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AN EXPERT IN DISCIPLINARY PROCEEDINGS IN THE POLICE IN POLAND

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Abstract Disciplinary proceedings in the Police is a crucial issue given the size of this formation. For this reason, the number of relevant proceedings is also adequate. I will begin this discussion with a presentation of selected issues of disciplinary proceedings in the Police that shed light on this subject matter. The core interest of this study is evidentiary proceedings carried out as part of disciplinary proceedings, and to be more precise, the possibility of taking evidence from an expert witness's opinion. This issue is largely regulated under the Code of Criminal Procedure. Naturally, there are some problems, e.g. when we talk about the system of verification of expert witnesses' competences, but this is not subject of the discussion here. The legislator, in the act that regulates the procedure in a disciplinary offence committed by a police officer, did not include a regulation concerning an expert witness and did not refer to the application of another relevant provision either. This is why we are left with a question of what to do if special information must be obtained in the case. Another element of the discussion, after answering the first question, addresses the possibility of suspending the disciplinary proceedings if an opinion of an expert witness is being awaited. Moreover, I also include comments on the possibility of asking the opinion of an expert witness specializing in Polish law. The discussion carried out in this study is only an outline of problems that appear in the practice of conducting disciplinary proceedings.

Keywords: opinion of an expert; disciplinary liability; suspension of proceedings; uniformed services

INTRODUCTION

An expert witness, as an individual with advanced knowledge in a strictly specified field, is often a foundation for issuing a correct judgment in the case in which he acts. Experts, with their professional expertise, appear in any proceedings where special information needs to be used and which the expert has. Therefore, it may be any civil, criminal or disciplinary proceedings, but I would like to focus on the latter here. The special characteristics of disciplinary proceedings means that existing procedures that have been functioning in the criminal process may not always be reflected in this type of proceedings because the legislator does not always prescribe a norm that allows appropriate application of regulations. Disciplinary proceedings of

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police officers refer to respective application of provisions of the Code of Criminal Procedure,[1] yet the are limited – by identifying specific measures that may be applied. The subject matter of this study presents a discussion on the possibility of appointing an expert in disciplinary proceedings for Police officers, despite the lack of a clear regulation of these issues in the Police Act.[2] I will present concepts associated with the possibility of presenting evidence from an opinion of an expert lawyer and a discussion associated with time limits of evidentiary proceedings as well as the limitation period. The last issue to investigate will be an attempt to answer the question: is waiting for an opinion of an expert a basis to suspend disciplinary proceedings?

1. DISCIPLINARY PROCEEDINGS FOR POLICE OFFICERS – SELECTED ISSUES

This discussion must begin with a general presentation of the basis of disciplinary liability of police officers. Pursuant to the Article 132(1-3) PA, a police officer is liable for committing a disciplinary offence that involves violation of professional discipline or non-observance of the principles of professional ethics. The legislator specifies that infringement of service discipline means an act of a police officer that involves culpable contravention of his powers or failure to discharge duties imposed by legislation in force or by orders or instructions given by his/her superiors authorised to do so pursuant to this legislation. Then the legislator lists behaviour that qualifies as infringement of service discipline. However, it is an open catalogue, as proven by the use of the expression: "in particular". Moving on to the second possibility to hold a police officer disciplinarily liable, that is for failure to observe service ethics laid down in the Ordinance of the Police Commander in Chief,[3] it needs to be stated that such violation results in the initiation of the same procedure like in the case of violation of service discipline. The framework of this study does not allow for a broader discussion of the subject matter of the basis of initiation of disciplinary proceedings, however, it is reasonable to at least signal this issue.

When there is a reasonable suspicion that a police officer has committed an act that may be qualified as a disciplinary offence, a disciplinary superior initiates proceedings (Article 135i(1) PA), appoints a disciplinary commissioner to conduct these proceedings (Article 135a PA), who also collects

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1 Act of 6 June 1997, the Code of Criminal Procedure, Journal of Laws of 2022, item 1375 [hereinafter: CCrP].

