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Practice of Establishment of Evidence in Cases of Administrative Offences

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Abstract

Averment in the administrative procedure is conditioned by a certain system and consists of several stages. In the article, its authors examine, based on the analysis of legislation and the empirical research, the peculiarities of evidence collection and application, one of the stages of the averment institution, in cases of administrative offences. Explaining the essence of evidence collection, the authors present the analysis and assessment of judgements of the Supreme Administrative Court of Lithuania (hereinafter referred to as "the SACL") and identify problems with evidence collection arising in practice and suggest solutions to them.

Keywords: judge, averment measures, averment circumstances, stage of the proceedings of administrative offence, admissibility and connection of evidence.

Introduction

Establishment of truth in a case is a complicated category consisting of different actions, different entities and different measures. Exactly because of this, averment is a special institution of the administrative procedure.

Averment in the administrative procedure is regulated by two major legal acts: the Code of Administrative Offences of the Republic of Lithuania (hereinafter referred to as "the CAO") and the Law on the Procedure of Administrative Cases of the Republic of Lithuania (hereinafter referred to as "the LPAC") which enshrine the procedure of administrative offence cases and the procedure of administrative cases, and establish different rules of averment. Application of averment measures in the averment process is not closely regulated by legislation.

Due to a limited size, the article examines the averment process in cases of administrative offences and elaborates peculiarities of the collection of actual data in practice.

A constantly growing number of administrative offences are observed in Lithuania, which means that an increasing number of cases of administrative offence are brought and decided. This consistent pattern, however, does not receive sufficient attention from scientists and legislators, since scientists, frequently discussing averment in the procedure of administrative cases in their works, devote very little attention to averment in the procedure of administrative offence cases.

We also consider that scientific publications do not analyze the issue of averment in the administrative procedure thoroughly enough. Discussing averment in the procedure of administrative cases in their works, scientists often give very little attention to averment in the procedure of administrative offence cases. In addition, certain provisions of the CAO regulating averment process no longer correspond to current public relations which have changed. We also discover quite many shortcomings in the regulation (for example, an incomprehensive list of averment measures). Consequently, the article examines a legal and practical basis for the averment process in cases of administrative offences which is illustrated by specific examples of case law and grounded on the common practice formed by the SACL.

Research subject is legal regulation and application practice of evidence collection in cases of administrative offences.

Research aim is to examine practical implementation of evidence collection in cases of administrative offences by discussing particularity of the application of the averment stage.

***Research objectives*:**

1. To discuss peculiarities of evidence collection in the averment process;
2. To establish how collection of evidence is carried out practically by evaluating legal regulation and arising problems.

***Research methods*.** In order to accomplish the aim of the research, analyze the subject of the research and achieve the established objectives, both theoretical research and empirical methods were used. The research employed the following research methods: comparative, logical-analytical, data analysis, legal document analysis, questionnaire and generalization methods.

The comparative method was employed to reveal approaches of different scientists to the concept

of evidence and components of the averment process. The comparative method was used to compare the lists of averment measures, concepts and peculiarities of separate averment measures. The logical-analytical method was adopted to explain structural components of the evidence concept, the performance of all actions of the stages of the averment process at every stage of the process and components of the evidence collection stage. The method of data analysis helped to reveal the necessity for evidence examination and assessment during its collection and the duties of the entity charging with an offence.

During the research, officials drawing up records of administrative offences and considering cases, and civil servants were surveyed. The answers of 54 respondents were summarized in questionnaires by using the method of generalization.

Among empirical methods, the method of observation should be mentioned, which was applied during the article authors' direct participation in and observation of the activities of administrative courts in Lithuania, and also the method of document analysis adopted to examine official documents (Lithuanian and foreign legislation as well as procedural documents of courts). The method of legal document analysis was used to discuss differences and similarities between the concepts of evidence established in the case law of the SACL, peculiarities of the evidence collection process and aspects of their use in the averment process. The questionnaire method was employed to conduct scientific research. During the research, entities drawing up records of administrative offences and considering cases were surveyed. The research is based on the empirical approach to the problem analyzed.

Overview of the conception of evidence

In order to protect diverse legal good, the state has established a mechanism for such protection covering the adoption of appropriate impact measures against those who infringe and cause harm to this good. The implementation of such protection is related to the determination of the fact of the act opposite to the law and other circumstances describing this fact, which is carried out by collecting, examining and assessing evidence (Wade, Forsyth, 2004). This means that the averment process is aimed at establishing the truth in the case. Establishment of the truth in the case is a complicated category consisting of different actions, different entities and different measures. Exactly because of this, the averment process is a special process.

