SUSPENSION OF CIVIL SERVANT'S SERVICE REPORT UNDER THE LABOR LAW PROVISIONS

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Abstract

The present article deals with situations in which the use of the provisions of the Labor Code is required for the suspension of a service report on the initiative of a civil servant for legitimate personal interest, provided that the regime of legal relations between civil servants and the state or the local public administration is regulated by Law no. 188/1999 on the Statute of civil servants. We appreciate the decisive importance both for public institutions, civil servants and courts of law, to advance a proposal to regulate the suspension of the employment relationship at the initiative of the civil servant, as from 2010, the provisions of Article 95(2) of the Law no. 188/1999 on the Civil Servants' Statute, are subject to different interpretations: either as an abrogated article or as an existing article outlined as content on the provision identified in the initial form of the normative act.

Keywords: *suspension, service report, civil servant, public office, public power powers in the executive sphere, powers of public power in the sphere of the judiciary, contract staff.*

JEL Classification: K23, K31, K40.

1. Background and timeliness - article 95(2) of the Law no. 188/1999 on the Civil Servants' Statute, repealed or not?

Article 95(2) of the normative act brought into question, which was the legal basis for the suspension of the service report at the initiative of the civil servant for a legitimate personal interest, was amended and supplemented by the Emergency Ordinance no. 105/2009 on certain measures in the field of civil service, as well as for the strengthening of managerial capacity at the level of deconcentrated public services of the ministries and other central public administration bodies in the administrative-territorial units and other public services, as well as for the regulation of certain measures regarding the cabinet of the dignitary from the central and local public administration, the prefect's office and the local elected office[3].

Subsequently, after 6 months, on July 8 of the following year, this article was amended by Law no. 140/2010 for amending and completing the Law no. 188/1999 on the Statute of civil servants[4]. With the entry into force of this law, the provisions of Art. I point 6-25 of the Government Emergency Ordinance no. 105/2009 is repealed[5], paragraph 20 fully identifying Article 95(2).

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[3] Government Emergency Ordinance no. 105/2009 on certain measures in the field of civil service, as well as for the strengthening of managerial capacity at the level of deconcentrated public services of the ministries and other central public administration bodies in the administrative-territorial units and other public services, as well as for the regulation of certain measures regarding the cabinet of the dignitary from the central and local public administration, the prefect's office and the local elected office, published in the Official Gazette of Romania, Part I, no. 668 of 6 October 2009.

[4] Published in the Official Gazette no. 471 of 8 July 2010.

[5] Law no. 140 of July 7, 2010 for amending and completing the Law no. 188/1999 on the Statute of civil servants, published in the Official Gazette no. 471 of 8 July 2010.

"Art. V at the date of entry into force of this law, the provisions of art. I pp. 6-25 and art. VII of Government Emergency Ordinance no. 105/2009 on certain measures in the field of civil service, as well as for the strengthening of managerial capacity at the level of deconcentrated public services of the ministries and other central public administration bodies in the administrative-territorial units and other public services, as well as for the regulation of certain measures regarding the cabinet of the dignitary from the central and local public administration, the prefect's office and the local elected office, published in the Official Gazette of Romania, Part I, no. 668 of 6 October 2009, as amended, and any other contrary provisions shall be abrogated. "

At present, in some programs of legislation, paragraph 2 of Article 95 is identified in the form since the entry into force[6] of Law no. 188/1999, with a clear indication of the application references[7] according to the provisions of Law no. 140/2010, and in others it is mentioned as being abrogated. Things are complicated in emphasizing the real context, which made certain clarifications necessary, and in this respect we appreciate the efforts made to obtain a point of view of the Legislative Council[8] as a specialized consultative body of the Parliament. Thus, we learned that in 2015 this specialty structure "proposed to some public institutions interested in the application of the regulations regarding the status of civil servants the initiation of a draft normative act that would clarify the situation created". Unfortunately, we are in 2017 and the situation is the same. And the presence of the specialized body of the central public administration responsible for drafting the norms for the unitary application of the legislation in the field of civil service and civil servants, but also with the provision of specialized assistance to methodologically coordinate the human resources departments within the public administration authorities and institutions central and local, in this case the National Agency of Civil Servants, is not felt even after seven years of blurring. One point of view is this institution, entitled "Speech on the suspension of civil servants' service report"[9]. Indeed, it is useful for those directly involved, but we can not overlook the possibility to provide a solution to the provisions of the Labor Code, by the very legal person in charge of public law that is responsible for the elaboration of the policies and strategies regarding the management of the civil service and civil servants.