2 Act of 6 April 1990, the Police Act, Journal of Laws of 2021, item 1882 [hereinafter: PA].

3 Ordinance no. 805 of the Police Commander in Chief of 31 December 2003, Official Journal of the Chief Police Headquarters of 2004, no. 1, item 3.

evidence and takes steps necessary to explain the case (Article 135e(1) PA). Therefore, it seems that proceedings may only be initiated where there is a "reasonable suspicion", which *de facto* may be equalled with a "reasonable suspicion of committing a crime", which must occur for the initiation of investigation or inquiry under criminal proceedings [Adamczak 2012, 57]. Thus, the disciplinary superior must be convinced that the facts he knows allow for the creation of at least one version which points to a police officer's committing a disciplinary offence [Przygodzki 2011, 130]. Where the disciplinary superior has doubts about what he has found out in the question of committing a disciplinary offence or of the legal qualification or identity of the perpetrator, he orders the disciplinary commissioner to conduct an investigation intended to collect material necessary to determine the validity of initiation of disciplinary proceedings. Documenting actions during the investigation is less formalized because writing a service note is sufficient here. Upon confirming the suspicion about the commission of the disciplinary offence, the material gathered in the proceedings should be annexed to the disciplinary proceedings [Baj and Bober 2013, 11].

Such proceedings must pursue objectives imposed by the legislator, whereby the investigator must: 1) establish whether the alleged act was committed and whether the accused has committed it; 2) explain causes and circumstances of committing the act; and 3) collect and record evidence in the case (Article 135i(5) PA). To meet these goals, it is necessary to conduct disciplinary proceedings effectively. As has already been signalled, the disciplinary commissioner collects evidentiary material and takes steps necessary to explain the case. The legislator lists examples of such steps, and they include - interrogation of witnesses, hearing the statement of the accused persons, of the victim, carrying out an inspection, confrontation, presentation or reconstruction of events or their fragments that are being examined. The disciplinary commissioner may also commission the performance of relevant examinations (Article 135e(1) PA). Evidentiary proceedings are the most important part of this procedure as they allow an answer to the question of what the commitment of a disciplinary offence looked like, who did it, in what circumstances, whether it was intentional or whether there are circumstances that mitigate liability. However, in order to answer such questions correctly, it is necessary to reconstruct the course of the event by means of the evidence taken. Declaring that the police officer did commit the disciplinary offence should be done with respect to the principle of objective truth, which, along with the principle of official action is valid in disciplinary proceedings. The disciplinary superior has the obligation to collect the evidence and take steps necessary to solve the case. It is an indispensable condition to correctly carry out this process and thus, also to settle the

case correctly. Attribution of guilt, therefore, requires a clear determination of the facts of the case and their correct legal assessment.[4]

Conducting explanatory proceedings as well as disciplinary proceedings is limited by deadlines stipulated in the act. The former should be finished within 30 days. The legislator allows for it to be extended to the maximum of 60 days in particular cases due to the character of the case and upon permission from the disciplinary superior (Article 134i(4) PA). In the case of disciplinary proceedings, the legislator points out that evidentiary steps should be finished within a month from the date of initiation of these proceedings. They may be extended by a decision of the High Disciplinary Superior for a fixed term of up to 3 months. Extension of this period may be granted by the Police Commander in Chief (Article 135h(1) and (2) PA). Due to the specific nature of disciplinary proceedings as well as basic requirements that must be met by any proceedings, it should be quick, efficient and effective and actions in them should be thoroughly planned to minimise their burdensomeness on participants of the proceedings [Kotowski 2021]. From this point of view, it is also important to observe the deadlines associated with the possibility to initiate proceedings and time limits of punishing offences. Pursuant to statutory regulations, disciplinary proceedings cannot be initiated after the lapse of 90 days from the disciplinary superior learning about the disciplinary offence, whereas the possibility to punish the disciplinary offence expires after 2 years from the date of its commission. Stay of disciplinary proceedings shall restrain this period (Article 135(3) and (4) PA). This time limit is extended where the disciplinary offence bears the marks of a (fiscal) crime or (fiscal) misdemeanour – according to rules adopted in the criminal code, fiscal criminal code and the code of minor offences.