A person can be made administratively liable only if he/she has committed an administrative offence and there is sufficient data for determining this fact. To establish these circumstances, evidence is used which, in administrative offence cases, helps to determine circumstances relevant to the case and enables stating whether an administrative offence has been committed, whether a specific person has committed it, whether he/she is guilty of this offence and what administrative penalty should be imposed on him/her (Galligan, Smilov, 1999).

The concept of evidence used in the procedure of administrative offence cases has similarities with the concept of evidence used in the criminal procedure, since actual data that, by revealing actual circumstances of the case, helps authorized entities to reach a conclusion concerning the presence or absence of the criminal act or the administrative offence, the guilt or innocence of the person who has committed this act or offence and other circumstances which can have an impact on the correct solving of the case is considered to be evidence. Such similarity between the concepts of evidence is linked to the common purpose of administrative liability in administrative offence cases and criminal liability.

It should be noted that statutory regulation of the conception of evidence is not clear and accurate enough; therefore, the consideration of structural components of evidence conception is a popular topic for discussion among scientists. Stasys Sedbaras emphasizes that "it is necessary to distinguish evidence – actual data, knowledge from evidence – sources with the help of which information is stored and transmitted as well as used in the process" (Sedbaras, 2005). Rinkevicius (1990) is convinced that merely facts cannot be evidence, as they are a phenomenon of objective reality. Treated in this way, evidence would be just knowledge of that phenomenon. Moreover, merely sources of evidence should not be evidence, since they do not contain actual data attributed to them. Consequently, in his view, evidence consists of the unity of two structural components – actual data and its sources (Rinkevicius, 1990). Cininas (2001) disagrees with the position expressed and states that actual data equals the content of evidence, while sources of actual data equal the form of evidence, therefore the content of evidence and its form should be considered to be independent evidence, yet the examination must not be limited to one of them only. Urbonas (2003) is convinced that in some cases "the concepts of the evidence source and the averment measure may not coincide (e.g. a witness as a natural person is a source of evidence, while his/her testimony is a measure of averment)", therefore he considers actual data contained in the sources indicated by the law and established by averment measures specified in the law to be evidence in cases of administrative offences. It should be stressed that the SACL considers

actual data established on the basis of averment measures (e.g. official reports of police officers, explanations of the offender etc.) to be evidence in cases of administrative offences. This means that the SACL does not see an essential difference between the source of evidence and averment measures and uses the concept of averment measures, as exactly their concept is enshrined in Paragraph 2 of Article 256 of the CAO. However, discrepancy between the concepts of the source of evidence and averment measures is likely in the presence of the human factor: when a witness gives testimony and the victim, the person who is made administratively liable, a specialist, an expert or other persons give explanations or testimony. Taking into account the fact that explanations or testimony are given when taking relevant proceedings, during which the testimony of a witness is obtained and recorded, as well as explanations or testimony of the victim, the person made administratively liable, a specialist, an expert or other persons concerning facts relevant to the investigation of the administrative offence, which are known to these persons, are taken, testimony and explanations should be considered to be an outcome of the expression of actual data obtained from the source of evidence and recorded when taking proceedings. In this case, merely averment measures (testimony and explanations) cannot be considered to be evidence, since they do not contain any actual data and they are just a "tool" used to obtain actual data from the source of evidence and record it (Gifford, 1992). Consequently, it should be concluded that the essence of evidence in cases of administrative offences should represent the unity of evidence content and form and, in certain cases, of averment measures, as, on the one hand, the existence of particular actual data in the form other than that established by the law without sources confirming actual data, which was obtained and recorded by averment measures other than those established by the law, will not give grounds for the recognition of such actual data as evidence. On the other hand, sources of actual data or measures taken when obtaining actual data, which do not contain recorded data on circumstances to be averred, should not be considered to be evidence either. In view of the above, it should be emphasized that the concept of evidence established in Article 256 of the CAO, which covers only actual data on circumstances to be averred in the case and averment measures specified in a separate paragraph, which are used to record this actual data, is not completely accurate in a theoretical sense, therefore, it makes sense to change it by indicating that evidence covers not only actual data, but also its sources and measures determining it, and to divide averment measures established in the second paragraph of this provision into sources of evidence and averment measures.

