

## Some explanations regarding appeal in special disciplinary law

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### *Abstract*

*Our study aims to analyze the disciplinary procedure for contesting the application of disciplinary punishments for certain categories of staff, having as start point the general rules under which any disciplinary decision may be appealed to the courts regardless of the severity of the sanction imposed. Here we take into consideration the special rules applicable to teachers, policemen, civil servants, military and judiciary.*

*Keywords: disciplinary punishment, appeal, policemen, teachers, civil servants, judiciary*

According to article 268 paragraph 3 and 5 of the Labour Code, the penalty decision shall be communicated to the employee within 5 calendar days from date of issue, it shall take effect from and it can be appealed to competent courts within 30 days from the communication day<sup>3</sup>. Per a contrario, any disciplinary decision may be appealed to the courts no matter its severity. It's important to specify that the appeal does not suspend the enforcement of disciplinary sanction<sup>4</sup>.

For some personnel disciplinary sanctions may be appealed through hierarchical way. An example of this is provided by article 280 paragraph 1 of the Education Law no. 1/2011: in university education the sanction decision may be appealed by the punished persons employed in schools within 15 days from communication at the Disciplinary Board in school inspectorate or at the Central Disciplinary Board of the Ministry of Education, Research, Youth and Sports by the management, guidance and control personnel employed in school inspectorates and in Ministry of Education, Research, Youth and Sports. The legislator stipulates that the person's right to address to the court is guaranteed. However, this does not mean that the complaint to the (central) disciplinary board is likely to remove or to condition the punished person's right to address to the court, because this right is guaranteed by the same legal text, paragraph 10. Regarding didactic and research staff in higher education, although the law does not make any statement, we believe that the punished person may appeal the sanction decision to the university

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<sup>3</sup> The provisions are in full compliance with article 283, paragraph 1 b, under which *applications to settle a labour dispute are (...) made within 30 calendar days from the date of notification the disciplinary sanction.*

<sup>4</sup> Ion Traian Stefanescu, *Theoretical and practical treaty of employment law*, Legal Publishing House, Bucharest, 2010, p. 732.

senate for penalties consisting in written warning or basic salary reduction cumulated, when is appropriate, with management, guidance and control allowance or to the Central Disciplinary Board of the Ministry of Education, Research, Youth and Sports for the others penalties (suspension for a specified period of time, of the right of entering a competition for a higher teaching position or a management, mentoring or monitoring position as a member of doctoral, master or license committees; dismissal from a management position, disciplinary cancellation of employment). By analogy, according to article 280 paragraph 8, the appeal may be introduced in 15 days from the communication of the penalty decision.

The policeman can address a written complaint against a disciplinary sanction, to the superior head of the one who imposed the penalty within 5 days of becoming aware or after communication<sup>5</sup>. According to article 61 paragraph 2 of the Law no. 360/2002 regarding Policeman Statute, the discontented policeman can address the National Police Corps, who can represent his interest, against sanctions and bad decisions<sup>6</sup>. The superior shall decide within 15 days by reasoned decision in which he can order, according article 66 paragraph 3 of the M.A.I. Order no. 400/2004 on discipline of staff in the Ministry of Interior:

- Dismiss the appeal as unfounded or belated and maintaining the penalty;
- Admission of the appeal and lighten the penalty;
- Reconsideration of the case by a new Board of Discipline; its decision will be submitted within 3 working days;
- Admission of the appeal and cancel the penalty.

According to article 7 paragraph 1 of the Law no. 554/2004 regarding Administrative Litigation<sup>7</sup>, *a prejudiced person in his own right or in a legitimate interest by an individual administrative act, shall require the issuing authority or the superior authority, if any, (...) its revocation, before addressing to court*<sup>8</sup>. This legal text is imperative, a matter arising from the wording “shall require” and the

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<sup>5</sup> Article 61 paragraph 1 of Law no 360/2002 regarding policeman statute with art.65 paragraph 1 of Order no 400/2004 on discipline of staff in Ministry of Administration and Interior.

<sup>6</sup> Article 50 paragraph d of Law no 360/2002 regarding policeman statute.

<sup>7</sup> Published in the Official Gazette of Romania, Part I, no. 1154 of 7 December 2004, the latest changes and additions to Law no. 202/2010 regarding some measures to accelerate the settlement process (published in Official Gazette of Romania, Part I, no.714 of October 26, 2010).