2. EVIDENCE FROM THE OPINION OF AN EXPERT − ITS USE IN CRIMINAL PROCEEDINGS AND ITS USE IN DISCIPLINARY PROCEEDINGS.

Pursuant to the Code of Criminal Procedure (Article 193(1) CCrP), if recognition of circumstances that are crucial to solving the case requires special information, then the opinion of an expert or experts is sought. The legislator uses the term expert in this provision, but there is no mention of what needs to be understood under this term, therefore it is reasonable to refer to the dictionary definition of this concept. There are two definitions of an expert in the dictionary of the Polish language: 1) a specialist in a given field and 2) someone with great skill and experience in a given field; the

[4] See judgement of the Provincial Administrative Court in Poznań of 14 February 2018, ref. no. IV SA/Wr 1103/17, Lex no. 2448737.

dictionary also specifies the concept of a judicial expert, which should be understood as: "a person appointed by the court to issue an opinion relating to this person's professional knowledge."[5] It must be clearly stated that an expert should be a person considered an authority in their field and someone who enjoys respect as well as trust of other experts in a given discipline.

An expert should have special information which in the relevant literature is defined as information that goes beyond average practical skills of an adult with relevant life experience, education and general knowledge and a normal, publically available knowledge about science, art, technology or craft[6] [Drajewicz 2014, 76]. What is important, the procedural authority, even where it itself has the knowledge considered special information, is obliged to take such evidence.[7]

In chapter 22 of the CCrP the legislator has regulated issues associated with a decision to allow evidence from an opinion of an expert witness, inclusion of an expert, the possibility for the expert to access the case files, the expert's secrecy or elements that an opinion of an expert must have. The Police Act, in turn, does not have stipulate regulations that refer to an expert.

Each piece of evidence in criminal proceedings is treated equally, we cannot make a division into better and worse evidence and there is no doubt that opinions of experts, due to the fact that they come from independent persons who do not have an interest in the resolution of the case, are important for the procedural authorities [Flaga-Gieruszyńska, Gołaczyński, Klich, et al. 2017, 179]. From the point of view of criminal proceedings, an opinion of an expert may be valued higher than, e.g. witness testimony, because it must meet statutorily specified criteria (Article 201 CCrP), it must be complete, clear and consistent, but still it is necessary that it is each time objectively assessed by the authority that orders it, according to the principles of free evaluation of evidence. An opinion of an expert may be questioned in a situation where it has no clear argument and its conclusions are illogical and imprecise and one cannot derive the expert's belief from the opinion. Conclusions must always be based on the research conducted [Ładoś 2016, 69]. On the other hand, an opinion of an expert is not disqualified if it is not explicit in a situation where it is objectively not possible to give a clear answer to the question, which is not down to the expert not having suitable qualifications or to his undue preparation of the opinion, but which is the result of state of the art, lack of suitable research methods

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5 See https://sjp.pwn.pl/sjp/szukaj/bieg%C5%82y [accessed: 20.09.2022].

6 Cf. judgement of the Supreme Court of 15 April 1976, ref. no. II KR 48/76, OSNKW 1976, no. 10-11, item 133.

7 Cf. judgement of the Supreme Court of 1 April 1988, ref. no. IV KR 281/87, OSNKW 1988, no. 9-10, item 69.

or modest research material which can in no way be complemented [Tomaszewski 2000, 119-20].

Referring this discussion on an expert witness appointed in criminal proceedings, we must think whether these principles and procedures, that function in the criminal process may be applied under the Police Act to disciplinary proceedings and whether provisions that regulate disciplinary liability in the Police at all allow the appointment of an expert in disciplinary cases. I will try to answer these questions after I present the subject matter of relevant application of provisions of the Code of Criminal Procedure to disciplinary proceedings of police officers.