Despite shortcomings in the above-mentioned concept established by the legislation, the structure of evidence should be made up of the unity of three components: actual data, the source of evidence and, in certain cases, the averment measure.

Persons who are entitled to collect, examine and assess evidence are called averment entities. This concept covers public authorities and/or their authorized officials, courts and participants in the proceedings (the person who is made administratively liable, the victim and their representatives). It should be stressed that witnesses, experts and specialists are not considered to be averment entities, since they are not entitled to provide evidence, yet have the duty to report all known information on particular issues.

We note that relation of obtained, presented and collected evidence to the case of administrative offence is established by institutions (officials) drawing up records of administrative offence and/or considering relevant cases. Connection of evidence is undoubtedly ensured if a material rule of law is properly applied. This means that actual data which is confirmed by provided evidence should constitute an averment object the content of which is revealed by a properly applied material rule of law.

The SACL has noted that, in such cases, a record of administrative offence should clearly formulate the essence of the charge brought against the offender and prove this charge by using the evidence in the case, and any article of the CAO, its paragraph or any other legal act which has been indicated inaccurately represents a mistake of the proof (Lietuvos vyriausiasis administracinis teismas, Nr. N-62-3167/2008). It is worthwhile stressing that in cases where there are grounds for thinking that an act indicated in the record of administrative offence can be qualified under the article of the CAO providing for a more serious offence in the CAO, applying by analogy Paragraph 2 of Article 256 of the Code of Criminal Procedure, participants in the court hearing should be informed of this possibility (Lietuvos vyriausiasis administracinis teismas Nr. N-575-2303/2008).

Evidence obtained, collected and provided by unqualified entities is recognized as inadmissible evidence in cases of administrative offences. For example, considering the case (Lietuvos vyriausiasis administracinis teismas Nr. N-261-1359/2009) of violation of Paragraph 2 of Article 124 of the CAO, the SACL stated that police officers who recorded the fact of speeding by using the speed meter "Barjer-2M" had not familiarized themselves with the instructions on how to use technical measuring devices, had not passed the test and could not know how to use this device, therefore, doubts arose over admissibility of actual data recorded by the readings of the speed measuring device.

Evidence Collection

Officials and participants in the proceedings who have the rights and duties granted by the law to collect or present evidence, examine and assess it, and also express their opinion on circumstances that are to be proved are considered to be averment entities in the case of administrative offence.

The duty of averment in cases of administrative offences is assigned to the institution (official) investigating and considering the case (Valstybes zinios, 1985, Nr. 42-1624). The offender cannot be obliged to aver that he/she is not guilty. The victim (his/her representatives) is also not bound by law to aver, currently averment is their right, rather than duty. He/she can give explanations and express his/her opinion on circumstances that are to be proved and on evidence assessment.

Evidence collection begins in the initial stage of the process of administrative offence case – in the investigation of the case of administrative offence – and can proceed further in the stage of considering the case, the stage of appealing against the ruling and of considering the appeal in the court of first instance. It should be noted that the possibility for collecting evidence in the court of appeal instance is limited and implemented in exceptional cases only. Taking into account the above, the process of evidence collection can be divided into the following two conditional stages:

1) Evidence collection before drawing up of the record of administrative offence;
2) Evidence collection before the institution and/or the court of first instance considering the case of administrative offence reach a decision in the case.

It is laid down in Paragraph 3 of Article 256 of the Code of Administrative Offences that evidence is collected and, if necessary, an expert or a specialist is assigned by officials who are entitled to draw up a record of administrative offence and by a body (official) considering the case of administrative offence. This provision imposes an exclusive duty of evidence collection on entities drawing up records of administrative offence and considering cases. Moreover, the aforesaid provision cannot be interpreted to mean that the institution (official) drawing up a record of administrative offence can be exempted from the duty to collect evidence or submit incomplete, inexhaustive or low-quality material of the case to the institution (official) or the court considering the case (Valstybes zinios, 2008, No. 62-2353).

