

DISCIPLINARY PENALTIES FOR CIVIL SERVANTS

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Abstract: *Disciplinary liability consists of a set of legal rules which penalize disciplinary violation, namely the act, in relation to one's work, which consists of a culpable act or omission committed by the employee. The trigger of disciplinary liability is the culpable breach of service obligations by the employee.*

The disciplinary liability of civil servants is governed by Law no. 188/1999 on the status of civil servants.

The culpable violation by civil servants of duties pertaining to public office they hold and of the rules of professional and civic conduct provided by law constitutes disciplinary violation and shall result in their being disciplinarily liable.

Disciplinary liability has a threefold function, namely punitive, preventive and educational.

The Statute of the Civil Service governs the general regime of legal relations between civil servants and the state or local government, through autonomous administrative authorities or the public authorities and institutions of central and local public administration, hereinafter referred to as service relations. The purpose of law is to ensure, in accordance with the legal provisions, a stable, professional, transparent, efficient and impartial public service, in the interests of citizens, as well as the authorities and public institutions of central and local public administration.

The culpable violation by civil servants of duties pertaining to public office they hold and of the rules of professional and civic conduct provided by law constitutes disciplinary violation and shall result in their being disciplinarily liable.

When establishing the disciplinary penalty, due consideration will be given to the causes and severity of the disciplinary violation, the circumstances in which it was committed, the degree of guilt and consequences of violation, the general behavior of the civil servant during service, and the existence of other disciplinary penalties in his background, which have not radiated under the law.

Keywords: *liability, civil servant, disciplinary*

Disciplinary penalties are coercive measures prescribed by law, with a strong educational character, aimed at defending the disciplinary order, developing the spirit of responsibility for the diligent performance of official duties and compliance with rules of behavior, as well as preventing acts of indiscipline¹.

In the case of civil servants, disciplinary penalties constitute an administrative decision, a unilateral act, like the act of investiture².

Disciplinary penalties are aimed at defending order and discipline in work units, educating civil servants in the spirit of diligent fulfillment of duties and preventing acts of indiscipline.

Disciplinary penalties are regulated according to the principle of legality, being an application of the principle of criminal liability contained in the Latin adage *nullum crimen sine legem, nulla poena sine legem*. This means that they are expressly and exhaustively provided by law, and their application in terms of duration and amount must be in strict compliance with the law³.

¹ In labor law, disciplinary penalties are measures in connection with the execution of the individual contract of employment, being reflected in the consequences they produce, solely on the legal relation of employment, without affecting other personal and patrimonial rights of the employee (Ghimpu S., Țiclea A., *Dreptul muncii*, ediția a II-a, Ed. All Beck, București, 2001, p. 400).

² Călinoiu C., *Răspunderea administrativ-disciplinară a funcționarilor publici*, în *Revista Română de Dreptul Muncii*, nr. 1/2002, p. 50.

³ Sida A., Berlingher D., *Teoria generală a dreptului*, Editura Cordial Lex, Cluj Napoca, 2012, p. 172.

As a result, the application or other forms or means of coercion, outside those provided by law, is not allowed. The application of such measures, without legal basis, would lead to its nullity.

Disciplinary penalties have the following distinguishing features⁴:

- they have a legal character, in the sense that they cannot intervene in the absence of legal provisions;

- they can only intervene after a disciplinary violation has been committed;

- they are coercive measures;

- they constitute a unilateral act of the management of the establishment or public authority;

- they have a personal character;

- they seek to either remove a state of danger, or protect persons or personal or public interests, or prevent antisocial acts;

- some disciplinary penalties are general in character, in that they apply to all civil servants, while others have a specific character, in that they only apply to certain categories of civil servants;

- the cumulation of disciplinary penalties is not allowed: the civil servant shall be dealt one disciplinary penalty for one disciplinary violation.

In the literature, disciplinary penalties have been classified according to two criteria: 1°. the staff category to which it applies; 2°. the effects produced by their application.

