought, the evidence should be taken by force of Article 84 CAP, not in order to compile a document to be included into evidence [Szalewska and Masternak 2010, 797].

Such a document certainly cannot be treated as official, though, given the notion of official documents in provisions of the CAP does not provide grounds for qualifying expert opinions as official documents. The subjective criterion in the definition of the official document under Article 76(1–2) CAP, according to

⁵⁰ Judgment of the RAC in Wrocław of 11 March 2010, ref. no. II SA/Wr 545/09, Legalis no. 617512.

⁵¹ Supreme Court = Administration, Labour and National Insurance Chamber judgement of 1 July 1998, ref. no. I PKN 203/98, Legalis no. 43898 and judgment of the SAC of 23 April 2008, ref. no. II OSK 1845/06, Legalis no. 140290.

⁵² Judgment of the SAC of 17 May 2017, ref. no. II GSK 2610/15, Legalis no. 1629512.

⁵³ Judgment of the SAC of 19 February 1999, ref. no. I SA/Lu 43/98, Legalis no. 1442863.

⁵⁴ Judgment of the RAC in Warsaw of 9 July 2007, ref. no. IV SA/Wa 15/07, Lex no. 362515; ref. no. I SA 807/92.

which official documents can only be executed by competent state or local authorities or by entities acting as part of individual cases they are instructed to conduct by force of law or agreements which are resolved by way of administrative decisions or certifications, is the key obstacle. It must be finally concluded an expert should be treated as an autonomous source of personal evidence and their opinions as autonomous evidence [Wartenberg–Kempka 2003].

5. EVALUATION OF EXPERT OPINIONS BY AUTHORITIES

An expert opinion is expected to assist an authority with resolving questions of fact and facilitate proper assessment of evidence where special knowledge is required in a case [Wierzbowski and Wiktorowska 2020].⁵⁵ This is ultimately an authority who resolves these issues in its own name. This is affirmed by the doctrine and judicial decisions, which concur opinion of an expert appointed in administrative proceedings is not binding on an authority conducting such proceedings but, like any other evidence, is subject to discretionary assessment an authority undertakes with regard to the entire evidence in the case.⁵⁶ An expert is merely an ‘assistant’ with case resolution that requires special knowledge. Thus, an expert’s role is not to replace an authority in its decision-making capacities, since this is the latter who resolves a case, possibly with the aid of an opinion. An authority may therefore accept an expert opinion if it is found apposite but can dismiss it in part or in full and accept another opinion of its own, based on science or experience.⁵⁷

An expert opinion can only be questioned in obvious cases where it can be demonstrated to have been prepared in breach of the law or if it contains evident errors that undermine its value as evidence.⁵⁸ It can be attained by means of evidence to the contrary or requiring appointment of another expert.⁵⁹ An authority cannot then expect a competitive opinion compiled out of administrative proceedings but must take evidence from another expert opinion or hear the case with participation of the current expert.⁶⁰ It does not mean, however, an authority is bound to appoint experts until their opinions comply with expectations of a party. This would be contrary to the principle of objectivity and violate principles of objective proceedings.⁶¹

⁵⁵ Judgment of the SAC of 12 June 2013, ref. no. II OSK 380/12, *Legalis* no. 763735.

⁵⁶ Judgments of the SAC of 5 March 2002, ref. no. I SA 1978/00, *Legalis* no. 75116; of 5 October 2009, ref. no. I OSK 1444/08, *Legalis* no. 211846, and of 29 August 1997, ref. no. III SA 93/96, *Lex* no. 31598; judgment of the RAC in Warsaw 5 March 2002, ref. no. I SA 1978/00, *Lex* no. 81669.

⁵⁷ Judgment of the SAC of 22 November 2016, ref. no. II GSK 1017/15, *Legalis* no. 1577246.

⁵⁸ Judgment of the SAC of 17 March 2020, ref. no. II OSK 428/19, *Legalis* no. 2390893.

⁵⁹ Judgment of the SAC of 30 June 1986 r., ref. no. III SA 554/86, *Legalis* no. 41908, judgment of the RAC in Kielce of 26 July 2018, ref. no. II SA/Ke 350/18, *Legalis* no. 1819502 and in Gdańsk of 6 December 2017, ref. no. II SA/Gd 539/17, *Legalis* no. 1711944.