Taking into account the fact that Article 282 of the CAO provides for rather short terms of the consideration of an administrative offence case and Article 248 of the CAO obliges entities drawing up records of administrative offence to duly, comprehensively, fully and objectively discover data of each case, it should be concluded that the institution (official) drawing up a record has to properly preliminarily qualify an act and gather sufficient evidence confirming relevant circumstances in order to state the fact of the commission of the administrative offence and the guilt of the person who is made administratively liable and to qualify the offence on the basis of this evidence. Otherwise, due to shortcomings in the record of administrative offence and the case material as a result of insufficient evidence and due to failure to remedy these shortcomings during the consideration of the case, a ruling issued in the case of administrative offence will be unlawful or the material of administrative offence case will be returned to the institution (official) that has drawn up a record of administrative offence, when an entity considering the case is unable to eliminate the shortcomings on their initiative. For example, in the case (Lietuvos vyriausiasis administracinis teismas, Nr. N-62-363/2007) of violation of Paragraph 1 of Article 159 of the CAO, B. T. was made administratively liable, since he had erected a new building in the place of the demolished outdoor kitchen in the protective area in Labanoras Regional Park by Stirniai Lake. The record of administrative offence was drawn up after a casual encounter with B. T. near the building which was not owned by him. When drawing up the record, the reason for his presence near the building and his relation to illegal construction were not determined. In view of the above, the Supreme Administrative Court of Lithuania (hereinafter referred to as "SACL") ruled that, when drawing up the record and imposing a penalty on its basis, circumstances relevant to the case were not determined, rather assumptions were made, therefore, the ruling in the case of administrative offence should be overturned and the case should be returned for reconsideration by the institution which had imposed the administrative penalty.

Paragraph 3 of Article 256 of the CAO entitles not only institutions (officials) considering cases of administrative offences to collect evidence, but also district courts of districts (cities) (judges of district courts) considering cases of administrative offences. The Constitutional Court of the Republic of Lithuania has stressed that a court cannot be a passive observer of the proceedings in cases and "the following situations are likely to develop: during the court hearing, circumstances which are relevant to the making of the right decision, yet have not been established by the person drawing up the record of administrative offence, emerge or the material submitted to the court is insufficient for the making of the right decision. In such a case, seeking to objectively and tho-

roughly investigate all the circumstances of the case and to establish the truth in it, a court (judge) has powers to take necessary proceedings by themselves, as administration of justice cannot depend only on what material of the case has been submitted to the court." (Zin., 2008, Nr. 62-2353). It should be emphasized that administrative courts have not only the analogous right (Law on the Procedure of Administrative Cases, Article 57, Paragraph 4), but also the duty to take an active part in the examination of evidence, the establishment of all the circumstances relevant to the case and their comprehensive and objective investigation. This duty has to be implemented through the consideration of cases of administrative offence by regional administrative courts and it is implemented in the court of appeal instance only in exceptional cases when evidence collection does not require high additional expenditures and does not form a basis for the application of subparagraph 2 of Paragraph 1 of Article 141 of the Law on the Procedure of Administrative Cases (hereinafter referred to as "LPAC"). This is usually implemented in practice when the court of appeal instance or the appellant expresses a doubt over the propriety of evidence examination and assessment carried out by the court of first instance.

Such practice of Lithuanian administrative courts orients courts to play an active role in the procedure and not to be limited to the function of the assessor of evidence presented by the parties. The laws regulating the administrative procedure of Lithuania do not, however, clearly establish the court's duty to examine circumstances of the case on its own initiative, unlike, for example, the Law on the Procedure of Administrative Courts of Germany, Article 86, Paragraph 1. In Germany, unlike in the civil procedure, in the administrative procedure the parties do not have the duty to present evidence (so-called "formal" burden of averment), since the court collects evidence on its own initiative. The rules of averment burden become relevant only when, as a result of failure to collect sufficient evidence, a decision is made as to what party in the case should bear negative consequences of failure to prove legally significant circumstances (so-called "material" burden of averment) (Kopp, Schenke, 2005). In each appeal to the administrative court it is necessary not only to state circumstances on which the applicant bases his/her requirements, but also to present evidence confirming them (LPAC, Article 23, Paragraph 1, sub-paragraph 6, Article 24, Paragraph 1) (Valstybes zinios, 2000, Nr. 85-2566). Although the administrative court can collect evidence on its own initiative, this should be done by the court when it sees that the party is not able to properly defend his/her rights himself/herself or other circumstances exist substantiating the court's intervention in the process of evidence collection.