3. RELEVANT APPLICATION OF PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE TO DISCIPLINARY PROCEEDINGS OF POLICE OFFICERS

The Police Act does not comprehensively regulate the question of conducting disciplinary proceedings, which is why the legislator uses the measure of respective application of the Code of Criminal Procedure, but it limits the extent in which it may be used to provisions concerning procedural steps, save for Article 117 and Article 117a, summons, dates, service and witnesses, but ruling out the possibility to impose order-related penalties, or confrontations, presentations, inspections and experiments (Article 135p(1) PA). In this study I will focus primarily on the possibility of appointing an expert to disciplinary proceedings, because according to a regulation included in the Police Act, there is no direct possibility to appoint an expert, the act does not regulate it independently nor does it allow for the application of measures related to experts described in the CCrP, referred to earlier. The authority of the disciplinary commissioner to appoint an expert may only be derived indirectly from the provision that regulates the course of disciplinary proceedings, which lays down that: "the disciplinary commissioner may also commission the performance of relevant examinations." Nevertheless, there are no special laws for this. Pursuant to the judgement of the Voivodship Administrative Court in Kraków: "appropriate application of provisions of the Code of Criminal Procedure" means that it does not accommodate all cases not regulated in the 1990 Police Act, but only concerns those issues that were specified by the legislator.[8] However, this conclusion does not correspond with general features of disciplinary proceedings referred to above and whose implementation depends on the most precise reconstruction of the facts, which may be done by taking necessary evidence. If in disciplinary

[8] See judgement of the Voivodship Administrative Court in Cracow of 4 June 2019, ref. no. III SA/Kr 200/19, Lex no. 2689531.

proceedings it is necessary to only take evidence from witness testimony, then this problem does not occur because the legislator regulates this procedure comprehensively. The problem appears when an expert must be appointed. Then, as rightly pointed out in legal commentary, it is legitimate to use *analogia legis*, which is not limited only to cases of referring clauses, but allows the regulation of questions not regulated by the legislator at all, therefore it solves the problem of a real lacunae [Janusz-Pohl 2017, 23]. In this place it is reasonable to invoke the position of the Constitutional Tribunal, which points out that disciplinary proceedings are special proceedings, therefore, application of relevant provisions of the code of criminal procedure intends to ensure rights and guarantees to the accused person which serve to safeguard their interests in disciplinary proceedings, not to give the procedure itself a criminal law character.[9] Undoubtedly, ensuring the possibility to appoint an expert in a disciplinary case which requires special information is a demonstration of guarantees of rights of the accused person. It is especially true in a situation where all regulations, e.g. related to the right to exclude the expert or to verify his opinion by the accused's submitting a request to appoint another expert, constitute implementation of the principle of reliability.

The above clearly shows that the possibility to appoint experts in disciplinary proceedings of police officers results from the provision of Article 135e PA, where the legislator allows the disciplinary commissioner to order a suitable examination, which in my opinion may be applied to an examination that should be carried out by the expert and I do not only mean here an examination of the mental health of the accused person; this issue is intentionally omitted in this study. On the other hand, when it comes to guarantees of the expert's independence, his adequate competences and the possibility to dismiss him as well as elements of an opinion he is obliged to produce, we must use, by *analogia legis*, provisions of the CCrP that regulate this subject matter, because this is consistent with principles and objectives of disciplinary proceedings. Some authors go further and allow the taking of evidence from an opinion of an expert lawyer if a complicated legal issue appears in the case [Jóźwiak 2011, 37]. In my opinion it is a too far-reaching step. We must not forget that disciplinary organs accommodate authorities that should have extensive knowledge, competences and professional experience. The specific characteristics of the work of the Police means that police officers have frequent contact with provisions of the law and apply them to citizens, thus they must have relevant knowledge. Therefore, it is not legitimate to appoint an expert lawyer who is to deal with an issue related to the Polish legal order. Otherwise, if we were to assume that a relevant expert

