

# ADMINISTRATIVE-DISCIPLINARY LIABILITY OF CIVIL SERVANTS FROM THE PERSPECTIVE OF THE ADMINISTRATIVE CODE

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## **Abstract**

*In the present study, the author, starting from the regulation of the disciplinary - administrative liability of civil servants in the Administrative Code<sup>2</sup>, analyzes the legal regime of the functioning of this fundamental legal institution, with real implications in the career of civil servants. The author analyzes the legal aspects regarding the disciplinary violations, about the legal regime and the functioning of the disciplinary commissions, the sanctions applicable to the civil servants, the cancellation of the sanctions applied to the civil servants and about the administrative record of the public servants in the field of the disciplinary - administrative liability. The analysis is also doubled by comparative references regarding the situation of employees as provided by the Labor Code. The conclusions of the study, which are based on the analysis of the relevant doctrine and legislation, will also lead to the formulation of de lege ferenda proposals in the field of labor legislation.*

**Keywords:** liability, public servants, administrative – disciplinary, Administrative Code.

**JEL Classification:** K23, K31

## **1. Introductory notes**

The civil service, through its characteristics, implies specific responsibilities for the incumbents, respectively civil servants, responsibilities arising from the exercise of state power.

Failure or culpability by civil servants to perform their duties incurs administrative, civil or criminal liability<sup>3</sup>.

Regarding the legal liability of civil servants<sup>4</sup>, the Administrative Code, the most important law in the field of administrative law in Romania<sup>5</sup>, establishes certain particularities specific to the civil service, which we mention below.

A specific case that attracts the legal liability of civil servants, regulated by the Administrative Code in art. 490, is the signing, countersigning or endorsement of draft normative acts issued in violation of legal provisions or their substantiation notes.

The civil servant has the possibility to refuse in writing and motivated, the endorsement, signing or countersigning of the documents in question, when they are against the law, within 5 working days from the receipt of the documents, unless the documents require another deadline, signing, which is recorded in a special register intended for this purpose.

If the refusal of the civil servant is unjustified, this entails legal liability.

Another particular situation of the liability of civil servants is the joint and several liability with the public authority or institution, as provided by art. 491 of the Administrative Code.

In the event that a person's rights or interests are violated by public institutions or authorities, he may address the courts, which in case of admitting the action and finding the guilt of the civil servant may decide jointly and severally to pay compensation by the institution or public

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<sup>2</sup> The Administrative Code adopted by the Government Emergency Ordinance, no. 57/2019, published in Official Gazette no. 555 from 5 July 2019.

<sup>3</sup> For this matter see Ș. Dumitrache, *Some considerations on disciplinary liability overlapping criminal liability and legal perspective of contract analysis* in „Juridical Tribune – Tribuna Juridica”, Volume 1, Issue 2, 2011, p. 186-193, Diana-Mihaela Malinche, *The Liability Of Public Servants*, „Perspectives of Law and Public Administration”, vol. 7(1), 2018, p. 67-71.

<sup>4</sup> For the disciplinary liability in generally, see A. Ticlea, *Raspunderea disciplinara in raporturile de munca. Legislatie. Doctrina. Jurisprudenta*, C. H. Beck Publishing House, Bucharest, 2017, V. Vedinaș, *Drept administrativ*. 11<sup>th</sup> edition revised and updated, Universul Juridic Publishing House, Bucharest, 2019, p. 556-569.

<sup>5</sup> For the importance of the Administrative Code, see C. S. Sararu, *Considerations on the sources of Romanian administrative law. The need to codify the rules of Romanian administrative law*, in „Juridical Tribune-Tribuna Juridica”, Vol 7, Issue 2, 2017, p. 224-236.

authority concerned, together with the civil servant.

Of all the forms of legal liability applicable to civil servants, we will analyze the particularities of disciplinary liability, according to the provisions of the Administrative Code.

## **2. Administrative - disciplinary liability of civil servants**

### **2.1. General aspects. Disciplinary violation. Disciplinary sanctions**

Disciplinary liability, whether it concerns the employment relationship of civil servants or is based on the employment relationship of employees, has as the premise of commission of a disciplinary offense<sup>6</sup>.

Disciplinary misconduct triggers administrative - legal liability, which can have unpleasant consequences for the careers of civil servants.

Given the importance of this category of legal liability, the sanctions imposed without strict compliance with the legal conditions governing the applicability of this legal institution cannot be applied.

*The small criminal law*, as it is commonly known disciplinary liability has precise rules of application.

The Administrative Code defines in art. 492 para. (1) the disciplinary violation as the violation with guilt by the civil servants of the duties corresponding to the public position they hold and of the norms of professional and civic conduct provided by law.