2. Considerations on the suspension of fixed-term service relationships following the request to move from the exercise of public powers in the executive sphere to the exercise of public powers in the sphere of the judiciary

A service report involves an administrative act appointing a civil servant to a public office, representing a set of tasks, responsibilities and rights.

In general, responsibilities are structured by folding on the guideline set by the principles underlying the exercise of public office, and therefore emphasize legality and accountability, efficiency and effectiveness, objectivity, impartiality, transparency, and at the same time orientation towards the citizen. The rights of the civil servant also form another ensemble structured on different domains, social, discrimination, etc., but the ones we want to raise concern the right to stability in the exercise of public office, the right to exercise the service relationship on an indefinite period[10] of time, the right to benefit from the protection of the law and, last but not least, the right to the possibility of suspending the service relationship with a motivation based on a personal legitimate interest.

In relation to the situation we want to present, this implies in particular the suspension of an indefinite period of service by the temporary passage of personal interests to a fixed-term service relationship, also within the public system but in the sphere of the judiciary. Thus we have as starting point an administrative act of indefinite appointment in a public position issued by a local public administration body and the intervention of an administrative act of appointment in a public

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[6] *Article 95: "(2) The service report may be suspended at the motivated request of the civil servant, for a legitimate personal interest, in other cases than those provided in paragraph (1) and art. 94 par. (1) over a period of one month to three years. "*

[7] Example: "on 02-Apr-2015, Art. 95, para. (2) of Chapter IX, Section 2, see application references in Article V of Law 140/2010 ".

[8] We are considering the address of the Legislative Council no. R466 / 2015.

[9] The document is available online at adress: http://www.anfp.gov.ro/R/Doc/Suspendarea%20Raportului%20de%20Serviciu%20al%20Functionarilor%20Publici.pdf (consulted on 1.10.2017).

[10] *Law no. 188/1999 on the Statute of civil servants. "Art. (1) Service relations shall be born and exercised on the basis of the administrative act of appointment, issued under the law. (2) Exercise of the service relations shall be performed indefinitely. (3) By way of exception from the provisions of paragraph (2) Civil service execution temporarily vacant for a period of at least one month can be employed for a fixed period, as follows: a) redeployment of civil servants reserve body meeting the specific conditions for occupying the respective public; b) by appointment for a definite period of time, by competition under the law, if there are no civil servants in the reserve body who meet the specific requirements for redistribution according to the provisions of art. a). The person appointed under these conditions acquires the status of civil servant only during this period and does not have the right to enter the civil servant's reserve body upon termination of the service report."*

position issued by a central public administration body , in this case the Minister of Justice. We have the public servant and the judicial assistant, whose institution is regulated by Title V of Law no. 304 of 28 June 2004 (r) on the organization of judiciary, gives the person appointed under a mandate of 5, stability during the term of office, taking the oath under the conditions laid down by law for judges and prosecutors. In both situations, we note the right to stability, distinguished only by the duration of the service relationship, in the first indefinite case in the exercise of public office, while in the second, determined by the duration of the assigned mandate.

The right to stability in the exercise of public office, combined with the scope of the service relationship, namely for an indefinite period, coexists with his right to request the suspension of the service relationship for a determined period on the basis of personal considerations. In the present case, we consider that the motivation of personal interest should no longer be subject to a thorough analysis, the notion of private legitimate interest must be understood and framed as such in the sphere considered by the legislator as a reason for suspending the service relationship and at the same time the legislator's reasoning not to regulate expressly the fate of the ongoing service relationship flow at the nomination date for the performance of the mandate.

In the sense of what has already been said, we must admit that although we have put forward the ideal reaction situation, in the absence of express provisions, there are different interpretations in practice, especially since this case of suspension of the service relationship, invoking the provisions of Article 54 Labor Code corroborated with Article 117 of Law no. 1888/1999 (r) and the current situation of Article 95 2, procedural, requires the employer's consent. I would point out above that the civil servant has an interest protected by the law, in that it concerns the right to suspension on the basis of a pertinent reasoning and that, as regards the legitimacy of the statement of reasons, it should no longer be considered when the exercise of the all of a mandate-based public function. But, on the one hand, we have a subjective right recognized by law, on the other hand we reiterate, in the absence of express regulations, the obligation to make a request for suspension and obtain an agreement from the employing public institution, the answer being appreciated as positive or negative. The discretion of the representatives of the employing public institution, their discretion, certainly should not imply the possibility of abusive action without a legal justification and with the disregard or the violation of the civil servant's right of suspension, especially since in this case the reasons the suspension could not be qualified as unfounded and unjustified.