[9] Judgement of the Polish Constitutional Tribunal of 27 February 2001, ref. no. K 22/00, ZU 2001, no. 3, item 48.

may be appointed always when there is a legal issue that goes beyond the capabilities of disciplinary authorities, then this possibility would surely be abused and disciplinary authorities would rarely take decisions contrary to an expert's belief. Abuses here would be severe because disciplinary authorities would shed the burden of liability for the result of the proceedings, shifting it onto the expert or his opinion. In such a case, we should think whether the panel of the broadly understood disciplinary judiciary should not be composed of only police officers with a legal education. Such a solution would have its pros, but it would not always be doable given the lack of persons with such qualifications in appropriate positions.

4. STAY OF DISCIPLINARY PROCEEDINGS

Disciplinary proceedings may be stayed by a decision of a disciplinary superior if there is a long-term obstacle that disallows the performance of proceedings. Also, they must be stayed where the accused police officer changes the place of his service (Article 135h(3) and (3a) PA). The discussion will only cover the first case that lays down the optional possibility of staying the proceedings. It needs to be pointed out that such a stay boils down to a temporary refraining from taking actions due to circumstances that paralyse the continuation of the procedure [Rodzoch 2017, 60]. The premise described in the Police Act is similar to the regulation described in the CCrP, with the proviso that in the CCrP the legislator pointed out, as an example, what may constitute the long-term obstacle, while such an example in not provided in the Police Act. In an attempt to define the concept of a long-term obstacle, it is reasonable to look at its linguistic understanding. Thus, long-term means something that "lasts for a long time; that is protracted" [Kubisa-Ślipko 2006, 91], while an obstacle means "something that hinders or makes it impossible to achieve something."[10] The premise of staying the proceedings has a passing nature, thus it will not lead to a definite ending of proceedings [Kosonoga 2017]. A stay of proceedings is legitimate if the obstacle is long-term and at the same time it makes it impossible to conduct the process. These elements must be conjoined. At that, it is not about the circumstances that make it difficult to carry out the process but about those make it impossible to do it.[11]

The literature points out that waiting for an opinion of an expert may be a long-term obstacle when the time necessary to issue an opinion (and

[10] See https://sjp.pwn.pl/szukaj/przeszkoda.html [accessed: 20.09.2022].

[11] See decision of the Supreme Court of 13 January 1973, ref. no. II KZ 171/73, OSNKW 1973, no. 10, item 127; decision of the Administrative Court in Rzeszów of 3 March 1992, ref. no. II AKZ 12/92, OSA 1993, no. 10, item 60.

proceedings to issue an opinion) exceeds basic time limits. An important determinant here is the necessity to determine that this obstacle makes it impossible to continue the proceedings [Kurowski 2022]. Therefore, a question arises whether the wait for the opinion of an expert in a disciplinary case validates the staying of proceedings and whether it would be legitimate. The answer to this question is not unequivocal because, as has been concluded above, the stay is possible if there is a long-term obstacle that makes it impossible to continue the proceedings. Meeting the first requirement is possible without a doubt, but the problem arises with the simultaneous implementation of the premise of disallowing the continuation if ordering an expert to issue an opinion does not prevent the authority from conducting further evidentiary proceedings in the same time. However, if we analyse this problem from a different perspective, the perspective of time limits, especially for punishing a disciplinary offence (2 years from the commission of a given offence that is subject only to disciplinary liability – the act is not a crime/misdemeanour), then it would be worth thinking about allowing the possibility to stay disciplinary proceedings due to having to wait long for the expert's opinion and where the results of such an opinion will directly affect the decision of the procedural authority. Therefore, pursuant to the principle of objective truth we should allow the possibility to stay proceedings for this reason. However, this issue is not clear because we must remember about the directive to recognize the case within a reasonable time, whereby a too broad interpretation of the concept of a long-term obstacle may become a source of excessive length of proceedings, to the detriment of the accused person. Therefore, as a rule, evidence difficulties per se should not be a basis to stay the proceedings [Kmiecik 1985, 52]. Legal scholars and commentators and the established body of judicial decisions are in line with the above-mentioned view which was based on the discussion concerning the stay of criminal proceedings. Due to an analogical formulation of the premises of a stay in the Police Act we me be tempted to apply them analogically in disciplinary proceedings in the Police. However, because there are differences between criminal and disciplinary procedures, it would be worth thinking about the possibility of allowing this premise as a basis for staying the disciplinary proceedings by reference to relevant time limits. We must also remember that only a legal stay of proceedings stops the course of this time limit.[12]