The disciplinary violation is, therefore, an act committed both in connection with the duties corresponding to the public office, but also with the norms of professional and civic conduct provided by law.

Guilt, in its two forms, intent and fault is an essential condition for the application of disciplinary liability.

The legislator lists in art. 492 para. (2) of the Administrative Code, the facts that constitute disciplinary violations in the case of civil servants: a) systematic delay in performing the works, b) repeated negligence in solving the works, c) unjustified absence from work, d) non-compliance with the work schedule, e) interventions or insistence on resolving requests outside the legal framework, f) non-observance of professional secrecy or confidentiality of works of this nature, g) manifestations that harm the prestige of the public authority or institution in which the civil servant operates, h) conduct during the work of political activities, i) unmotivated refusal to perform duties, j) unmotivated refusal to submit to the control of occupational medicine and medical expertise as a result of recommendations made by the occupational physician, according to legal provisions; k) violation provided duties and prohibitions established by law for civil servants, other than those relating to conflicts of interest and incompatibilities, l) violation of the provisions on incompatibilities if the civil servant does not act to terminate them within 15 calendar days from the date intervention of the case of incompatibility, m) violation of the provisions regarding conflicts of interest, n) other facts provided as disciplinary violations in the normative acts in the field of civil service and civil servants or applicable to them.

The legislator improved the regulation in the matter, thus, unlike Law no. 188/1999, it is provided that non-compliance with the work schedule is punished even if it is not repeated.

Also, another important provision as a novelty is the term of 15 days in which the civil servant can remedy the problems related to incompatibility.

The enumeration of disciplinary offenses by the legislator is of particular relevance, because the civil servant can only be sanctioned for committing one of these acts.

For example, the Labor Code does not list disciplinary violations, as it is impossible for the legislator to exhaustively cover all areas in which employees work and to establish for each area the

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<sup>6</sup> For the disciplinary offense, generally, see L. Uță, F. Rotaru, S. Cristescu, *Dreptul muncii. Raspunderea disciplinara. Practica judiciara*, Hamangiu Publishing House, Bucharest, 2009, p. 1-65.

facts that are considered disciplinary violations.

In the case of employees, disciplinary violations are established by internal regulations or, if the social partners agree, by collective labor agreement.

## 2.2. Disciplinary commissions. Legal regime

The civil servant may be sanctioned administratively - disciplinary, only after the preliminary disciplinary investigation against him is carried out.

According to art. 492 para. (8) of the Administrative Code, the disciplinary sanctions shall be applied within a maximum of 6 months from the date of notification of the disciplinary commission, but not later than 2 years from the date of committing the disciplinary violation, except for the disciplinary violation provided in art. 492 para. (2) letter l), respectively the violation of the provisions regarding incompatibilities if the civil servant does not act for their termination within 15 calendar days from the date of intervention of the case of incompatibility

The imposition of a disciplinary sanction without the prior hearing of the civil servant and without the hearing being recorded in writing shall be sanctioned with absolute nullity.

The refusal of the civil servant to appear at the hearings or to countersign the documents resulting from the conduct of the administrative disciplinary investigation shall not prevent the application of a disciplinary sanction by the commission.

At the level of each public authority and institution, disciplinary commissions are set up, which have as attributions the analysis of the facts notified as disciplinary violations, the proposal of disciplinary sanctions for civil servants, respectively the notification of the competent authorities in case of incompatibilities, according to art. 494 para. (1), letters a) - c) of the Administrative Code.

The Code establishes in the matter of the composition of the disciplinary commissions, specific aspects for the different categories of civil servants, for example for the disciplinary commission for senior civil servants<sup>7</sup>, the disciplinary commission for general secretaries of communes, cities and sectors of Bucharest, constituted at county level, respectively of Bucharest, by order of the prefect or the disciplinary commission for the general secretaries of the counties and the general secretary of Bucharest, constituted at national level, by order of the president of the National Agency of Civil Servants, these having a specific composition.

Administrative Code stipulates that the disciplinary commission includes at least one representative of the representative trade union or, in the absence of a representative trade union at the level of the public institution or authority, a representative elected by a majority of civil servants.

Nevertheless, disciplinary commission may also involve in its activity the members of the control authorities at the level of public institutions or authorities.

The Administrative Code establishes certain common rules for conducting disciplinary administrative investigation, so if there is a suspicion that the investigated official could influence the conduct of the investigation, the public authority or institution may order either its temporary transfer or prohibition of access to case documents.

In the case of individualization of disciplinary sanctions, the commission must relate to the causes and severity of the disciplinary violation, the circumstances in which it was committed, the degree of guilt and consequences of the offense, the general behavior during the service of the civil servant, and the existence of its antecedents of other disciplinary sanctions that were not deleted under the law, according to art. 492 para. (6) of the Administrative Code.