For these reasons, we will formulate in paragraph 4 of the present article proposals for the law of ferneda regarding the provisions of Law no. 304/2004 respectively of the provisions of Law no. 188/1999 (r).

3. Considerations on the suspension of fixed-term service relationships following the request to switch from the exercise of public powers in the executive sphere to the performance of contractual functions

In the literature, in a commentary published in the work of the Civil Servants' Statute[11], published in the Universul Juridic Publishing House, the provisions of the Statute of Civil Servants are supplemented with the provisions of labor law, because "the legislator found it appropriate to start with the right to work, suggests that the first category of regulations that complements the status of a civil servant is the labor law, "the priority given to labor law is also justified by the fact that" the civil servant has similarities with the employee. "According to the professor, the considerations was the basis for the adoption of Law no. 477/2004 on the Code of Conduct for Contract Staff from Public Authorities and Institutions have been identified according to the legislator's argument, precisely by the need for other categories of staff within the public institutions to benefit from the provisions of Law no. 7/2004 on the Code of Conduct for Civil Servants as a framework law for staff in public authorities and institutions. Moreover, this "benefit", which is visible in practice in the form of specific obligations and ultimately the image of a public

[11] Verginia Vedinaș, *Statutul funcționarilor publici (Legea nr. 188/1999), Comentarii, legislație, doctrină și jurisăprudență,* Universul Juridic, Bucharest, 2016, p. 304.

institution, also implies the observance of the correlative rights including the stability in the public office, thus implicitly of returning to the post at the moment of fulfillment the term on which the individual labor contract was concluded.

The right to suspend an indefinite period of service by temporarily passing on grounds of personal interest to a fixed-term employment contract, both within the public system but in the sphere of contract staff operating in a public institution, may be also invoked under the provisions of the Labor Code, the applicability of the provisions of Article 95 paragraph 2 of Law no. 1888/1999 (r) being, as we have found, inoperative. Thus, we again find an administrative act of indefinite appointment in a public position issued by a local public administration body and a fixed-term employment contract. Secondly, we find the civil servant, with the rights conferred on him by law, the right to stability in the exercise of public office, the right to file a request for suspension, the right not to be refused the suspension of the service report in an abusive manner, without a legal and pertinent justification and as a consequence as a result of suspension for a specified period, the right to return to public office. The quality of "law" does not arise from the formulation of the law, but from the content of the norm, which, recognizing certain institutions, creates the prerequisites, namely the right of the civil servant to resort to them.

In this situation, from a procedural point of view, are we at this time more at hand of the employing public institution that can interpret the motivation of personal interest, unfavorably to the applicant, without calling into question another administrative act of appointment in a new position, but a contract work involving a willingness agreement between the new employer and the employee? Does it contravene the legislation specific to the public function, the conclusion of an individual employment contract by a civil servant, which is why the public institution's representatives could refuse the suspension? Or are we in a case similar to the one dealt with in Section II, subject only to the strictly the right to suspend the civil servant and the limits of the discretion in which the representatives of the employing institution can rule? We believe that this final answer is consistent with the existing legal provisions, possibly with an emphasis on an analysis of the possible arguments that can form the basis of a refusal. We bring to the forefront the recommendations of the National Agency of Civil Servants, as they were formulated in the document called "Speech on the Suspension of the Civil Servants' Service Report"[12], and we proceed to a brief analysis of these by referring to the parties involved:

A first recommendation is "proper motivation of requests to suspend service reports".

It clearly represents guidance to civil servants who, for personal reasons, pursue the suspension of the service report, but without a targeted explanation of the phrase "correct reasoning", offers possibilities for interpretation either in terms of legal motivation, namely correct / incorrect indication of (the provisions of Article 54 of the Labor Code or others) or the non-inclusion of the legitimate interest in the cases provided by art. 94 par. 1 and art. 95 par. 1 of Law 188/1999, or that of factual motivation, of personal arguments. Certainly, a misleading reasoning on the basis of law can attract rejection. As far as the factual reasoning is concerned, I do not consider that the employer's discretion in the employee's personal reasons can be objective and certainly capable of giving discretionary interpretations. It would be preferable in this respect to make a recommendation imposing the condition for the submission of supporting documents, for example a term of appointment to another public office.