The conducted research allows us to state that institutions (officials), district courts of districts (cities) (judges of district courts) and regional administrative courts considering cases of administrative offences frequently do not implement the duty to gather additional evidence in the case of administrative offence, but rather choose the following options of solving the case:

- To dismiss a case of administrative offence, giving reasons that the incident and the composition of an administrative offence are absent, since no sufficient evidence has been collected to state the fact of violation or the guilt of the person who is being made administratively liable.

For example, Kaunas District Court issued a ruling on 3 April 2008 to dismiss the case of administrative offence against K. B. concerning violation of Paragraph 1 of Article 41 of the CAO due to lack of evidence in the case confirming that K. B. had committed the violation incriminated to him. Having considered this case under the appeal procedure, the SACL ruled that the State Labour Inspectorate of the Republic of Lithuania submitted low-quality material of administrative offence case to the court, since it failed to gather all necessary evidence in the case, i.e. it did not question persons who could confirm or deny indictment statements and, as the case contained totally opposite versions of the considered violation, their testimony could be significant for the decision on whether or not the person being made administratively liable was guilty. In this case, incompleteness of the material could be eliminated through the duty of the court (judge) to collect evidence by themselves, which was not performed in this case (Lietuvos vyriausiasis administracinis teismas, Nr. N-575-684/2009).

- To return a case of administrative offence to the institution drawing up the record of administrative offence, giving reasons that it is necessary to conduct an additional investigation of circumstances and collect extra evidence.

For example, Klaipeda Regional Administrative Court passed a judgement on 19 September 2008 to overturn the decision of Taurage District Police Unit and to hand over the case to Palanga Town Police Unit, ruling that it was necessary to carry out an additional investigation of circumstances in the case of violations of Paragraph 1 of Article 127 and Paragraph 1 of Article 130 of the CAO, i.e. to identify the cause of defects present on the car of the person made administratively liable. Having considered this case under the appeal procedure, the SACL ruled that, after establishing that the issue of insufficient evidence arose in the case, the court was supposed to gather extra evidence on its initiative, rather than hand this

duty over to the institution which drew up the record. In view of the above, the judgement of Klaipeda Regional Administrative Court was overturned and the case was returned to the same court for re-consideration (Lietuvos vyriausiasis administracinis teismas, Nr. N-575-2677/2009).

Taking into account the fact that legislation provides for as many as two possible cases of evidence collection during the consideration of a case of administrative offence, it should be concluded that the practice chosen by institutions (officials) and courts which has been specified in the above examples is improper, harmful and impermissible, since it violates Article 248 of the CAO, the principles of procedure urgency and expedition, and procedural provisions regulating the consideration of administrative offence cases.

Considering an appeal against a ruling in the case of administrative offence, the regional administrative court should not take over functions that are assigned to the institution empowered to draw up a record of administrative offence (Raizys, 2008), as, in this case, the border between the functions performed by institutions of judicial power and institutions of executive power disappears. Therefore, the procedural law should lay down specific grounds "for the return of the case as a result of incomplete investigation of case circumstances to the institution empowered to draw up a record of administrative offence. The SACL has however, formulated grounds of this nature in its practice, stressing that the return of the case of administrative offence to the institution which has drawn up a record is possible, yet in exceptional cases when "the record has been drawn up improperly – essential <...> elements of the composition of administrative offence have not been indicated and the record or case material has other essential shortcomings impeding the consideration of the case in court." (Lietuvos vyriausiasis administracinis teismas, 2005, Nr. 7). In such a case, after passing a reasoned judgement specifying the shortcomings identified, the court should return the case to the institution which has drawn up the record to revise the record or to additionally investigate the case subject to the circumstances of the case. Such proceedings are only possible if the court is unable to eliminate the aforesaid shortcomings on its initiative and the presence of these shortcomings has considerable significance for the establishment of violation and guilt facts. In view of the above, we believe that in the process of consideration of administrative offence case, proceedings taken by the court which has many possibilities for collecting evidence should, first of all, be directed at the implementation of the objectives set out in Article 248 of the CAO and the establishment of the truth in the case, rather than at the refusal to perform additional functions of institutions of executive power.

