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From Polish Perspective for Polish Students

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Hearing in administrative proceedings: justifiability and the scope of applica-tion thereof

Abstract

The justifiability of the institution of the hearing in administrative proceedings may raise some doubts. The paper explores how this element of proceedings operates from the angle of speedy proceedings, the principle of objective truth as well as purposes which the administrative proceedings as such serve. The author puts forward a thesis that the hearing is not a necessary element of administrative proceedings; moreover, it could be excluded therefrom without affecting the proceedings in a negative manner. In fact, this could even contribute to the fulfilment of the principle of speedy proceedings, as well as depoliticize some proceedings or at least reduce the media interest in them.

The paper presents a review of relevant case-law regarding hearings in administrative proceedings. Also, arguments for and against maintaining the hearing have been analyzed. The arguments against it include the need for speedy proceedings, limited credibility of witness evidence or general limited justifiability of holding hearings. In turn, arguments for the institution in question encompass especially the opportunity to collect evidence at the same time and at the same place, as well as the possibility to conduct confrontation.

The discussion part of the paper includes de lege ferenda conclusions concerning the possibility to eliminate the hearing from administrative proceedings. This reflects the fundamental thesis of the paper as well as the doubts arising from case-law and practice of decision-making bodies as to whether keeping the institution of the hearing is justifiable.

Key words: *administrative proceedings, hearing, theory of law, public policy*

Introduction

The hearing in administrative proceedings is a legal institution set forth in Chapter 5, Part II (Articles 89-96) of the Code of Administrative Procedure[1]. It is may be defined in the following manner: *a named and institutionalized form of an evidentiary process being part of general administrative proceedings, constituting an organizational means (method) instigated by a public administration body, whose aim is essentially to concentrate the evidentiary process at a specific place and time; less frequently its aim is to achieve another objective determined by the preconditions for an administrative hearing; it encompasses a set of diverse but intentional procedural steps by involved entities (including ones having different procedural positions), whose execution is based to a larger extent on the principle of directness as well as oral and adversarial character, whereby it is obligatory to record them in writing*[2]. The Code stipulates *expressis verbis* which conditions need to be met in order to include a hearing in the proceedings. Namely, it may be conducted *ex officio*, at the request of a party, and "in each case where this will speed up or simplify proceedings or where the law requires it"[3]. Furthermore, a hearing should be conducted when there is a need to determine the interest of the parties, clarify a case with the involvement of witnesses or call an expert witness. Hence, it seems that the institution of the hearing in administrative proceedings is aimed at expediting and facilitating the proceedings, and, secondly, at clarifying the case, and by the same token, arriving at material truth. The present paper discusses

[1] Journal of Laws of 2017.1257 – consolidated text.

[2] G. Łaszczyca, *Rozprawa administracyjna w ogólnym postępowaniu administracyjnym*, Warszawa 2008.

[3] Article 89 (1), *Code of Administrative Procedure*.

whether it is justifiable to maintain a hearing in administrative proceedings. Its main thesis is that the hearing, contrary to the legislator's intention, fails to expedite proceedings and may even lead to the extension of the time thereof. Additionally, administrative proceedings are, and should be, intrinsically based on documents and entitlements derived from provisions of law. Contrary to criminal proceedings, intentions of the parties and the psychological relations with the subject of the ruling do not constitute a basis for assessment. Also, in contrast to civil proceedings it is not justice or fairness that the ruling is to be based upon but rather rule of law. The current paper is based on the theory of law and insights regarding the doctrine of administrative law[4]. Thus, its critical considerations are focused on the essence of the hearing, the justifiability of its introduction, goals as well as their convergence with the objectives of administrative proceedings. Therefore, most of the claims presented in the final part of the text are *de lege ferenda* conclusions.