<sup>8</sup> This provision is the special rule in relation to the procedural provisions which have a general nature. However, the correlation civil procedural rule should not be considered only in light of the report a general rule – specific rules, but by reference to other civil procedural rules governing the content elements of the prior proceedings, that the application instituting the administrative court. Oliviu Puie, *Administrative and judicial appeal*, Juridical Universe Publishing House, Bucharest, 2007, p. 16-17.

interests protected<sup>9</sup>. But here, the interest concerns, as stated in legal practice, in limiting the number of disputes brought before administrative courts by satisfying the requests of the complainants in this preparatory phase by the authority of the act itself, to the extent permitted by law<sup>10</sup>. As a matter of fact, the legislator has no left to the interested party or both parties to determine whether or not the preliminary procedure is made, but he conditioned the court referral by its performance. As it is a condition of initiating legal proceedings, the preliminary procedure is actually a limitation of the right to act in a material way, not of the right of procedural action which is guaranteed by article 21 of the Constitution<sup>11</sup>. Given these arguments, we can't agree with the solution of premature rejection<sup>12</sup> of the prior complaint as it is the absence of an exercise condition. Prematurely is the correct solution when the right to act doesn't exist. In the administrative litigation the right to act arises when the solution is communicated by the issuing authority or by a higher authority or at the end of the period where it had resolved the complaint, and, as a result of that, bringing proceedings before this date, justifies this solution. If the preliminary procedure is not accomplished, many authors and judicial practice reject it as inadmissible<sup>13</sup>. Both, the current Code of Civil Procedure (article 109, paragraph 3) and the new Code of Civil Procedure – law no. 134/2010 (article 188 paragraph 2) state that the failure of prior proceedings may be invoked only by the defendant as an exception, in contestation, under forfeiture penalty. The exception for lack of prior proceedings is an absolute exception with a special legal regime<sup>14</sup>, meaning that it can be invoked only by the defendant,

<sup>9</sup> Viorel Mihai Ciobanu, *Note II* decision of the Supreme Court of Justice no 416/19.04.1995 in "Law" Journal no 10/1997, p. 106-108. However, it is estimated that it would have been more useful to keep the solution offered by Law no 1/1967, that in cases where the administrative authority refuses to satisfy the demand for a right recognized by law or not even responds to, no longer be forced to go to that authority, giving them the same attitudes. In such situations, the prior administrative procedure not only prolongs the abuse of administrative authority. See, Viorel Mihai Ciobanu, *Theoretical and practical treaty of civil procedure*, second volume, National Publishing House, Bucharest, 1997, p. 11, footnote 14.

<sup>10</sup> See High Court of Cassation and Justice, panel of nine judges, decision no 258/2004, www.scj.ro.

<sup>11</sup> Constitutional text regards access to justice, and according to paragraph 1, any person may appeal to the courts for protection of rights, freedoms and legitimate interests.

<sup>12</sup> See legal practice about dismissing as premature for failure of prior proceedings, Court of Appeal Timișoara, civil decisions no 30/1996, no. 11/1996 "Law" Journal, p. 121; Court of Appeal Brasov, civil sentence no 65/1999 and in doctrine, see V. Prisăcaru, *Romanian administrative court*, All Beck Publishing House, second edition, 1998, p. 198.

<sup>13</sup> Viorel Mihai Ciobanu, *Tratat...*, work cited., tome II, p. 16; Gabriel Boroi, *Codul de procedură completat și adnotat*, tome I, All Beck Publishing House, Bucharest, 2001, p. 309; See High Court of Cassation and Justice, sentence no. 134/1991 in *Probleme de drept din deciziile Curții Supreme de Justiție (1990-1992)*, „Orizonturi” Publishing House 1993, p. 645-646; High Court of Cassation and Justice, administrative litigation section, sentence no. 416/1995 in „Dreptul” (Law) Journal no. 5/1996, p. 114.

<sup>14</sup> Absolute exemptions can be invoked by either party, the prosecutor or the court on its own at any time during the process, even direct appeals – see Mihaela Tabarca, *Civil Procedural Law*, Juridical Universe Publishing House, Bucharest, 2005, p. 491; Verginel Lozneau, *Exceptions background in the civil trial*, Lex Light Publishing House, 2003, p. 15.

through contestation. Failure to comply the law goes to forfeiture of raising the exception.

We conclude that the procedure of complaining to the superior of the one who ordered the disciplinary penalty is mandatory for those police officers dissatisfied with the sanction imposed. Using expressions such as “disciplinary sanction may be appealed” or “the policeman can challenge disciplinary sanction” is not likely to print an optional feature to the preliminary procedure. These undoubtedly enshrine the principle of availability of the challenge concerning the disciplinary sanction.

In theory<sup>15</sup>, it was considered that the preliminary procedure is an opportunity for both the authorities so that they can cancel their act and aren't obliged to participate in a lawsuit and for the injured party, who will be able to protect the right or the legitimate interest in an administrative way, avoiding referral to court.

According to article 61 subparagraph 3 of the Law no. 360/2002 concerning Policeman Statute and article 67 of the M.A.I. Order on discipline of staff in the Ministry of Interior, the police officer who is dissatisfied with the sanction imposed may apply to the court of administrative litigations. As the special law doesn't provide regulations concerning term of referral or the competent court, common law provisions are applied. Thus, according to article 10 paragraph 1 of the Law 554/2004 concerning administrative litigations<sup>16</sup>, the litigations regarding the administrative acts of sanction issued by local or county authorities (for example by the county chief) shall be resolved by the law courts in their administrative and fiscal departments<sup>17</sup>, and those issued by central authorities (for example by central inspectorate chief or by the Minister of Administration and Interior) shall be resolved by the courts of appeal departments. Article 10 subparagraph 3 provides: the plaintiff may address to the court from his domicile or from the defendant's domicile. In the second case it can't be claimed the lack of territorial jurisdiction. Article 11 paragraph 1 of the Law no. 554/2004 says that the requests regarding cancellation or amendment of the order or penalty provision may be introduced in 6 months by the date the motivated decision was communicated in which the superior head of the one who imposed it shall decide on the policeman appeal or in 15 days by registration – the legal term for resolve the complaint. The 6 month period is a limitation period, as paragraph 5 sentence one says, which means that in this case will be applied the common rules concerning the suspension, interruption and limitation reinstatement.

