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THE PRINCIPLES GOVERNING THE ADMINISTRATIVE-DISCIPLINARY PROCEDURE UNDER ROMANIAN LAW

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Abstract:
This paper aims to provide an overview on the provisions regulating the principles that govern, under the Romanian Administrative Code, the activity of the disciplinary committee, but which are applicable to the entire administrative-disciplinary procedure.
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The administrative-disciplinary liability of the civil servant represents a form of administrative liability, along with contraventional liability [1]. As in the case of civil and criminal liability, administrative liability is based on fault [2], and its legal regime is established by the provisions of the Administrative Code, in the provisions of Part VI. *The state of civil servants* supplemented by the provisions of Annex 7, which includes the rules regarding the manner of constitution, organization and functioning of disciplinary commissions, as well as the composition, the attributions, the reporting method and the disciplinary procedure. This article analyses the administrative-disciplinary procedure through the principles that govern the activity of the disciplinary committee, but which are actually applicable to the entire disciplinary procedure. Disciplinary commissions are deliberative structures, without legal personality, independent in the exercise of legal powers.

The principles governing the disciplinary procedure and the activity of the disciplinary committee are expressly provided by art. 17 para. (1) of Annex 7. These principles can be classified, depending on their object, into principles regarding the regulation of liability, principles regarding the guarantee of rights and procedural principles.

I. Principles regarding the regulation of liability

A first series of principles regulates the concept of administrative-disciplinary liability and the way of establishing the sanction. First, the administrative-disciplinary responsibility can only operate under the conditions or in the cases provided by the law and within the limits established by it - the principle of the legality of the employment of the administrative-disciplinary responsibility, expressly provided by art. 17 para. (1) lit. e) from Annex 7.

Administrative-disciplinary liability can be incurred only in the case of committing an act that meets the typical elements of disciplinary misconduct and only if this act is listed expressly or by reference to art. 492 para. (2).

Thus, disciplinary misconduct represents the culpable violation by civil servants of the duties corresponding to the public office they hold and of the rules of professional and civic conduct provided by law. As I have shown previously, administrative-disciplinary liability can only be incurred under the conditions of the existence of the civil servant's guilt, there being no disciplinary offense in situations where the deed was committed by mistake, through physical or moral violence, or in a fortuitous case or by force major [3]. Art. 492 para. (2) of the Administrative Code, limitedly establishes the facts that constitute disciplinary violations, either by the express enumeration of these facts (a) systematic delay in the performance of works; b) repeated negligence in solving the works; c) unmotivated absence from work; d) non-compliance with the work schedule; e) interventions or efforts to resolve requests outside the legal framework; f) failure to respect professional secrecy or the confidentiality of works of this nature; g) manifestations that affect the prestige of the public authority or institution in which the civil servant carry out the activity; h) carrying out activities of a political nature during working hours ; i) unmotivated refusal to perform the duties of the service; j) the unmotivated refusal to submit to occupational medicine control and medical expertise as a result of the recommendations made by the occupational medicine doctor, according to the legal provisions), or by reference to other normative acts (k) violation of the provisions related to duties and prohibitions established by law for public officials , other than those related to conflicts of interest and incompatibilities ; l) violation of the provisions related to incompatibilities if the civil servant does not act to terminate them within a term of 15 calendar days from the date of the 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 public office and civil servants or applicable to them).

As a consequence, an act that is not expressly provided for by the legislation in the field of public office cannot constitute a disciplinary offense and public servants or applicable to them. The use of the syntagm "normative acts" removes from the scope of interpretation acts that regulate the activity of an institution, but which do not have a normative character, such as, for example, an internal regulation, a procedure or a work instruction. Moreover, those normative acts inferior to the organic law must be excluded, given that the Constitution establishes the fact that the status of the civil servant is established by organic law.

In the situation where a disciplinary offense is found, the establishment of the sanction must comply with three principles expressly provided by the Administrative Code.

First, the principle of uniqueness states that only one disciplinary sanction can be applied for a disciplinary offense. This principle must be respected even in case of multiple disciplinary violations, when the disciplinary sanction related to the most serious disciplinary violation is to be applied (art. 492 paragraph (7) of the Administrative Code).