Under Paragraph 1 of Article 272 of the CAO, a person who is being made administratively liable has the right, but not the duty to provide the institutions considering the case with evidence confirming or denying the fact of the commission of administrative offence, his/her guilt and other circumstances related to the violation. The above-mentioned provision, in conjunction with Paragraph 2 of Article 53 of the LPAC and Paragraph 3 of Article 6 of the European Convention on Human Rights, guarantee the right of defence for a person being made administratively liable. Usually a person being made administratively liable, seeking to avoid the application of administrative liability and the imposition of an administrative penalty, is concerned with the collection and provision of exculpatory evidence[1], however, denial of guilt without providing confirming evidence should not be considered to be reasonable. The SACL has emphasized that the right of a person who is being made administratively liable to provide evidence is exercised improperly when, in the appeal brought to the court, this person disagrees with the conclusions of the court which are unfavourable to him/her, and presents his/her own version and evidence assessment acceptable to him/her when the data convenient to this person is manipulated and essential actual circumstances are withheld or presented from the positions beneficial to him/her, yet evidence confirming all this is not presented (Vyriausiasis administracinis teismas, Nr. N-62-343/2007). This means that the evidence provided by the person who is being made administratively liable will be recognized as proper evidence in the case of administrative offence, if it does not distort real actual circumstances surrounding the violation, is objective and has all the discussed qualities of evidence.

A person who is being made administratively liable is not always able to present evidence on his/her own, since he/she does not have the right to take certain proceedings. In such cases, a person being made administratively liable can apply to the institution (official) or the court considering the case to sue out evidence relevant to the consideration of the case. Unfounded rejection of this application infringes the person's right to present evidence. For example, in the considered case (Lietuvos vyriausiasis administracinis teismas, Nr. N-62-976/2008), the SACL stated that, seeking to prove her innocence, S. T. applied to the Vilnius Regional Administrative Court to sue out the video recording showing the traffic accident

[1] This fact corresponds to the circumstance established during the research: the surveyed officials and civil servants confirmed that approximately 83% of persons who are made administratively liable actively exercise the right of defence.

which was considered in the case. The SACL established that the aforesaid video recording should be considered relevant to the considered case, nevertheless, the Vilnius Regional Administrative Court turned down the application of S. T. In view of this, the SACL ruled that procedural rights of S. T. were thus infringed, as her right to present evidence and defend herself from the charge brought against her was restricted.

Under Paragraph 2 of Article 273 of the CAO, the victim is also entitled to participate in the averment process by presenting evidence. The victim also has the right to apply to the institution (official) or the court considering the case of administrative offence to sue out evidence.

Taking into account the fact that further process of the case consideration, the content of the ruling issued in the case and the final outcome of the case consideration depend on the quality and quantity of evidence collected and presented during the investigation and consideration of the case of administrative offence, we believe that the person gathering evidence should carry out an early examination and assessment of every collected and obtained piece of evidence by analyzing it and determining its admissibility, connection, certainty, reliability, consistency and sufficiency. Such proceedings taken would guarantee submission of proper and thorough material of administrative offence case to the institution considering the case, would speed up consideration of the case and prevent possible disappearance of uncollected evidence. Actual circumstances of the commission of an administrative offence are determined by institutions (officials) investigating and considering the case, i.e. the body (official) investigating and considering the case has the duty of averment in cases of administrative offence (Lietuvos vyriausiasis administracinis teismas, Nr. N-62-976/2008).

When gathering material for the article, it was established that the above-mentioned duty is usually fulfilled by more than two thirds of the officials surveyed (73%), while the rest (27%) tend to neglect this duty, therefore, the need for the collection of additional evidence often arises during the consideration stage of administrative offence cases.

Conclusions

The conducted research allows us to state that the essence of evidence in cases of administrative offences should be made up of the unity of evidence content and form and, in certain cases, averment measures.

The concept of evidence established in Article 256 of the CAO is not accurate in a theoretical sense, therefore, it is purposeful to change it by indicating that evidence covers not only actual data, but also its sources and measures determining it, and to divide averment measures established in the second paragraph of the provision into sources of evidence and averment measures.

Actual data which is confirmed by provided evidence should, during the consideration of the case, form an averment object the content of which is revealed by a properly applied material rule of law.

Rules of law do not specifically establish to what extent a judge should be active in the collection of evidence during his/her consideration of an administrative dispute case. We believe that the court would objectively examine all the circumstances of the case, if the court and the parties to the dispute applied the principle of cooperation. The administrative court should collect evidence on its own initiative, when it sees that the party is not able to properly defend his/her rights himself/herself or other circumstances exist substantiating the court's intervention in the process of evidence collection.