Methods

The research behind the present paper is based upon studying legal texts, and in particular the *Code of Administrative Procedure* as well as analyzing publications devoted to the doctrine of administrative law. During the second stage of the study, the author applied a hermeneutic method in order to gain an insight into the essence of the hearing in administrative proceedings, and then to juxtapose it with basic principles of proceedings as well as theoretical

[4] Given the language of the present publication as well as its potential readers, some of the information in the text does not deal with the theory of law directly, but rather it regards Polish administrative law, so that a person not sufficiently familiar with the Polish legal system can follow the analyzed issues.

and axiological bases on which they are founded; finally, the author will return to the essential research topic and conclude whether the hearing is an indispensable, or at least, justifiable, element of the formal procedure in question. Due to the transition from the general to the specific, the author has been in the position to verify the essential thesis and come up with proposals *de lege ferenda* which have been subject to discussion in the final part of the paper.

The following monographs proved especially useful in the course of the research: Grzegorz Łaszczyca, *Rozprawa administracyjna w ogólnym postępowaniu administracyjnym [in English: Administrative Hearing in General Administrative Proceedings]*, Warsaw 2008, Robert Szuwaj, *Judycyzacja postępowania administracyjnego [in English: Judicization of Administrative Proceedings]*, Warsaw 2009 and Andrzej Wróbel, *Komentarz aktualizowany do ustawy z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [in English: Updated Commentary to the Act of 14 June 1960, Code of Administrative Procedure]*, LEX/el. 2016. Additionally, case-law has been used to demonstrate the theoretical theses put forward and verified in the paper, including decisions in the following cases: III SA/Łd 562/17 (on the assessment of derogation from holding a hearing), II SA/Łd 814/16 (on the purpose of personal appearance to participate in activities and evidence from hearing of the parties), I OSK 2638/14 (on the purposefulness of holding a hearing) and II OSK 70/13 (on the preconditions for holding administrative hearings). Apart from the above-mentioned sources, also academic papers and articles published in national journals have been used, as reflected in references.

Outcomes

As indicated by Robert Szuwaj, the administrative evidentiary process has essentially a form of proceedings conducted in chambers. This means that the principle adopted for criminal proceedings (and for civil legal proceedings for that matter), according to which the decision-making body examines a case during a hearing, does not apply. This means that it is examined without a hearing, unless conditions indicated in Article 89 of the *Code of Administrative Procedure* to hold one have been met. As a result, in most of the cases administrative proceedings are not concentrated at one place and at one time; moreover, they are conducted from one evidence-gathering act to another, at certain time intervals. In fact, whereas for customary judicial procedures procedural acts are carried out at hearings and court sessions are held rarely, the principle of operation of administrative proceedings is that the decision-making body operates in chambers, while hearings are summoned in relatively extraordinary circumstances only. Having analyzed the provisions on hearing in administrative proceedings, in particular the ones set forth in Article 89 of the Code of Administrative Procedure, one may conclude that its application should be quite wide-spread, as suggested by the nature of statutory conditions for summoning a hearing[5]. And yet, it seems to be incompatible with *ratio legis* of codes and contradictory to the essence of administrative proceedings which are based predominantly on documents.

The essence of administrative procedure is expressed by its underlying principles. Those include: rule of law (legality, legality of acts), the principle of objective truth, the principle of *ex officio* consideration of public interest and

[5] R. Szuwaj, *Judycyzacja postępowania administracyjnego [in English: Judicisation of Administrative Procedure]*, Warsaw 2009.

the legitimate interest of the members of the public, the principle of enhancing confidence in state authorities, the principle of informing the parties and other participants of the proceedings, the principle of active participation of the party in the proceedings, the principle of persuasion, the principle of speed and simplicity of proceedings (speed and limited formalism of proceedings), the principle of amicable resolution of administrative disputes, the principle of written form, the principle of two-tier proceedings, the principle of durability of final administrative decisions, and the principle of court's verification (control) of final decisions. In particular, the principle of written form seems interesting from the angle of the present article, as well as the principle of speed and simplicity of proceedings and the principle of objective truth. The latter might seemingly imply that the hearing is an indispensable element of administrative proceedings. However, taking into account the fact that the essence of proceedings is to resolve individual cases by way of an administrative decision – whereby the decision is taken mostly on the basis of submitted documents – the hearing seems to be an unjustified element thereof, when one considers the principle of written form of proceedings according to which any evidence should be filed in a written form as well as the principle of speed of proceedings.

