THE CONSTITUENT ELEMENTS OF DISCIPLINARY TRANSGRESSION. STUDY CASE

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Abstract

The main effect of non-compliance of the employees with respect to the obligations resulting from the employment legal relations is the application of the specific ways of accomplishing the discipline of labor. In this respect we can state that the discipline of labor is not only a system of norms that allows the employee to meet the requirements resulting from the labor relations, mainly through the possibility of applying the specific disciplinary sanctions, but also of a preventive or stimulatory character under the aspect of forms of labor organization. As regards the principle of employee subordination in the legal relationship with the employer, in relation to his/her obligation to respect a well-established system of norms issued for the purpose of labor process, failure to comply with the resulting obligations leads to the possibility of applying sanctions for violation of the labor discipline. The article presents the conditions for the non-compliance of the obligations resulting from the employment relationships of civil servants, the legal basis specific to the violation of specific duties, the way of individualization of the sanction applied, as well as elements of judicial practice.

Keywords: *discipline, rights, sanctions, individualization, violation.*

JEL classification: K31.

1. Introduction

The basis of the existence of the disciplinary offense is related to the disrespect by the employee of the provisions contained in the specific norms applicable to labor relations, namely the legal norms, the provisions of the internal regulation, the individual and collective labor contracts, and last but not least the provisions of the hierarchical leaders, as long as they are not illegal.

Thus, the employer's right to resort to the disciplinary sanction is not a prerogative left to his mere act of will, and there is a need for a disciplinary misconduct, which is a guilty infringement of an obligation. Of course, the guilt of the employee must relate to the intentional violation of the specific legal norms, causing a disturbance in the working process, meeting the characteristics of a socially dangerous act.

In addition, the facts of non-compliance of the employee with the obligations resulting from the performance of the employment relationship must contain as essential elements, to meet the characteristics of a disciplinary misconduct, the guilt of the employee[2], the existence of the illicit deed, the harmful result produced to the employer or other persons in the process of work, as well as the causal link between the deed and the result.

Starting from the provisions of Law no. 188/1999, the Statute of civil servants, article, 2 paragraph 1 refers to the public function defining it as the purpose of achieving the roles of public power through specific attributions and responsibilities, in application of the principles[3] of legality, impartiality, objectivity and responsibility.

The fulfillment of the specific duties and responsibilities of the civil servants requires the existence of the hierarchical subordination, as the superior's right to give compulsory order, in the view of the law, for the purpose of efficient labor relations. The public function[4] is thus distinguished by the existence of the subordination ratio, by compliance with the legal provisions received from the hierarchical superiors, but also by the right of the official to refuse, in writing and reasonably, the fulfillment of the illegal provisions received from them.

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[2] Ghimpu S, Ţiclea A., *Dreptul muncii*, Ed.All Beck, Bucharest, 2000, p. 562.

[3] Dorneanu V., *Dreptul muncii.Partea generală*., Ed.Universul Juridic, Bucharest, 2012, p.16.

[4] Iorgovan A., *Tratat de drept administrativ*, Ed.All Beck, Bucharest, 2005, p. 361.

Conversely, the receipt of a legal written order from the hierarchical superior, followed by the non-compliance of the concerned subordinate attracts the application of the provisions of Article 75 of Law no. 188/1999 regarding the application of disciplinary sanction as a result of guilty infringement of service duties. In this case, the disciplinary misconduct within the normative provisions may consist in systematically delaying the performance of the work, repeated negligence, refusal to perform the job duties or violation of the legal provisions related to the duties, with gradual application of the disciplinary sanctions[5], from the simplest form of written reprimand, until the dismissal of the public office.

In the sense of the law, as a measure of protection of employees' rights, we consider the individualization[6] of the gravity of the disciplinary offense, as well as the preliminary investigation through the discipline commission, except for the written reprimand stipulated in article 77 paragraph (3) letter a) from Law no. 188/1999 which can be applied directly by the person having the legal capacity to appoint in the public position, with the exclusion[7] of any discrimination.

2. The legal basis for the application of the disciplinary sanction

The court practice, in accordance with the applicable legal provisions and as a result of the administration of the evidence have admitted as legal and sound the application of the sanction of written reprimand to the civil servant who did not comply with the obligation resulting from the issuing of an order by his hierarchical superior.

The penalty of written reprimand, regulated by the provisions of article 77, paragraph 2, letter j, of the Law no. 188/1999, the civil servant's statute, was based on the public servant's act of violating the legal provisions regarding the duties.