We consider that the entity gathering evidence should carry out an early examination and assessment of every piece of collected and obtained evidence by analyzing it and determining its admissibility, connection, certainty, reliability, consistency and sufficiency. Such proceedings taken would guarantee submission of proper and thorough material of administrative offence case to the institution considering the case, would speed up consideration of cases and prevent possible disappearance of uncollected evidence.

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Administracinių teisės pažeidimų bylų įrodymų nustatymo praktika

Santrauka

Įrodinėjimą administraciniame procese reglamentuoja du pagrindiniai teisės aktai: Lietuvos Respublikos administracinių teisės pažeidimų kodeksas (toliau – ATPK) ir Lietuvos Respublikos administracinių bylų teisenos įstatymas (toliau – ABTĮ), įtvirtinantys administracinių teisės pažeidimų bylų teiseną bei administracinių bylų teiseną ir nustatantys skirtingas įrodinėjimo taisykles. Įrodinėjimo priemonių taikymas įrodinėjimo procese nėra išsamiai reglamentuotas teisės aktų.

Mokslinėse publikacijose nepakankamai išsamiai nagrinėjami įrodinėjimo administraciniame procese klausimai. Mokslininkai, dažnai aptardami įrodinėjimą administracinių bylų teisenoje, labai mažai dėmesio skiria įrodinėjimui administracinių teisės pažeidimų bylų teisenoje. Be to, tam tikros ATPK įrodinėjimo procesą reglamentuojančios nuostatos nebeatitinka pasikeitusių visuomeninių santykių realijų, atrandama nemažai reglamentavimo trūkumų (pavyzdžiui, neišsamus įrodinėjimo priemonių sąrašas). Todėl šiame straipsnyje aptariamas teisinis ir praktinis įrodinėjimo proceso administracinių teisės pažeidimų bylose pagrindas, kuris iliustruojamas konkrečiais teismų praktikos pavyzdžiais ir grindžiamas Lietuvos vyriausiojo administracinio teismo (toliau – LVAT) suformuota praktika.

Įstatyminis įrodymų sampratos reglamentavimas nėra pakankamai aiškus ir tikslus, todėl įrodymų sampratos struktūrinių dalių aptarimas yra populiari mokslininkų diskusijų tema. Straipsnyje nagrinėjama mokslininkų pozicija dėl įrodymų administracinėje teisenoje struktūros ir dalių, remiamasi galiojančiais teisės aktais ir vyraujančia teismų praktika.

Atlikus tyrimą, atskleidžiama įrodymų rinkimo administracinėje teisenoje teisinės, teorinės ir praktinės problemos. LVAT nutarčių pagrindu nustatomos ir pateikiamos esminės problemos, renkant įrodymus administracinių teisės pažeidimų bylose.

Dažnai administracinių teisės pažeidimų bylas nagrinėjančios institucijos (pareigūnai), rajonų (miestų) apylinkių teismai (apylinkių teismų teisėjai) ir apygardų administraciniai teismai neįgyvendina pareigos rinkti papildomus įrodymus administracinio teisės pažeidimo byloje ir pasirenka šiuos bylos sprendimo variantus:

1) nutraukti administracinio teisės pažeidimo bylą motyvuojant tuo, kad nėra administracinio teisės pažeidimo įvykio ir sudėties, kadangi nesurinkta pakankamų įrodymų pažeidimo faktui ar administracinėn atsakomybėn traukiamo asmens kaltei konstatuoti;

2) administracinio teisės pažeidimo bylą grąžinti administracinio teisės pažeidimo protokolą surašiusiai institucijai, motyvuojant tuo, kad būtina atlikti papildomą aplinkybių tyrimą, surinkti papildomus įrodymus.

Straipsnio autoriai LVAT nutarčių pagrindu prieina prie išvados, kad dažnai vyraujanti institucijų (pareigūnų) ir teismų pasirinkta praktika yra netinkama, žalinga ir neleistina, kadangi pažeidžia ATPK 248 str., proceso greitumo ir operatyvumo principus bei administracinių teisės pažeidimų bylų nagrinėjimą reglamentuojančias procesines nuostatas.