1°. According to the staff category to which disciplinary penalties apply, they are divided into: a) general penalties provided for in the Labor Code, Law 53/2003 and internal regulations; b) specific penalties which are set out in the staff statutes or in disciplinary statutes applicable to certain employment sectors or professions⁵.

2°. The second category includes predominantly moral penalties and predominantly material penalties.

⁴ Rusu I., *Drept administrativ*, Ed. Lumina Lex, București, 2001, p. 295; Iorgovan A. *Tratat de drept administrativ*, vol. II, Ed. Nemira, București, 1996, p. 231-232; C. Călinoiu, *op. cit.*, p. 50-51.

⁵ It is worth mentioning as an example: rules on labor discipline and liability of magistrates comprised in Chapter II Law no. 303/2004 on the statute of judges and prosecutors.

Disciplinary penalties for civil servants have been classified in the literature into⁶: moral penalties; patrimonial penalties; penalties that affect the civil servant's career and penalties which cause the termination of employment.

The Statute of the Civil Service only regulates disciplinary penalties, without giving any details on how to apply each of these penalties. The law only requires that the disciplinary penalty be individualized according to certain criteria, such as: the causes and severity of the disciplinary violation, the circumstances in which it was committed, the degree of culpability, consequences of violation, the general behavior at work, and the existence of other disciplinary penalties in his background, which have not radiated under the law⁷.

The severity of the violation is determined depending on the result it produced and the importance of the service obligation that has been violated. When the act of civil servant is connected with improper fulfillment or non-fulfillment of essential tasks at work, or caused a significant disruption or material damage to the public institution, the disciplinary penalty will be more severe.

There is also a mandatory preliminary procedure to be performed before dealing a disciplinary penalty to a civil servant, which involves performing preliminary investigation of the fault and the hearing of those involved. Thus, disciplinary penalty may be only applied after prior disciplinary investigation has been conducted and only after the civil servant has been heard⁸. The hearing of the civil servant must be recorded in writing, under penalty of nullity. The civil servant's refusal to appear at the hearing or to sign a declaration on the disciplinary violations he is accused of shall be recorded in the minutes.

⁶ Vedinaş V., *Statutul funcționarului public*, Ed. Nemira, Bucureşti, 1998, p. 234-235.

⁷ Criteria for individualizing disciplinary penalty are also found in labor law, in terms of the disciplinary liability of employees, namely: the circumstances in which the act was committed, the employee's degree of culpability; the consequences of disciplinary violation; the general behavior of the employee; any disciplinary penalties previously dealt to the employee.

⁸ Bucharest Court of Appeal, Administrative and Fiscal Litigation Section, civil sentence no. 1506 of 01 06 2009.

The Statute of the Civil Service expressly and exhaustively sets, in art. 77 para. 3⁹, that the disciplinary penalties for civil servants are as follows:

- written reprimand;
- reduction of wages by 5-20% over a period of up to 3 months;
- suspension of the right to advancement in pay scales or, where appropriate, promotion in public office for a period of 1 to 3 years;
- demotion in pay scales or demotion in the public service for a period of up to one year;
- dismissal from public office.

The *reprimand* is the most lenient disciplinary penalty and consists of a written warning to the public servant who has committed a disciplinary violation for the first time, that he has not adequately fulfilled one or more duties or that he has violated a certain rule of behavior in the establishment, calling his attention to the dangers and consequences of his act and on his reform in the future¹⁰.

This penalty usually applies to a civil servant who has committed a disciplinary violation for the first time, which does not require a more severe disciplinary penalty for reform. A reprimand can be dealt directly by the head of the public authority or institution, at the suggestion of the head of the department in which the civil servant operates. The disciplinary penalty of reprimand can be dealt directly by the person legally competent to appoint to public office. Disciplinary penalties may only be imposed after a preliminary investigation of the violation and after hearing the civil servant¹¹. Written reprimand does not have a continuous character to be applied for a certain period of time. This penalty is radiated by law within 6

⁹ Law 188 of 1999 on the Statute of the Civil Service, republished in the Official Gazette of Romania, part I, no. 365 of 29 May 2007, as amended and supplemented.