⁶⁰ Ref. no. I SA 1978/00.

⁶¹ Judgment of the SAC of 18 August 2017, ref. no. II OSK 2939/15, *Legalis* no. 1694387.

Probative value of an opinion, its reliability and utility to case resolution must be evaluated by an authority, although it is claimed expert opinions are the only evidence not to be assessed for reliability, only accepted or dismissed by public administrative authorities [Widła 1992, 84–89].⁶² When evaluating an expert opinion, an authority cannot limit itself to citing a conclusion to the opinion and should review reasons for the conclusion and verify the expert's reasoning for logic, practical experience, and correct argumentation in the statement of reasons [Ise-rzon and Starościak 1970, 178–79].⁶³ Correctness of conclusions must be assessed in view of evidence in the case and without going into specialist knowledge.⁶⁴ Evidence should be analysed and comments on evidence should be incorporated in reasons for a decision.⁶⁵

An administrative authority cannot undertake an independent evaluation of issues requiring special knowledge,⁶⁶ however, broaching on substance of an opinion and its foundations, since it does not possess the special knowledge available to an expert. It does not mean, though, the authority is released from the duty of assessing probative value of an opinion and its utility to case resolution. An authority is additionally obliged to address and respond to charges raised by a party. An opinion must be evaluated in conjunction with the remaining evidence collected. Should a party raise objections to contents of an opinion, therefore, an authority should present the charges to the expert in order to address them [Terlikowska 2017].⁶⁷ Only after a party's objections to an opinion are clarified and full evidence is gathered can an authority establish facts and form assessments required to make a resolution.⁶⁸

Evaluation of an opinion is also formal, which means an authority should verify it is compiled and signed by an authorised person, whether it contains required elements and is free from ambiguities, errors or omissions that should be corrected or supplemented for a document to serve as evidence.⁶⁹ An authority is

⁶² Judgment of the SAC of 22 September 2016, ref. no. I OSK 1120/16, *Legalis* no. 1534089.

⁶³ Judgment of the SAC of 12 December 1983, ref. no. II SA 1302/83, *ONSA* 1983, No. 2, item 106 and judgment of the RAC in Cracow of 4 October 2018, ref. no. II SA/Kr 1143/18, *Legalis* no. 1834084; judgment of the RAC in Cracow of 28 March 2019 r., ref. no. II SA/Kr 34/19, *Legalis* no. 1895410; judgment of the RAC in Warsaw of 14 February 2007, ref. no. VIII SA/Wa 67/07, *Lex* no. 386409; of 14 February 2007, ref. no. VIII SA/Wa 75/07, *Lex* no. 372556; judgment of the RAC in Lublin of 4 November 2010, ref. no. II SA/Lu 507/10, www.orzeczenia.gov.pl

⁶⁴ Judgment of the SAC of 29 November 2017, ref. no. I OSK 174/16, *Legalis* no. 1727307.

⁶⁵ Judgment of the RAC in Bydgoszcz of 18 December 2007, ref. no. II SA/Bd 807/07, *Legalis* no. 271681.

⁶⁶ Judgment of the RAC in Poznań of 30 January 2019, ref. no. IV SA/Po 1053/18, *Legalis* no. 1878903.

⁶⁷ Judgment of the RAC in Szczecin of 9 May 2012, ref. no. II SA/Sz 1398/11, *Legalis* no. 556377.

⁶⁸ Judgment of the RAC in Rzeszów of 7 March 2017, ref. no. II SA/Rz 1199/16, *Legalis* no. 1601864; judgment of the RAC in Białystok of 10 June 2014, ref. no. II SA/Bk 265/13, *Legalis* no. 1058010.

⁶⁹ Judgment of the RAC in Warsaw of 21 February 2008, ref. no. I SA/Wa 259/07, *Legalis* no. 271103; judgment of the RAC in Warsaw of 14 March 2007, ref. no. VIII SA/Wa 67/07, *Legalis*,

also authorised and bound to verify whether an opinion is complete, logical and reliable and possibly to require it to be supplemented.⁷⁰ In particular, an authority has the duty of addressing major differences between opinions of experts appointed in a given case. If an authority has received divergent opinions and evidence suggests only a single expert opinion cannot be relied on, contradictions between the opinions should be clarified by jointly reviewing such expert opinions or requiring additional opinions from other experts.⁷¹ The very nature of such evidence implies a resolving authority is obliged to compare and contrast different assessments by various experts in the same case.⁷² One opinion cannot be rejected and another accepted without examining the other, therefore, and an authority should explain why its resolution relies on one and why another has been found unreliable.