Looking at the legal system of the Republic of Poland from a broader perspective, the hearing remains a proper and specific element of criminal and civil proceedings, and an accompanying element of other procedures where, due to rationality and speed of proceedings, it is not utilized. It is worthwhile pointing out that besides administrative proceedings, this is also the case for proceedings conducted before the Constitutional Tribunal. In such cases, additionally rules of law on civil proceedings apply, and the whole

proceedings are centered around hearings during which witnesses are questioned. The whole process mainly serves non-legal objectives, i.e. mostly public and educational ones as during such hearings critical cases on constitutional matters are considered. And yet, it seems that civil education does not need to imply poorer efficiency and speed of proceedings held before state or local government bodies. The Constitutional Tribunal is a court that deals with law and, by the same token, it is preoccupied with normative acts and proper application of conflict-of-laws rules. Its remit as indicated in the constitution does not justify holding hearings unless for purposes other than the ones related to its judicial function, i.e. in order to attract media attention. The media eagerly broadcast questioning of politicians of various allegiance by the Tribunal's judges; it especially concerns politicians who are members of the incumbent government.

The above remark, even though it is not directly linked with the topic of this paper, indicates that introducing hearings to various proceedings in Poland is connected to political and doctrinal circumstances. One may conclude that the goal of hearings is to legitimize the activities of an authority from the point of view of the public and to manifest its importance, while the purpose of rational utilization of time and resources comes second. In its judgment II SA/Łd 814/16 the court pointed out that the purpose of personal appearance to participate in activities is aimed at explaining before the decision-making body certain issues which could not be explained in writing. However, personal appearance is not aimed at confronting parties with contradictory interests – this is the goal of holding a hearing, in the course of which the parties may present clarifications, demands, and accusations as well as submit supporting evidence. Moreover, the parties may comment on the

results of the evidentiary process. The catalogue of activities which one may conduct during a hearing does not justify the holding thereof. In fact, only entering into a direct dispute and adversarial process might serve as grounds absolutely justifying holding a hearing. Still, the essence of administrative proceedings does not lie in resolving disputes, but rather in shaping the legal situation of a party. Moreover, in the judgment I OSK 2638/14 the court indicated that the necessity of using certain means of evidence stipulated by law in order to clarify a case, following from the principle of objective truth, does not constitute a ground for holding an administrative hearing if there is no need to conduct a hearing to achieve this goal. The reason being this goal may be equally achieved by way of proceedings in chambers. Hence, it seems that the principle of objective truth referred to above may be fulfilled in the course of proceedings without a hearing; moreover, the principle of speedy proceedings and of economics of trials should prevail in this respect.

The catalogue of grounds for holding a hearing is set forth in judgment II OSK 70/13. There, it is indicated than an authority should hold an administrative hearing if there is a need to reconcile the interests of the parties or where it is necessary to clarify the case with the involvement of witnesses or experts or by means of inspections. As suggested above, reconciling the interests of the parties in administrative proceedings may be conducted through an exchange of documents. In contrast to criminal proceedings, the authority shall not consider personal conditions such as regret, repentance or arrogance, but the set of facts and legislation in place only. Witness evidence in administrative proceedings is not as numerous as documentary evidence and taking into account the matters adjudicated in the course of administrative proceedings, it seems that sustaining the hearing in order to admit such type

of evidence is not a sufficient reason to reject the thesis of the present paper. With regard to experts and inspections, the former mostly draft documents to be attached to the case file, whereas the latter do not concern mainly persons or property that might arise at a hearing. Thus, it seems unjustifiable to maintain the institution of the hearing in order to conduct those activities only. Also, the above claims are supported by a ruling of the Voivodship Administrative Court in Warsaw[6]; the Court stated that "the evidentiary value of the declarations of both parties with contradictory interests is equally uncertain". Hence, not only the principle of objective truth would remain intact if the hearing was eliminated from administrative procedure, but also the opportunity for manipulation could be reduced and an administrative decision would be based fully on documents. After all, it is the documents that constitute material basis for the issuance of such a decision.