¹⁰ Preda M., *Tratat de drept administrativ - Partea generală*, ediția a III-a, ed. Lumina Lex, București, 2000, p. 211.

¹¹ Bucharest Court of Appeal, Section 8 Administrative and Fiscal Litigation, civil sentence no. 1506 of 01 06 2009.

months of the application, which is not equivalent, however, to the application of the written reprimand for a period of 6 months¹².

Reduction of wages by 5-20% over a period of up to 3 months is a patrimonial disciplinary penalty applicable to civil servants who, intentionally or by negligence, committed a serious disciplinary violation which resulted in the production of damage to the public institution, or who persevered in disciplinary violation after being reprimanded. The application of this measure will take into account the disciplinary record of the person sanctioned.

Suspension of the right to advancement in pay scales or, where appropriate, promotion in public office for a period of 1 to 3 years apply to those civil servants who are not first offenders and who commit severe violations of labor discipline, producing serious damage to the public institution, or for committing a first offense which, owing to the gravity of the result produced, involves the application of this measure. The fact that the civil servant repeatedly commits minor disciplinary violations does not justify the application of this penalty, unless this denotes a continued negative attitude.

The penalty regards the right of advancement in professional ranks and the right of promotion to a higher public office, within the same class, as well as the right of advancement in class¹³.

Demotion in pay scales or demotion in the public service for a period of up to one year is the most severe disciplinary penalty that applies to civil servants while maintaining public office. This penalty applies when civil servants have committed repeated disciplinary violations for which lighter penalties were dealt, or if the committed a serious disciplinary violation. In this situation, the management of the public authority or institution believes that this sanction is sufficient to reform the civil servant. Demotion in the public service changes the public office relation in terms of two of its elements, namely, position and remuneration.

¹² Craiova Court of Appeal, Administrative and Fiscal Litigation Section, civil sentence no. 3633/2009.

¹³ Trăilescu A., *Drept administrativ*, ediția a 3-a, Ed. C. H. Beck, București, 2008, p. 161.

This disciplinary measure consists of transferring the civil servant to a lower position or a lower salary step. It is a complex penalty, as it affects both the civil servant's career and his material rights, since a different salary corresponds to every class, professional rank or category, higher than the one due to the previous class or category.

Demotion to a lower position occurs within the same class, with a corresponding reduction in salary, taking into account the specialized training and the profession of the civil servant.

The level of the lower position to which the civil servant can be transferred remains in the sole discretion of the management of the public institution. As a penalty that is dealt through an act of authority from the competent public authority, it is mandatory for the civil servant guilty of disciplinary violation, without requiring his consent¹⁴.

Dismissal from public office is the most severe disciplinary action which may be dealt to a civil servant, being equivalent to disciplinary termination of employment. Dismissal involves the termination of public office. This disciplinary penalty applies to civil servants through an administrative act of the person who has the legal competence to appoint to public office.

Dismissal from public office, according to art. 101 para. 1 of the Statute of the Civil Service, shall be ordered for reasons attributable to the civil servant in the following situations:

- repeated disciplinary violations or one disciplinary violation that had serious consequences;
- if a legal reason of incompatibility¹⁵ arose, and the civil servant does not act for its termination within 10 calendar days from the date when the case of incompatibility intervened.

Repeated disciplinary violations involve repeated infringement of professional duties by a public official, for which he was dealt a

¹⁴ This disciplinary penalty applies to severe or repeated disciplinary violations and not as a consequence of incompetence of the civil servant, which may result in the dismissal of the civil servant, meaning the termination of employment (Trăilescu A., *op. cit.*, p. 161-162).