An administrative authority's negligence in this respect would constitute a major infringement on regulations that would affect outcome of a case.⁷³ If an authority convincingly argues in its decision why it has accepted one expert opinion and dismissed another, the authority's position cannot be effectively undermined for this sole reason, charging a resolution is based on defective determination of facts and their faulty legal evaluation.⁷⁴ These principles are of particular importance where proceedings are initiated *ex officio* to impose a duty on a party.⁷⁵

CONCLUSION

As a result of progress in knowledge and technology, reliable clarification of cases commonly requires expert opinions. Although this evidence, like any other, is subject to discretionary assessment of an authority and does not enjoy an *a priori* prevailing probative value, its dominant role in administrative proceedings is increasingly noticeable. Expert evidence is of major importance as its correct taking can contribute to explication of an administrative case and is occasionally a condition of resolving cases that require special knowledge.

Unfortunately, the institution of experts and their opinions are not fully governed by provisions of the CAP, like they in e.g. the Code of Civil Proceedings, which is highly negative. The CAP's regulation in this respect is limited to normalising situations where experts should be appointed and the capacity to act as an expert. Doubts concern not only who can be an expert, though, but also object

and of 2 February 2007, ref. no. IV SA/Wa 2383/06, Legalis no. 271640; judgment of the SAC of 28 February 2019, ref. no. I OSK 996/17, Legalis no. 1887754.

⁷⁰ Ref. no. IV SA/Wa 1697/05; ref. no. IV SA/Wa 440/06.

⁷¹ Judgment of the SAC of 19 February 1997, ref. no. SA/Sz 189/96, Lex no. 28534 and of 17 October 2019, ref. no. II OSK 1217/19, Legalis no. 2266570.

⁷² Judgment of the SAC of 26 June 1997, ref. no. SA/Sz 484/96, Lex no. 30819.

⁷³ Judgment of the SAC of 30 December 1980, ref. no. SA 645/80, Legalis no. 34455.

⁷⁴ Judgment of the SAC of 18 April 1984, ref. no. III SA 113/84, Legalis no. 35283 and ref. no. III SA 554/86.

⁷⁵ Judgment of the RAC in Warsaw of 12 May 2011, ref. no. I SA/Wa 2524/10, Legalis no. 365731.

of expert opinions, their role in administrative proceedings and forms of their preparation. Given the absence of legal regulations, these issues are currently resolved by judicial decisions, which could provide foundations for regulations.

Regulations of the Code of Administrative Proceedings need to be more accurate, following the model of the civil procedure, therefore, by regulating requirements of experts, indicating format and elements of opinions, and the option of requesting their supplementation and clarification, among other things. The option of receiving oaths from individuals to become experts in administrative proceedings needs to be considered as well.