[12] See judgement of the Voivodship Administrative Court in Rzeszów of 2 March 2017, ref. no. II SA/Kr 1093/16, Lex no. 2260521.

CONCLUSIONS

Concluding this discussion, it must be clearly stated that an opinion of an expert may be sought in disciplinary proceedings of police officers if there are circumstances in the case that require special information and that are crucial to resolving it. The legislator's silence in this regard cannot be interpreted as intentional elimination of this evidence from disciplinary proceedings as it could affect the shape of these proceedings. Evidence from an opinion of an expert is often key and contributes to a fair resolution of the case. Not being allowed to rely on it would mean having to apply the rule according to which unavoidable doubts must be resolved to the advantage of the accused person. We could not adopt a position that worsens the situation of the accused person since the evidence material would not be complete and the authority could not supplement it with an opinion of an expert. We must conclude that regulations concerning an expert described in the Code of Criminal Procedure in chapter 22 should be applicable to disciplinary proceedings, therefore, the provision of Article 135p PA should be supplemented with respective application of provisions on experts, which would eliminate interpretation problems.

Knowing that we may appoint experts in disciplinary proceedings of police officers, we must answer a question whether we may appoint an expert to solve a legal issue that appears in such proceedings despite the fact that it is commonly assumed that it is inadmissible in a criminal procedure, save for an expert in foreign law. I believe too that an expert cannot be appointed in such a situation because it would be contrary to the general rule that states that organs that apply the law know this law. Admittedly, disciplinary authorities are not usually composed of lawyers, but the specific characteristics of these proceedings do not require so. On the other hand, when it comes to persons that hold disciplinary functions, there should be high criteria, including knowledge of the law and of disciplinary procedures. The emerging legal problems may be discussed with legal departments that operate at police units, therefore appointing a lawyer seems unnecessary. We may perhaps postulate that the disciplinary judiciary should be composed of officers with a legal education and there is no shortage of such persons in the Police. Naturally, it should not be the only condition for the choice of disciplinary authorities, but if there were a few candidates, this should be the decisive requirement.

Disciplinary proceedings, as a special kind of liability, have their time limits which result directly from the Police Act and in the case of crimes, fiscal crimes, misdemeanours and fiscal misdemeanours from the Criminal Code, the Fiscal Criminal Code and the Code of Minor Offences where time limits of punishing offences have been laid down. In the case of an act

that meets the requirements of only a disciplinary trespass, this time limit is relatively short - it is only 2 years from the commission of the act. Thus, the authority has limited time to issue a ruling, which is to the advantage of the accused person. A stay of proceedings is a measure that may stop the course of this time limit. The question that I asked in the introduction of this study concerned the possibility of staying the proceedings due to the wait for an opinion of an expert. Arguments concerning the stay of disciplinary proceedings did not yield a clear answer. Therefore, it was necessary to rely on solutions proposed in legal commentary that referred to the stay of criminal proceedings. Views of legal scholars and commentators there are consistent as they agree that waiting for evidence may not be the basis to stay the proceedings. However, due to the specific characteristics of disciplinary proceedings and their time limits, I believe that we must not definitely prohibit the staying of proceedings due to the fact that an opinion must be issued by an expert. It should be each time evaluated individually and it is the conducting authority that should take a decision in this matter, especially if the opinion is to concern questions that are the main theme of proceedings and there is no other basis to issue a decision.

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