In the case of a disciplinary violation contest, the disciplinary violation for the most serious act is applied.

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<sup>7</sup> According to art. 494 para. (4) of the Administrative Code: The Disciplinary Commission for Senior Civil Servants is composed of 5 senior civil servants, appointed by decision of the Prime Minister, at the proposal of the Minister of Public Administration and the President of the National Agency of Civil Servants, with the application corresponding to the provisions of art. 396 para. (2) and para. (5) - (10).

In the case of senior civil servants in the situation presented above, the institution or public authority the person competent to appoint in the public office has the obligation to order the temporary transfer of the civil servant to a public position corresponding to the level of education, maintaining the salary rights (art. 492 para. (11) of the Administrative Code).

If the act of the civil servant is also notified as a crime, the disciplinary investigation is suspended until the criminal court rules on the act of the civil servant. If the court's solution is not one of conviction, the disciplinary investigation shall be resumed, and the eventual disciplinary sanction shall be applied within a maximum of one year from the resumption of the administrative disciplinary investigation.

### **2.3. Disciplinary sanctions applicable to civil servants**

The Administrative Code establishes, in art. 492 para. (3), the following sanctions applicable to civil servants:

- a) written reprimand;
- b) reduction of salary rights by 5-20% for a period of up to 3 months;
- c) decrease of salary rights by 10-15% for a period of up to one year;
- d) suspension of the promotion right for a period from one to 3 years;
- e) demotion to a lower level public position, for a period of up to one year, with a corresponding decrease in salary;
- f) dismissal from public office.

Unlike the previous legislation, respectively Law no. 188/1999 on the status of civil servants, at present, the legislator has clearly individualized the sanctions applicable for each disciplinary violation.

Thus, for the systematic delay in performing the works; repeated negligence in solving the works and non-compliance with the work schedule, written reprimand or reduction of salary rights by 5-20% can be applied for a period of up to 3 months.

For the disciplinary violation consisting in the unmotivated absence from work, all disciplinary sanctions can be applied, except the one from art. 492 para. (3) letter b), respectively the decrease of the salary rights by 5-20% for a period of up to 3 months.

For committing disciplinary offenses consisting of: interventions or efforts to resolve requests outside the legal framework, non-compliance with professional secrecy or confidentiality of works of this nature, manifestations that harm the prestige of the public authority or institution in which the civil servant carries out his activity and development during to the work program of some political activities, the sanctions provided by art. 492 para. (3), letters c) - f), respectively: reduction of salary rights by 10-15% for a period of up to one year, suspension of the promotion right for a period from one to 3 years, demotion to a lower level public office, for a period of up to one year, with the corresponding decrease of the salary, respectively the dismissal from the public position.

If the civil servant commits the following disciplinary offenses: unjustified refusal to perform his duties, unjustified refusal to submit to the control of occupational medicine and medical examinations as a result of recommendations made by the occupational physician, according to legal provisions, violation of regarding duties and prohibitions established by law for civil servants, other than those related to conflicts of interest and incompatibilities, violation of the provisions regarding conflicts of interest, may be subject to any disciplinary sanction.

For the violation of the provisions regarding incompatibilities if the civil servant does not act for their termination within 15 calendar days from the date of intervention of the incompatibility case, only one sanction can be applied to the civil servant, namely dismissal.

Regarding the dismissal, the legislator regulates special provisions in art. 520 of the Administrative Code.

The disposition of this sanction is in the competence of the person who has the legal competence to appoint in the public office and who issues an administrative act that includes the sanction in question.

The sanction of dismissal can be applied for the following situations: a) for committing a disciplinary offense that had serious consequences; b) if a legal reason for incompatibility has arisen, and the civil servant does not act for its termination within 15 calendar days from the date of intervention of the case of incompatibility; the situation of incompatibility is ascertained and sanctioned under the conditions of Law no. 176/2010, with subsequent amendments and completions<sup>8</sup>.

Disciplinary sanctions are applied to civil servants by order of the Minister or by order given by the head of the institution or public authority<sup>9</sup>.

The administrative act in question may be challenged in the administrative contentious court by the dissatisfied civil servant who may request the modification or abolition of the administrative sanctioning act.

#### 2.4. Cancellation of disciplinary sanctions

Returning to our assessments at the beginning of this study, in which we state that disciplinary liability is called *little criminal law*, due to its importance for the career of civil servants, we emphasize that the resemblance to criminal law manifests itself on multiple levels, including rehabilitation of the perpetrator after atonement of the punishment. The rehabilitation term characteristic of the criminal law being corresponded to the one of cancellation of the sanctions in the matter of administrative disciplinary liability.