REFERENCES

- Adamiak, Barbara, and Janusz Borkowski. 2019. "Komentarz do art. 84." In *Kodeks postępowania administracyjnego. Komentarz*. Warsaw: C.H. Beck. Legalis el. [accessed: 02.11.2020].
- Bochentyn, Adam. 2020. *Dowód z opinii biegłego w jurysdykcyjnym postępowaniu administracyjnym*. Warsaw: Wolters Kluwer.
- Chmielewski, Jan. 2019. "Opinia instytutu naukowego lub instytutu naukowo-badawczego w administracyjnym postępowaniu dowodowym." *Monitor Prawniczy*, no. 20 [accessed: 02.11.2020].
- Chorąży Krzysztof, Wojciech Taras, and Andrzej Wróbel. 2002. *Postępowanie administracyjne i postępowanie egzekucyjne w administracji*. Cracow: Zakamycze.
- Daniel, Paweł. 2013. *Administracyjne postępowanie dowodowe*. Wrocław: PRESSCOM.
- Drabik, Lidia, and Elżbieta Sobol. 2007. *Słownik języka polskiego PWN*. Warsaw: PWN.
- Ereciński, Tadeusz, ed. 2006. *Kodeks postępowania cywilnego. Komentarz. Część pierwsza: postępowanie rozpoznawcze. Część druga: postępowanie zabezpieczające*, vol. 1. Warsaw: Wolters Kluwer.
- Gołaszewski, Piotr. 2018. In *Kodeks postępowania administracyjnego. Komentarz*, edited by Roman Hauser, and Marek Wierzbowski. Warsaw: C.H. Beck [accessed: 02.11.2020].
- Guzek, Leszek. 2003. "Dowód z opinii biegłego w postępowaniu podatkowym." *Nieruchomości*, no. 6 [accessed: 02.11.2020].
- Iserzon, Emanuel, and Jerzy Starościk. 1970. *Kodeks postępowania administracyjnego. Komentarz, teksty, wzory i formularze*. Warsaw: Wydawnictwo Prawnicze.
- Jaśkowska, Małgorzata, Martyna Wilbrandt-Gotowicz, and Andrzej Wróbel. 2021. *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*. LEX/el.
- Kędziora, Robert. 2014. *Kodeks postępowania administracyjnego. Komentarz*. Warsaw: C.H. Beck.
- Kmieciak, Zbigniew. 2003. *Postępowanie administracyjne i postępowanie sądownoadministracyjne*. Cracow: Zakamycze.
- Kmiecik, Romuald. 2008. *Prawo dowodowe. Zarys wykładu*. Warsaw: Wolters Kluwer.
- Knysiak-Molczyk, Hanna, ed. 2015. *Kodeks postępowania administracyjnego. Komentarz*. Warsaw: Wolters Kluwer.
- Kosmalska, Agnieszka. 2016. "Dowód z opinii biegłego w procedurze cywilnej, karnej i administracyjnej." *Monitor Prawniczy*, no. 9 [accessed: 02.11.2020].
- Kurek, Ewa. 2011. "Biegły w postępowaniu administracyjnym." *Wiedza prawnicza*, no. 3, <http://wiedzaprawnicza.pl/teksty/3-2011/EwaKurek.pdf> [accessed: 15.10.2020].
- Ochendowski, Eugeniusz. 2014. *Postępowanie administracyjne ogólne, egzekucyjne i sądownoadministracyjne. Wybór orzecznictwa*. Toruń: TNOiK.
- Pachnik, Karol. 2010. "Zasady udziału biegłego w ogólnym postępowaniu administracyjnym." *Casus* 56:25–28.
- Suwaj, Rober. 2005. *Postępowanie dowodowe w świetle przepisów Kodeksu postępowania administracyjnego*. Ostrołęka: Wydawnictwa Profesjonalne Alpha.

- Szalewska, Małgorzata, and Marian Masternak. 2010. "Rola eksperta i jego opinii w postępowaniu administracyjnym." In *Kodyfikacja postępowania administracyjnego na 50-lecie KPA*, edited by Janusz Niczyporuk, 797. Lublin: Wydawnictwo WSPA.
- Terlikowska, Małgorzata. 2017. *Kodeks postępowania administracyjnego. Dowody. Komentarz*. Legalis el. [accessed: 15.10.2020].
- Wartenberg-Kempka, Barbara. 2003. "Pojęcie biegłego w postępowaniu administracyjnym ogólnym." *Roczniki Administracji i Prawa: teoria i praktyka*. <https://www.sbc.org.pl/dlibra/show-content/publication/edition/4004?id=4004> [accessed: 15.10.2020].
- Wiśła, Tadeusz. 1992. *Ocena dowodu z opinii biegłego*. Katowice: Wydawnictwo Uniwersytetu Śląskiego.
- Wierzbowski, Marek, and Aleksandra Wiktorowska. 2020. "Komentarz do art. 84." In *Kodeks postępowania administracyjnego. Komentarz*, Legalis el. [accessed: 15.10.2020].
- Wróbel, Andrzej. 2016. In Małgorzata Jaśkowska, and Andrzej Wróbel, *Kodeks postępowania administracyjnego. Komentarz*, 490. Warsaw: Wolters Kluwer.
- Wróbel, Wojciech. 2000. In Małgorzata Jaśkowska, and Andrzej Wróbel, *Kodeks postępowania administracyjnego. Komentarz*, 492. Cracow: Zakamycze.