¹⁵ Regarding the incompatibility of the magistrates in general sense, see Creț D. C., *Instituții de drept procesual civil*, vol. I, Ed. Casa Cărții de Știință, Cluj-Napoca, p. 45-46; regarding the incompatibility of the magistrates in particular sense, *ibidem*, p. 81-84.

disciplinary penalty, not restored until the moment of enforcement of the new penalty, or, although not previously penalized, the public institution is within term to punish all violations. To be considered for dismissal, it is not enough that the civil servant has committed more disciplinary violations, but it is necessary that the conduct of the civil servant show that he is incorrigible and, as such, can no longer be maintained in the institution.

The disciplinary violation is considered serious when the act of the civil servant has produced serious consequences, disturbing the smooth functioning of the public institution or has produced significant damage to it, or to the legal interests of a person. The law does not stipulate the criteria by which a disciplinary violation can be considered of such severity as to lead to the dismissal of the civil servant, but the act committed must have caused very serious consequences.

The severity of the disciplinary violation is assessed by the body that is authorized by law to deal disciplinary penalties. The assessment of severity could be facilitated by some additional details entered into organizational regulations or statutes of the various categories of civil servants, taking into account the specific branch of activity of the institution and the different categories of positions.

The administrative act dealing the penalty to the civil servant should include, under penalty of absolute nullity, the description of the act which constitutes disciplinary violation, the specifications of the minutes of the disciplinary panel, the reasons why the defenses of formulated by the civil servant during the preliminary disciplinary investigations were dismissed, the legal basis under which the disciplinary penalty is dealt, the period within which the disciplinary sanction may be disputed, the competent court to which the administrative act ordering the disciplinary penalty may be appealed¹⁶. The presentation of the act constituting disciplinary violation in the penalty decision should not be made generically, without any concrete elements. The description of the violation, made

¹⁶ Cluj Court of Appeal, Administrative and Fiscal Litigation Section, civil sentence no. 995 of 14 May 2007.

within the penalty decision, should include the time when the disciplinary violation was committed¹⁷.

If one of the cases of incompatibility provided by law intervenes, the civil servant has a period of 10 calendar days from the date when such incompatibility intervened to solve this problem. If the case of incompatibility is maintained after the expiry of 10 days, the civil servant will be dealt the disciplinary penalty of removal from office.

The administrative act ordering the dismissal of the civil servant shall be notified to the latter within five working days of the date of issuance by the head of the public authority or institution where the civil servant is employed. The notification of the administrative act must be made prior to the date of dismissal from public office.

In all cases, the competent body to deal the penalty should show concern for doing in a fair and individualized manner, observing the criteria set by law, as only a fair correlation of the penalty with the seriousness of the violation is likely to ensure the educational and preventive role of liability.

As regards the circumstances in which the disciplinary violation was committed, due consideration should be given to whether there is a cause that is likely to remove disciplinary liability, such as self-defense, state of necessity, physical or moral coercion, a case of force majeure, fortuitous event, mistrial.

The disciplinary penalty of reprimand is dealt directly by the head of the public authority or institution, at the suggestion of the head of the department where the civil servant is employed, whereas the other disciplinary penalties are only dealt by the head of the public authority or institution following the proposal of the disciplinary panel.

The proper functioning of public services necessarily requires strict compliance with the duties and powers of each position, within the established hierarchy. A junior civil servant is obliged to comply with the service orders given by the senior officer.

Compliance with orders of seniors is the expression of personal hierarchical subordination, underlying labor discipline, as a prerequisite

¹⁷ Galați, Court of Appeal, Administrative and Fiscal Litigation Section, civil sentence no. 822/R, of 24.01. 2008

for ensuring order in the labor and production process. Obviously, it is only service orders issued lawfully, in compliance with legal concerning the competence of the relevant body, that have any binding power. Failure to comply with an illegal order of a senior, as well as one which, although legal in content, has a clear appearance of illegality, does not constitute disciplinary violation. On the contrary, by executing a manifestly illegal order, the junior civil servant is held disciplinarily liable, this being different from the liability of the hierarchical senior who issued it.