Atsižvelgiant į tai, kad nuo administracinio teisės pažeidimo bylos tyrimo ir jos nagrinėjimo metu surinktų ir pateiktų įrodymų kokybės ir kiekybės priklauso tolesnė bylos nagrinėjimo eiga, priimamo nutarimo byloje turinys ir galutinis bylos išnagrinėjimo rezultatas, manytina, kad įrodymus renkantis subjektas turėtų atlikti išankstinį kiekvieno surinkto ir gauto įrodymo tyrimą ir vertinimą, išanalizuodamas jį ir nustatydamas jo leistinumą, sąsajumą, tikrumą, patikimumą, neprieštaringumą ir pakankamumą. Tokie atlikti veiksmai garantuotų tinkamos ir išsamios administracinio teisės pažeidimo bylos medžiagos pateikimą bylą nagrinėjančiai institucijai, paspartintų bylų nagrinėjimą ir užkirstų kelią galimam nesurinktų įrodymų išnykimui. Faktines administracinio teisės pažeidimo padarymo aplinkybes išaiškina bylą tiriančios ir nagrinėjančios institucijos (pareigūnai), t. y. pareiga įrodinėti administracinio teisės pažeidimo bylose priklauso organui (pareigūnui), tiriančiam ir nagrinėjančiam bylą[2]. Renkant medžiagą straipsniui, nustatyta, kad minėtą pareigą paprastai įgyvendina

[2] Lietuvos vyriausiojo administracinio teismo 2009 m. liepos 24 d. nutartis administracinėje byloje Nr. N-662-1783/2009.

daugiau nei du trečdaliai apklaustų pareigūnų (73 proc.), o kiti (27 proc.) yra linkę nevykdyti šios pareigos, todėl nagrinėjant administracinių teisės pažeidimų bylas, dažnai kyla papildomų įrodymų surinkimo poreikis.

Straipsnyje **apibendrinama**, kad tam tikri faktiniai duomenys, neatitinkantys įstatymo nustatytos formos neturint duomenis patvirtinančių šaltinių ir gauti bei užfiksuoti ne įstatyme nustatytomis įrodinėjimo priemonėmis, nepripažįstami įrodymais.

Atliktas tyrimas leidžia konstatuoti, kad įrodymų esmę administracinių teisės pažeidimų bylose turėtų sudaryti įrodymų turinio, formos ir tam tikrais atvejais įrodinėjimo priemonių visuma.

ATPK 256 str. įtvirtintą įrodymų sąvoką tikslinga pakeisti ir nurodyti, kad įrodymai apima ne tik faktinius duomenis, bet ir jų šaltinius ir juos nustatančias priemones, o šios nuostatos antroje dalyje įtvirtintas įrodinėjimo priemones – išskaidyti į įrodymų šaltinius ir įrodinėjimo priemones. Faktiniai duomenys, kuriems patvirtinti pateikiami įrodymai, nagrinėjant bylą, turi sudaryti tokį įrodinėjimo dalyką, kurio turinį atskleidžia tinkamai pritaikyta materialioji teisės norma.

Teisės normos konkrečiai nenustato, kiek aktyvus turi būti teisėjas, rinkdamas įrodymus, kai nagrinėja administracinio ginčo bylą. Manoma, kad teismas objektyviai ištirtų visas bylos aplinkybes, jei kartu su ginčo šalimis vadovautųsi kooperacijos principu. Administracinis teismas turėtų rinkti įrodymus savo iniciatyva, kai mato, kad šalis pati negeba tinkamai ginti savo teisių arba yra kitokių aplinkybių, pagrindžiančių teismo įsikišimą į įrodymų rinkimo procesą. Teismas kaip vienas subjektų, turinčių teisę rinkti įrodymus, iškilus abejonių turi teisę patikrinti informacijos pripažinimo tinkamumą.

Galima teigti, kad įrodymus renkantis subjektas privalėtų atlikti išankstinį kiekvieno surinkto ir gauto įrodymo tyrimą ir vertinimą, išanalizuodamas jį ir nustatydamas jo leistinumą, sąsajumą, tikrumą, patikimumą, neprieštaringumą ir pakankamumą. Tokie atlikti veiksmai garantuotų tinkamos ir išsamios administracinio teisės pažeidimo bylos medžiagos pateikimą bylą nagrinėjančiai institucijai, paspartintų bylų nagrinėjimą ir užkirstų kelią galimam nesurinktų įrodymų išnykimui.

Pagrindiniai žodžiai: įrodinėjimo priemonės, administracinio teisės pažeidimo bylos procesas, įrodymų leistinumas, sąsajumas.

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