The motivation of the official[8] in his/her non-compliance with the order of the superior was related to the lack of direct communication between him/her and the issuer of that provision as well as to his subsequent request[9] to the syndicate[10] concerning the impossibility of complying with the obligation, considered as a refusal to give an unlawful provision.

Thus, by a Disposition issued at the level of the employing institution by the Executive Director, based on the address of the coordinating ministry, the public servant mandated to exercise the specific duties of the head of the audit department, having the obligation to obtain the mandated auditor's opinion, in order to coordinate the elaboration and updating the Internal Audit Charter as well as drafting multiannual and annual audit plans.

If the civil servant did not understand to follow the order of the superior and did not submit his personal file for the purpose of obtaining the opinion as a mandated auditor, for the purpose of exercising the duties of chief of department, he was sanctioned by a written reprimand, according to the provisions of article 77 paragraph 3, letter a of Law no.188/1999 on the Statute of civil servants, as a result of deviations in the systematic delay in carrying out the work and the refusal to fulfill the job duties, respectively the non-compliance with the provisions received and the unmotivated delay of their accomplishment.

Regarding the superior's order, the appointment provision as mandated auditor was issued following the notification of the employer's coordinating ministry regarding the regulation of the functioning of the internal audit department at the level of the issuing institution.

In this respect, in relation to the official's support for the fact that the sanctioning provision would have been reached by absolute nullity, no prior investigation was made, this is unfounded.

Thus, according to the provisions of article 78, paragraph 1 of Law no. 188/1999, the Statute of civil servants, republished, stipulates that: "The disciplinary sanction stipulated in article 77 paragraph (3) letter a) the reprimand can be applied directly by the person who has the legal

[5] Ţiclea A, *Codul muncii*, Ed. Universul Juridic, Bucharest, 2015, p. 295.
[6] Ţiclea A, *op.cit*, p. 867.
[7] Muscalu L.M., *Discriminarea în relaţiile de muncă*, Ed. Hamangiu, Bucharest, 2015, p. 137.
[8] Deleanu I., *Tratat de procedură civilă*, Ed. Universul Juridic, Bucharest, 2013, p. 372.
[9] Volonciu M., *Negocierea contractului colectiv de muncă*, Ed. Omnia Uni SAST, Braşov, 1999, p. 25.
[10] Ţinca O., *Dreptul muncii. Relaţiile colective*, Ed.Lumina Lex, Bucharest, 2004, p. 3.

competence to appoint in the public office", thus excluding the preliminary disciplinary investigation and the necessity of meeting a discipline commission.

In the sense of the law, according to article 78, paragraph 2, "the disciplinary sanctions provided in article 77 paragraph (3) letters b) - e) shall be applied by the person who has the legal competence of appointment to the public position, at the proposal of the discipline commission".

In the case, the sanction applied - written reprimand is provided by article77 paragraph 3 letter a) of Law no. 188/1999, normative act stipulating in article 78 that "the disciplinary sanction provided for in Article 77, paragraph 3, letter a), may be applied directly by the person who has the legal power of appointment to public office".

The corroboration of the two texts shows that the stage of the preliminary investigation, that is the phase of the civil servant's hearing, is mandatory only in the case of sanctions provided by article 77, paragraph 3, letters b)-e), of the Law no. 188/1999, to be carried out by a disciplinary commission.

In the same sense, at one hand, the provisions of Article 30, paragraph 1, of GD no. 1344/2007 on the organization and functioning norms of the disciplinary commissions stipulate that "The administrative inquiry procedure is mandatory for the application of the disciplinary sanctions stipulated in article 77, paragraph (3) letters b) - e) of the Law no. 188/1999, republished, as well as if the disciplinary sanction stipulated in article77, paragraph (3), letter a) from the same normative act was challenged to the head of the public authority or institution".

On the other hand, according to article 30, paragraph 2, letter a) of GD no. 1344/ 2007, the administrative inquiry procedure consists mainly in hearing the person who filed the complaint and the civil servant whose act was referred to as disciplinary offense, followed by the administration of the evidence and the debate of the case.

As a result, there is no confusion between a prior investigation involving the civil servant's hearing and an administrative inquiry by the Disciplinary Board, since the prior research assigned to the Disciplinary Board consists precisely in the hearing of the civil servant, according to article 30 paragraph 2, letter a) of GD no. 1344/2007.

3. The constituent elements of disciplinary deviation

The triggering of disciplinary liability requires the meeting of the constitutive elements of the disciplinary deviation, namely the object, the objective side, the subject, and the subjective side.