The Administrative Code regulates the legal regime of cancellation of disciplinary sanctions applied to civil servants, establishing the cases in which sanctions are cancelled by law.

A first case of cancellation of disciplinary sanctions applied to civil servants is in the case of a written reprimand, which is canceled within 6 months of application.

A second situation concerns the disciplinary sanctions from art. 492 para. (3) letters b)-e), which is canceled at the expiration of the term for which they were applied (we refer to the other sanctions apart from dismissal).

A third situation concerns the dismissal from office which is canceled within 3 years from the application.

In the case of these three situations of cancellation, the public authority or institution issues an administrative act establishing the cancellation of the sanction.

We emphasize that the administrative act issued by the public authority or institution is an act of finding. Therefore, if the institution or authority delays in issuing the act in question or does not even issue it at all, this will not have legal consequences on the impact of the cancellation of the sanction.

It does not matter whether or not the civil servant has committed other disciplinary offenses, according to the legal text, the cancellation produces legal effects within the term established by law.

If the administrative contentious court admits the request of the civil servant to annul an administrative-disciplinary sanction, the sanction is considered canceled from the date of communication of the final court decision to the civil servant.

For employees, the Labor Code regulates the cancellation much more succinctly, even incomplete, the legislator not commenting exhaustively on this issue. Thus, Law no. 53/2003 - Labor Code<sup>10</sup> in art. 248 para. (3), establishes the following: the disciplinary sanction is canceled by law within 12 months from the application, if a new disciplinary sanction is not applied to the employee within this term<sup>11</sup>. The cancellation of the disciplinary sanctions is ascertained by

<sup>8</sup> Published in Official Gazette no. 621 of September 2, 2010.

<sup>9</sup> Regarding the administrative act, see A. Iorgovan, *Tratat de drept administrativ*, vol. I and II, IV edition, All Beck Publishing House, Bucharest, 2005, Rodica Narcisa Petrescu, *Drept administrativ*, Hamangiu Publishing House, Bucharest, 2009, p. 305 – 358.

<sup>10</sup> Republished in the Official Gazette, part I, no. 345 from 18 May 2011.

<sup>11</sup> For the analyse of this institution of labor law, see R. S. Pătru, *Dreptul individual al muncii*, Universitară Publishing House, Bucharest, 2018, p. 248 – 250.

decision of the employer issued in written form<sup>12</sup>.

The legislator sets in the case of employees a single term of 12 months, regardless of the sanction received, not establishing, among other things, the concrete conditions under which this term applies (for example if the term expires and if the employee no longer works for a certain period of time) after the application of the sanction.

## 2.5. Administrative record of civil servants

In the matter of civil servants, the legislator established the existence of the administrative record with a role in highlighting their disciplinary situation, issued by the National Agency of Civil Servants.

The administrative record includes the disciplinary sanctions received by civil servants, which were not canceled.

Obviously, the disciplinary sanctions applied to civil servants who have been canceled are no longer found in the administrative record.

According to art. 496 para. (3) the administrative record is issued at the request of: a) the civil servant, for his own disciplinary situation, b) the head of the public authority or institution in which the civil servant carries out his activity, c) the head of the public authority or institution the category of senior civil servants or the vacant public management position, for civil servants applying to the promotion competition organized for its occupation, d) the chairman of the disciplinary commission, for the civil servant in the administrative investigation procedure, e) other persons provided by law.

For employees, no similar issues are provided, although the legislator should establish similar provisions for them as well. The employees have only the personal file, which includes the aspects related to their professional evolution in the unit where they are employed.

## 3. Conclusions

Disciplinary administrative liability of civil servants is an essential institution of administrative law.

The Administrative Code regulates these aspects in detail, establishing the legal framework in a particularly sensitive area, such as the disciplinary administrative liability of civil servants.

The legislator regulated more carefully in the Administrative Code than in the previous regulation the aspects regarding the disciplinary administrative liability of the civil servants, an eloquent example being the rigorous and exhaustive regulation of disciplinary violations and correlative sanctions in case of their commission.

The legislation for the regulation of the juridical regime of the civil servants represent always a benchmark for similar legislation on employees, including in the field of disciplinary liability.

Compared to the situation of employees, some proposals *de lege ferenda* can be highlighted for the improvement of labor legislation such as, for example, the regulation of an administrative record for the employee also and the establishment of a comprehensive legal regime for cancellation of the sanctions imposed on employees.

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<sup>12</sup> For a comparison between the disciplinary liability of employees and disciplinary liability of public servants, see R. S. Pătru, *Considerations on the modifications brought to disciplinary liability by the Laws no. 40/2011 and 62/2011*, in „Juridical Tribune – Tribuna Juridica”, Volume 1, Issue 2, 2011, p. 166 – 175.

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