It is also worthwhile mentioning a ruling by the Voivodship Administrative Court in Łódź[7] which stipulates that a motion of one party to hold a hearing is not binding for a body. Failure to conduct a hearing despite the application of a party should be assessed from the viewpoint of efficiency of proceedings. Consequently, it seems that there is a preference in the case-law for the principle of speedy proceedings over the possibility of conducting a hearing in the course of proceedings.

One should point out at this stage that the hearing as an institution contains elements which could speak in favor of maintaining it as part of proceedings and still fulfil the principle of speedy proceedings. In a judgment by the

[6] IV SA/Wa 1119/08.

[7] III SA/Łd 562/17.

Voivodship Administrative Court in Szczecin[8] it has been indicated that a public administration body is obliged to hold a hearing if this expedites or simplifies proceedings. It is up to a body conducting proceedings to assess whether holding a hearing would contribute to expediting or simplifying the proceedings. When performing such assessment, the body should take into account the fact that, as a rule, concentrating evidence at one place and at one time is a factor that simplifies and expedites administrative proceedings.

Another argument for maintaining the institution could be also the need to fulfil the principle of objective truth by allowing confrontation of the parties and, by the same token, attempting to determine the set of facts. After all, a hearing not only serves the goal of gathering evidence at one place and time, but also the one of verifying its credibility. This applies in particular to statements of witnesses or parties. In the course of a confrontation, one may select information presented by those who make statements. Furthermore, personal appearance allows one to assess credibility of a witness or a party based on their behavior and manner of expression. Such assessment, based on life experience of the members of the body that conducts proceedings, may not be performed on the basis of documents or written statements.

Finally, a hearing allows for gathering at one place and confronting with one another various items of evidence. It is possible not only to confront the parties with each other, but also the parties and witnesses, witnesses and experts, and the parties and experts. Consequently, a case may be run in a time efficient manner, and the principle of objective truth may be successfully implemented. What remains problematic however is how administrative proceedings are conducted in practice. Namely, it looks like a hearing is used as an additional

[8] I SA/Sz 909/15.

element, which is also reflected by the linguistic and logic interpretation of the rules of law set forth in *the Code of Administrative Procedure* devoted to the hearing. The procedure in chambers, as mentioned before and as emphasized by source literature, remains the basic mode of administrative proceedings. This is mostly due to the nature of adjudicated matters as well as the purpose of the procedure, i.e. issuing an administrative decision.

The practice of bodies, in particular basing proceedings on documentary evidence, as well as uncertain evidentiary value of testimonies of parties in particular established in case-law, speak in favor of the thesis presented in the introductory part of the paper, i.e. that the hearing should be excluded from administrative proceedings. The reason being that both case-law and practice indicate that allowing for parties' confrontation at a hearing is an insufficient ground to justify the time and resources involved. Especially that, as stipulated above, it may compromise the principle of objective truth – as evidence from a hearing is uncertain – as well as of the speed of proceedings. Therefore, the procedure in chambers should not only prevail, like the practice shows, but it should also be the sole mode of this type of proceedings.

Discussion

As indicated in the introduction, the main thesis put forward in the present paper is that the hearing, contrary to the intention of the legislator, fails to expedite proceedings, and in some cases may even contribute to the extension thereof. Having analyzed the *Code of Administrative Procedure* as well as relevant case-law, one may conclude that the justifiability of maintaining the hearing as an element of administrative proceedings is at least limited. It seems that due to the uncertainty of witness evidence, and the

evidence given by the parties in particular, emphasis should be put on documents and information provided by experts; such documents and information give the possibility to determine the set of facts and arrive at objective truth. Consequently, they allow for identifying facts based on which an administrative decision may be issued.