As far as the subject of the disciplinary offense is concerned, it is necessary that the committed act should cause the infringement of a social value, namely order and discipline at the workplace.

In this respect, the employing institution asked the coordinating ministry a point of view regarding the non-conformities found in the functioning of the internal audit department, receiving an address containing a guiding form for the implementation of the stages needed to optimize its activity. Following an audit mission, measures necessary to ensure its functionality were implemented, including the delegation of mandated auditor duties - head of internal auditor's compartment and the recruitment of the second auditor with an execution function of that institution.

The implementation of the necessary measures for the creation of a functional audit compartment was to be assigned to the head of the internal audit department, the delegated official, with the obligation to coordinate the activities of elaborating and updating the internal audit charter and obtaining the opinion from the audit department organized at the level hierarchically superior to the concerned institution.

In this respect, the address of the coordinating ministry containing the recommendations to the competent ministry was communicated to the institution in question, the mandated official proposing the deadlines in the follow-up sheet for the implementation of the recommendations. The follow-up sheet for the implementation of the recommendations received by the employing institution provided for the organization of a functional audit compartment with the delegation of

specific duties to the head of the internal audit auditor's compartment, which led to the issuance of a mandate to submit the personal file for the purpose to obtain the opinion of the relevant ministry.

The Coordinating Ministry's Address stated the responsibility of the management of the institution to mandate by administrative act the person in the Audit Compartment to exercise the managerial responsibilities, as this would have the obligation to coordinate the activities of elaborating and updating the Internal Audit Charter and to obtain an opinion from the internal audit department organized at the hierarchical level, as well as to draw up multiannual and annual internal audit plans.

In the case of non-compliance of the official with the direct order received, in the fact that in the follow-up sheet the implementation of the recommendations even specified the necessity of organizing a functional audit department, as well as the delegation of the specific duties to the chief of the internal auditor's compartment, the recruitment of the second auditor with execution function becomes impossible, according to the provisions of article 20 (2) of the Law no. 672/2002 of the public internal audit.

As far as the objective aspect[11] is concerned, it is represented by the illicit act of the public official, which will produce a detrimental result to the internal order of the employing institution.

Thus, the sanctioned civil servant did not raise any objection to the new delegated powers when issuing the mandate order, not criticizing this administrative act for unlawfulness within the meaning of article 45 of the Law no.188/1999, the status of civil servants, republished, in which case these duties have become mandatory. As a result, after the communication of this provision, the official as the accredited auditor was required to depose a file to the Public Internal Audit Service of the Coordinating Ministry and to obtain the opinion as a necessary condition for drawing up the multiannual and annual internal audit plans.

Although the only internal auditor's position within the institution was occupied by the mandated civil servant, he did not, however, submit his personal file for approval as a mandated auditor, which led to his notification by the Executive Director of the institution by email. Notification of the Chief Executive Officer to the appellant and the audit compartment followed a notification by the appellant to the Director also by email addressing the work procedures for the internal audit work and the Audit Charter.

The subjective side is represented by the negative psychological attitude of the civil servant towards the committed act, in this case the failure to submit the personal file for the purpose of being appointed as a mandated auditor.

Thus, by issuing a written provision to the official was delegated the specific duties as the head of the audit and appointment department as a mandated auditor, with the obligation to submit the file for the purpose of his approval.

Following the issuance of the order, the executive director of the institution issued a direct written order addressed to the official in order to comply with the specified obligations, provided that he had not filed his personal file until that date. The Executive Director thus asks the official to draw up the necessary documentation and submit it within a maximum of 15 days in order to carry out a functional audit department at the level of the unit.

At the end of the term, the official was found not to comply with this direct order, which was later discussed at the meeting of the Board of Directors of the institution. Analyzing the follow-up record of the implementation of recommendations containing deadlines proposed by the recurrent to achieve a functional audit compartment, the Steering Committee issued a new address to the official's attention, informing him that due to his non-compliance with the obligations and the lack of opinion the auditor mandated that file could not be approved, which led to the impossibility of adhering to the inserted terms. The Steering Committee has forwarded to the official that the final deadline for complying with his obligation to file the dossier under the Mandate Provision to receive the opinion from the Public Audit Service of the Ministry is 10 days from the communication.

[11] Ţiclea A, *Codul muncii*, Ed. Universul Juridic, Bucharest, 2015, p. 836.