The second recommendation is that "before requesting suspension, we recommend to officials to analyze the impact that the absence during the period of suspension has on the institution's activity and to identify solutions to any foreseeable problems."

First of all, we report the grammatical inaccuracy of the text, which belongs to the author of the address, which is why we kept the original text. Correctly, the text should have referred to the "analysis of the impact that the absence on the episode of suspension has."

[12] The document is available online at adress: http://www.anfp.gov.ro/R/Doc/Suspendarea%20Raportului%20de%20Serviciu%20al%20Functionarilor%20Publici.pdf (consulted on 1.10.2017).

Going beyond these issues and going through the exact above-mentioned text, we do not understand how ANFP[13] can give such general guidance in the context of the specific legislation of the public office that individually sets the level of attributions of each public office holder and promotes the principle of hierarchical subordination. At the same time, this recommendation has nothing to do with the personal interest as a defining point on the only basis of law recognized by this informative case as applicable to this date precisely by the ANFP representatives, namely Article 54 of the Labor Code. In other words, is the analysis of the impact of the suspension on the institution's activity, the forecasting of problems and the identification of solutions by the owner of an execution function versus the personal interest?

The third recommendation is that "public institutions have the possibility (and not the obligation !!!) to grant civil servants the suspension of the service report".

This recommendation, in the context in which it is acknowledged that Law no.188 / 1999 (r) does not contain express provisions prohibiting the suspension of the service report for personal reasons, and the representatives of the employer have the obligation to verify the appropriateness of the motivation of the request in the context of the institution's activity , we appreciate it as unobserved.

Fourthly, we find in that address the idea that "in granting the suspension of the service relationship, the heads of the institutions must ensure that the activity of the institution is not adversely affected by the absence of the civil servant whose service relationship is suspended and immediately entrust his duties other civil servants. "

This is, in our view, a correct approach, which we consider to be sufficient, taking into account all the legal provisions, the attributions and responsibilities established under the law, the general regime of legal relations between civil servants and the state or the local public administration, through the autonomous administrative authorities or through the public authorities and institutions of the central and local public administration, of the service relations.

Also in this case, due to the absence of express provisions, there are different interpretations in practice, which is why we find it appropriate to formulate ferneda proposals in the following regarding the completion of the provisions of Article 95 of the Law no. 188/1999 (r).

4. *De lege ferenda* proposals. Conclusions

The proposals for *de lege frenda* are to be presented below in view of the vision for amending and completing the provisions of Article 95 of the Law no. 188/1999 (r) on the Statute of civil servants in point 4.1 and the provisions of Article 111 of Law no. 304/2004 on judicial organization in point 4.2.

4.1. Proposals *de lege ferenda* on the modification of the provisions of Article 95 of Law no. 188/1999 (r) on the status of civil servants

The current form of article 95 paragraph 2 of Law no. 188/1999 with reference to Article V of Law 140/2010 and Article I of GEO no. 105/2009:

"Art. 95 of Law no. 188/1999

(2) The service report may be suspended at the motivated request of the civil servant, for a legitimate personal interest, in other cases than those stipulated in paragraph (1) and art. 94 par. (1) over a period of one month to three years. - on 02-Apr-2015 Art. 95, par. (2) of Chapter IX, section 2, see application references in Article V of Law 140/2010 "

Art. V of Law 140/2010 for amending and completing the Law no. 188/1999 on the Statute of civil servants

"At the date of entry into force of this law, the provisions of art. I pp. 6-25 and art. VII of Government Emergency Ordinance no. 105/2009 on certain measures in the field of civil service, as

[13] National Agency of Civil Servants.

well as for the strengthening of managerial capacity at the level of deconcentrated public services of the ministries and other central public administration bodies in the administrative-territorial units and other public services, as well as for the regulation of certain measures regarding the cabinet of the dignitary from the central and local public administration, the prefect's office and the local elected office, published in the Official Gazette of Romania, Part I, no. 668 of 6 October 2009, as amended, and any other contrary provisions shall be abrogated. "

Government Emergency Ordinance no. 105 of 6 October 2009 on certain measures in the field of public function as well as for the strengthening of managerial capacity at the level of deconcentrated public services of the ministries and other central public administration bodies in the administrative-territorial units and other public services as well as for the regulation of some measures concerning the cabinet of the dignitary from the central and local public administration, the prefect's office and the local elected office