Besides analyzing legal acts and case-law, one should also take into account the practice of adjudicating bodies. They do handle most cases in chambers. Hence, hearing in administrative proceedings is relegated to the position of a solely auxiliary institution. Additionally, its objectives in administrative proceedings are limited as compared to the ones it has in the case of civil or criminal procedures.

In the face of the above, a *de lege ferenda* proposal put forward in this paper is an amendment involving exclusion of the hearing from administrative procedure. Such amendment should simultaneously safeguard, in accordance with the principle of written form of administrative proceedings, the opportunity to provide evidence of the parties in writing, as well as written statements by experts. It should not eliminate the possibility of inspections either, if such a need arises. However, inspections would not be part of a hearing, but rather would be conducted on site, i.e. away from the seat of a decision-making body.

The amendment removing the hearing from the procedure would not only reflect the spirit of the current practice of adjudicating bodies, but also pave the way for administrative proceedings to become recognized as led fully in chambers. This would imply limited involvement of the parties in the proceedings and putting more emphasis on proving legal interest and indicating information on the set of facts on the basis of documents. This, in

turn, would allow for full implementation of the principle of written form, while limiting costs incurred for holding a hearing. As a result, the proceedings would be less expensive and quicker, which might exert positive influence on the fulfillment of the constitutional principle of rule of law.

The final argument for the *de lege ferenda* proposal presented herein is that it could depoliticize key administrative proceedings. Like in the case of proceedings conducted before the Constitutional Tribunal, crucial administrative proceedings are of interest for groups presenting various political interests. This might provoke superficial attention of the media in such cases and result in a media pressure on an adjudicating body to issue or refrain from issuing particular administrative decisions. Administrative procedure is based on documents and the recognition of a legal interest, i.e. qualified interest and, as such, should not be subject to such forms of interference. It is the presented materials (documents) as well as material and legal foundations that should form the basis for issuing an administrative decision. Thus, such elements as actual contribution to the occurrence of a particular state of affairs or being in a difficult situation – if not based on substantive law – should not be translated into a particular legal interest, and consequently, should not impact the course of the proceedings. Eliminating the hearing from administrative proceedings would be equivalent to excluding an emotional factor therefrom. This should translate into limited media coverage of proceedings and reinforcing them against involvement of political interest groups.

In the end it should be underlined that excluding the hearing from proceedings is not necessarily equivalent to the lack of public control, including the control by the media, over particular decisions. Building trust

towards the state and the principle of a democratic state based on the rule of law should imply that one has access to non-confidential materials from proceedings as well as that information on the course thereof will be shared with the public. The only thing they should not imply is allowing for politics, as an area of public life where power processes are carried out, to interfere with the processes of administration, and in particular with the fulfilment of public administration and statutory authority (and not power) by state and local government bodies.

Bibliography

Case-law

1. III SA/Łd 562/17
2. II SA/Łd 814/16
3. I OSK 2638/14
4. II OSK 70/13
5. IV SA/Wa 1119/08.
6. III SA/Łd 562/17.
7. I SA/Sz 909/15.

Literature

1. Grzegorz Łaszczyca, *Rozprawa administracyjna w ogólnym postępowaniu administracyjnym [in English: Administrative Hearing in General Administrative Proceedings]*, Warszawa 2008.
2. Robert Szuwaj, *Judycyzacja postępowania administracyjnego [in English: Judicization of Administrative Proceedings]*, Warszawa 2009.
3. Andrzej Wróbel, *Komentarz aktualizowany do ustawy z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [in English: Updated Commentary to the Act of 14 June 1960, Code of Administrative Procedure*, LEX/el. 2016.