Some illicit acts may contain both the constitutive features of disciplinary violation, and those of an offense or contravention. In such a situation, the civil servant will be dealt several coercive measures, according to the forms of liability whose conditions are met.

Disciplinary liability does not exclude criminal liability. The same act committed by a civil servant can affect both the social order in the major values protected by criminal law, and the disciplinary order of that unit or institution. Hence, the fact that the two liabilities may be cumulated.

If the management of the public authority or institution considers that the civil servant has committed criminal acts, the measure of dismissal cannot be ordered before the court has established his guilt by final judgment.

Both disciplinary and criminal liability involve committing illicit acts contrary to agreed standards, but differ in terms of the severity of the consequences it produces, i.e. the degree of disruption of relations that it achieves. Given that a gradual difference subsists between damaged items, in terms of their social dangerousness, criminal liability, once triggered, produces a cessation of the disciplinary, which means the cumulation of liabilities does not occur at par and simultaneously, but in a subsequence relation. This means that the unit cannot proceed to a disciplinary investigation and to dealing the disciplinary penalty in a manner that is parallel and separate from criminal proceedings.

Therefore, if a civil servant is accused of committing criminal acts, in connection with his work, which creates an incompatibility with exercising his position, the initiation of disciplinary proceedings shall be suspended until final resolution of the criminal trial. In other words, the

criminal keeps the disciplinary in place in the same way that it keeps the civil in place¹⁸.

The provisions of the final criminal judgment on the existence of the act, its author and his guilt have *res judicata* in the procedure for dealing disciplinary penalties.

Dismissal cannot be effected if the criminal court finds, by final judgment, that the act does not exist or that the civil servant is innocent. The lack of criminal liability, established by the court, does not prevent the civil servant from being held disciplinary liable, if the conditions required for dealing this legal penalty are met. Likewise, it does not preclude the concurrent engagement of other forms of legal liability for committing the same tort (civil, patrimonial, administrative)¹⁹.

Conclusions

Civil servants are obliged to fulfill their service duties with professionalism, impartiality and in accordance with the law, and refrain from any action which could harm natural or legal persons or the prestige of the civil service.

The culpable violation of service duties by civil servants entails, as applicable disciplinary, administrative, civil or criminal liability.

Disciplinary liability occurs in situations where the civil servant commits a culpable violation of obligations, including the rules of conduct. The existence of the illicit act is a prerequisite for holding the employee disciplinarily liable.

Disciplinary penalties may be death only after preliminary investigation of the offense committed by the civil servant and his hearing. The principle of proportionality of disciplinary the penalty, regulated in art. 77 para. 4 of Law no. 188/1999, expressly establishes that the individualization of the disciplinary penalty must take account of the causes and severity of the disciplinary violation, the circumstances in which it was committed, the degree of culpability and the consequences of violation, the general behavior during the

¹⁸ Ghimpu S., Marica P., *Desfacerea contractului de muncă în temeiul art. 20 lit. f din Codul muncii și în temeiul art. 13 lit. e din Legea 1/1970 în R.R.D. 6/1970*, p. 65.

¹⁹ Călinoiu C., *op. cit.*, p. 53.

service of the civil servant, and the existence of other disciplinary penalties in his history that were not radiated under the current law. The clarification of criteria that must be considered when individualizing disciplinary penalties under the statutory provision cited above show the importance of each of the criteria legally regulated when dealing disciplinary penalties.

Therefore, the analysis of the disciplinary penalty dealt to civil servants should give priority to circumstances relating to the act that constitutes a disciplinary violation, namely, the causes and severity of the disciplinary violation, the circumstances in which it was committed, the degree of culpability and the consequences of violation, and, subsequently, the general data characterizing the individual civil servant.

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