"Art. I. Law no. 188/1999 on the Statute of civil servants, republished in the Official Gazette of Romania, Part I, no. 365 of 29 May 2007, as amended and supplemented, shall be amended and completed as follows:

Article 95 (2) shall be amended and shall have the following content:

"(2) The service report may be suspended on a reasoned request of the civil servant for a legitimate personal interest in cases other than those provided for in paragraph (1) and in Article 94 (1) for a period of time between one month and 6 months, without cumulative periods of suspension exceeding 3 years in the career of civil servant within the same public authority or institution. The head of the public authority or institution can not approve the request to suspend the civil servant's service report if the personal interest legitimate is justified by the pursuit of remunerated activities during the period of suspension of service relationships. "

The proposal for amendment and completion, which we will present below, under the present para. 2 of article no. 95 of Law no. 188/1999 (r), is aborted as we have shown above, aims at:

- Corroborating the legal provisions regulating the institution of the service report suplementation under Law no. 188/1999 (r) with the provisions of the Labor Code, in the sense that the regime for granting the suspension may not be less favorable than that provided by Article 54 of the Law no. 53/2003 (r).

The reasoning is both the provisions of Article[14] 117 of Law no. 188/1999 and observance of the principle of non-discrimination. We understand from various reasons of the Constitutional Court that the constitutional principle of equality of rights does not require uniformity, so different situations justify and sometimes even impose such legal treatment[15]. The legislator is free to lay down different conditions regarding the suspension of service, function or activity relationships, while not considering different socio-professional categories.

- It is also necessary to complete Art. 95 of Law no. 188/1999 on the Statute of the Civil Servant in a manner allowing the provision of special situations, such as the intervention of an administrative act appointing a term of office on the basis of the consent of the civil servant.

We consider that the following formula can be considered: "(2) The service report may be suspended, by agreement of the parties, at the motivated request of the civil servant, in the case of unpaid leave for studies or for personal interests in cases other than those provided for in paragraph (1) and in Article 94 paragraph 1. The suspension of the service report shall be approved by the head of the public authority or institution on the basis of supporting documents."

[14] *Law no. 188/1999 (r). "Art. 117. The provisions of this law shall be supplemented by the provisions of labor law, as well as by the civil, administrative or criminal law, as the case may be, insofar as they do not contravene the specific legislation of the civil service."*

[15] See Decision no. 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, no. 69 of 16 March 1994.

4.2. Proposals *de lege ferenda* on the modification of the provisions of Article 111 of Law no. 304/2004 on judicial organization

Modification of the Law no. 188/1999 must be corroborated with the provisions of art. 111 of Law no. 304/2004 on judicial organization. Thus, the proposals of the law ferenda regarding the modification and completion of the provisions of Article 111 of the Law no. 304/2004 takes on the following concrete formula, which we support first of all on the basis of a reasoning that the current situation is more the consequence of a technical error than the voluntary act of the legislator. We propose that the text should have the following content: "Art. 111 (1) Judicial assistants enjoy stability during their term of office and are subject only to the law. Persons appointed as legal assailants, during the period in which they act as such, shall be suspended from employment contracts or, as the case may be, from employment relationships with reserved posts. "

5. Conclusions

We considered it necessary to address this subject for several reasons. Firstly, in order to reveal the inconsistency of the legislator, amidst a legislative instability and, let us say, a legislative "indiscipline", accounted for by the adoption of emergency ordinances, with provisions contrary to the Constitution, which determines their declaring unconstitutional. This is all the more serious as we relate to normative acts regulating important institutions such as the civil servant and public administration in general. Secondly, we wanted to present the practical consequences of such situations, which make the law inapplicable, legitimizing the abuses of public authorities and, more seriously, affecting the status and career of civil servants. Referring specifically to the suspension of civil servants, we have been allowed to refer to a "right to suspension" of their position when there is a private legitimate interest legitimizing such a request.

Against the backdrop of the legislative inconsistency we have revealed, we highlighted the need, in the absence of clear and precise regulations, to represent the solution until the amendment of Law no. 188/1999, recourse to the provisions of the Labor Code, which, however, according to Article 117 of the Law no. 188/199, is also a common law for civil servants. In this context, we considered that the regime of suspension of civil servants should not be more severely devised than the employee's regime. We express our hope that the present study will be a source of inspiration, if not for the legislator, at least for the organ that manages the destiny of the civil service in Romania and which is the National Agency of Civil Servants.

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