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<sup>15</sup> Verginia Vedinaş, *Some theoretical considerations and practical implications of the new Law on Administrative Litigation Law no 554/2005* in “Law” Journal no. 5/2005, p. 22.

<sup>16</sup> Legal provision is fully consistent with the provisions of article 2 point 1 of article 3 and item 1 of the Code of Civil Procedure relating to jurisdiction within the first instance courts and courts of appeal regarding processes and applications in the administrative court. See likewise article 94 point 1 and article 93 item 1 of the new Code of Civil Procedure – Law nr. 134/2010.

<sup>17</sup> Please note that the legal text refers to tax administrative courts, but given that it was not set up such specialized courts or for a better practical application of research, we refer to sections or, where appropriate, specialized panels for administrative and fiscal causes.

Exceptionally, for good reasons, the complaint may be made over the specified term, but no later than one year from the same date. In this case the term will be a decay one, according to article 11 paragraph 5, second sentence.

Article 80 of Law no. 188/1999 regarding Public servants statute and article 51 of the Government Decision no. 1344/2007 regarding rules of organization and functioning of disciplinary committees, provide that the public servant can challenge the disciplinary sanction imposed by the court, under the law<sup>18</sup>. We note that the legislator merely refers to the law, without establishing special rules concerning the internal procedure to challenge disciplinary sanctions or concerning the legal action. We conclude that the preliminary procedure is mandatory and that if the public servant is dissatisfied with the disciplinary sanction, he can require the issuing authority or the superior authority, if there is any, the cancellation in whole or in part of the act within 30 days from the communication date. Article 8 paragraph 1 of the Law no. 554/2004 says that the public servant who is dissatisfied with their response to the complaint or who hasn't receive a response within the time prescribed by law, can notify the competent administrative court to request the cancellation of the act, compensation for damages caused and compensation for moral damage. Here are applicable article 10 and 11 of the Law no. 554/2004 which were discussed before, relating the competent court to solve the public servant request and it's time limit.

According to article 70 of the Order no. 26/2009 of the Minister of National Defence for approval the Military discipline regulation<sup>19</sup>, the military dissatisfied with disciplinary sanctions can address to the direct command of the one who issued the sanctioning decision, by a written report which must argue their act, within 30 days from the communication. The commander must appoint a committee which will propose a new decision, either on maintaining, application of other disciplinary sanction, or cancellation the disciplinary sanction. This decision may be also appealed to the competent administrative court in compliance with Law no. 554/2004.

For these professions the appeal against administrative and fiscal departments sentences from the court law are judged in the appellate courts. Theirs appeal shall be judged by administrative and fiscal division of the High Court and Cassation and Justice.

According to article 49 paragraph 2 of the Law no. 317/2004 regarding The Superior Council of Magistracy, The Superior Council of Magistracy's sentences which solve disciplinary actions against judges can be appealed within 15 days from communication. Jurisdiction to hear the appeal belongs to the panel of 9 judges of the High Court and Cassation and Justice. The same legal text establishes two incompatibilities in the panel composition: the voting members of

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<sup>18</sup> With regard to parliamentary officials, article 88 of the Law on Civil Servants Statute no. 7/2006, lawmakers stipulates that civil servants, if dissatisfied with the penalty imposed, could address the administrative court, requesting the annulment or amendment of order or penalty provision in the law.

<sup>19</sup> Published in the Official Gazette, Part I, no. 187 of 25 March 2009.

the Superior Council of Magistrates and the trial judge. In this case we can ask a question: according to article 19 of the Law no. 304/2004 regarding judicial organization<sup>20</sup>, as amended by Law no. 202/2010 concerning some measures to accelerate the lawsuit, The High Court and Cassation and Justice is organized by 4 divisions – Civil and Intellectual Property Section, Criminal Division, Commercial Division, Administrative and Fiscal Section, 4 panels of 5 judges and United Divisions with its own jurisdiction. Basically, according to article 24 of the Law 304/2004, the panels of 5 judges took the attributions of the panel of 9 judges, replacing him. In conclusion, the panel of 5 judges as a disciplinary court is legally competent to hear appeals against disciplinary decisions. In this regard, we recommend the correlation of the national regulatory framework in general and the correlation of the Law no. 317/2004 provisions concerning the Superior Council of Magistracy with the ones of the Law no. 304/2004 regarding judicial organization, in particular.

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