Upon his final appointment to obtain a mandated auditor's opinion, the officer communicated to the Executive Director by written address that the other duties he had prior to appointment as an authorized auditor would prevent him from performing additional tasks and requested the release of them, respectively, of the obligation to inventory classified documents. On the background of the delay in the inventory of the documents to which he referred, by decision of the Board of Directors of the institution, he was informed about the establishment of a committee in order to resolve the stated situation in the short term, a commission constituted by the provision including him as a member. In addition, in order to determine whether to comply with the obligations to obtain the mandated auditor's opinion, another provisioning officer in the institution was appointed as a security officer and took over the complainant's duties regarding the implementation of the measures for the protection of the censored information, a new job sheet was completed.

Subsequently, the official also communicated by written address to the Executive Director that he understood not to submit his file for the purpose of being appointed as an authorized auditor because he intends to resign.

In the circumstances in which, even after the dismissal of the duties, the official did not understand to send the personal file for the purpose of obtaining the authorized auditor's opinion, by the Disposition he was sanctioned with written reprimand, according to the provisions of article 77, paragraph 3, letter a) of Law no. 188/1999 on the status of civil servants, as a result of the deviations of the systematic delay in the performance of the works and the refusal to perform his duties, respectively the non-compliance with the provisions received and the unjustified delay of their accomplishment, respectively the failure to fulfill the Disposition by which it was mandated with specific attributions as the head of the audit department.

As regards the causal link between the illicit act and the result produced, the sanction was applied in the circumstances in which, in the absence of a certified auditor's opinion at the level of the institution, the documents specific to the audit activity could not be elaborated, thus preventing the effective conduct of the activity of internal audit.

The official's support that since the date of Disposition issuance and until the date of application of the sanction his employment relationship with the employer has been changed is unfounded, since his relocation of attributions was not a recognition of any culprit or the assignment of a new function and it was necessary to determine his compliance with the obligations resulting from the legal employment relationship in order to establish a functional audit compartment at the level of the unit. The non-compliance of the recurrent with the quality as a statutory auditor, as he does not exercise any diligence in the sense of his approval, leads to the impossibility of submitting the second auditor's post to the competition for the establishment of a functional audit compartment.

In addition, the official's assertion that at the time of application of the sanction he was unable to fulfill the obligations imposed by the appointment order as a mandated auditor since the audit attribution could only be carried out under the coordination of the head of department that had not yet been appointed is totally unfounded as he was the only internal auditor in the organizational structure of the institution, and the disposition had as its object exactly his appointment as head of the audit compartment.

Thus, in the case in question, the applicant's conduct of non-compliance with the superior order, as well as the failure to fulfill his own obligations, continued after the issue of the sanctioning decision. Failure to comply with the obligations resulting from the employment relationship, namely obtaining the opinion as mandated auditor, led to the request of the Court of Auditors following the control made to submit a note of relations in the justification of his conduct. In this respect, in the financial audit report provided that the internal audit activity of the entity did not operate according to the law, and that no internal audit mission was performed, stating that although the official was mandated to perform the duties of the head of the internal audit department and to obtain the ministry's opinion in this respect, and that repeated deadlines were given to obtain the opinion, he did not comply with the orders received.

4. Conclusions

The cumulative conditions necessary for the existence of the disciplinary offense are represented by the object, the objective side, the subject and the subjective side, in the conditions in which the employee's conduct relates to the violation of the legal norms, the provisions of the collective and individual labor contracts, and the order of the superior.

We refer to the respect of the social working relations, in particular of the discipline of labor, according to the legal provisions in the field, represented in this case by the provisions of the Law no.188/1999 on the status of civil servants.

In this respect, as regards the application of the written reprimand sanction, the legal basis is represented by the provisions of article 77, paragraph 3, letter a) of the Law no.188/1999, motivated by the systematic delay in carrying out the works and the refusal to perform the job duties, the non-compliance of the official with the primary dispositions, as well as the unjustified delay in their performance.

As a result of the above aspects, the degree of social danger of the offense caused by the non-compliance of the official with the obligations resulting from the employment relationship constitutes a basis for the disciplinary sanction, provided that the facts of violation of the legal and contractual norms are proved, in relation to the fault of the official concerned, the resulting harmful outcome and the causal link can be presumed.

Regarding the civil servant quality of the sanctioned person, the Law no. 188/1999 on the Civil Servants' Statute contains specific provisions for the conduct of those subject to it, the facts of the systematic delay in performing the work, the refusal to perform the job duties, the non-compliance with the obligations under the norms of law or the order of the superior are also assessed as being the guilty party to the special status of this professional category, which fully substantiates the application of the disciplinary sanction corresponding to the degree of social danger produced.

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