Based on the principle of the legality of the sanction, this single disciplinary sanction can only be one of those expressly provided by art. 492 para. (3) of the Administrative Code, respectively:

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

The individualization of the applied sanction is done in compliance with the principle of proportionality, according to which a correct ratio must be observed between the seriousness of the act that constitutes a disciplinary offense, the circumstances of its

commission and the sanction proposed to be applied (art. 17 para. (1) letter d of Annex 7). However, the cited provisions must be supplemented with the provisions of art. 492 para. (6) of the Administrative Code, which provides that when the disciplinary sanction is individualized, according to the provisions of para. (4), the causes and seriousness of the disciplinary offense, the circumstances in which it was committed, the degree of guilt will be taken into account and the consequences of the misconduct, the public servant 's general behaviour during service, as well as the existence in his antecedents of other disciplinary sanctions that were not removed under the law.

Unlike labor law where individualization is carried out on the basis of legal criteria, in administrative law the Code establishes imperatively the sanctions that can be applied for various disciplinary violations, limiting the possibility of the decision-maker to choose the prescribed sanction. With regard to this norm, the doctrine [4] has shown that in practice there can be abuses, exemplified by the situation in which an official was dismissed from the public office for committing the disciplinary offense "unjustified absence from work", although, in fact , had applied for leave during the period in which it was planned and was not aware of the fact that it had not been approved.

Also based on the principle of legality, disciplinary sanctions in art. 492 para. (3) lit. b)-f) can only be applied after the prior investigation of the committed deed and after hearing the public official, the two conditions having to be fulfilled cumulatively, as it was confirmed by the doctrine [5] and established by the jurisprudence of the supreme court [6].

II. Principles regarding the guarantee of rights

Once the principles governing administrative-disciplinary liability and the establishment of the sanction have been clarified, three other principles have a fundamental role in carrying out the commission's activity, namely the presumption of innocence, guaranteeing the right to defense and adversariality.

Based on the presumption of innocence, the civil servant is considered innocent for the act reported as a disciplinary offense as long as his guilt has not been proven. The principle of the presumption of innocence is enshrined in Article 6 paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a legal

provision that refers to "a person accused of a crime". Later, ECtHR jurisprudence specified that the principle of presumption of innocence is not limited to a simple procedural guarantee in criminal matters, its scope being wider and requiring that no representative of the state or a public authority declare that a person is guilty of a crime before its guilt has been established by a " court " [7]. Even after expanding the scope of the article, with regard to professional disciplinary proceedings, in *Albert and Le Compte v. Belgium*, 1983 (§ 30) the Court considered it unnecessary to give a ruling on the matter, having concluded that the proceedings fell within the civil sphere. However, the Court emphasize, that the two aspects, civil and criminal, of Article 6 are not necessarily mutually exclusive [8]. The case law on disciplinary proceedings resulting in the compulsory retirement or dismissal of a civil servant follows the same path; the Court found that Suche proceedings were not "criminal" within the meaning of Article 6 (*Moullet v. France* (dec.), 2007; *Trubić v. Croatia* (dec.), 2012, § 26; *Pişkin v. Turkey* , 2020, §§ 105-109; *Čivinskaitė v. Lithuania* , 2020, §§ 98-99).

In common labour law, the Constitutional Court ruled on the constitutionality of article art. 52 para. (1) lit. a) from Law no. 53/2003, which provided for the possibility of the employer to suspend the employee's individual employment contract as a result of the initiation of the preliminary disciplinary investigation against him [9]. In its decision, although the Constitutional Court established the unconstitutionality of the article, it assessed that "that the suspension of the employment relationship in the case provided by art. 52 para. (1) lit. a) from Law no. 53/2003 does not have the significance of violating the presumption of innocence, since, as shown above, it does not constitute a disciplinary sanction and even less one of a criminal nature. Thus, the employer does not pronounce on the guilt or innocence of the employee, nor on any possible criminal liability. Likewise, it cannot be argued that this measure could be equated with what the European court understands by an accusation of criminal guilt formulated by a "representative of the state or a public authority", before the pronouncement the court". In labour law, therefore, the presumption of innocence is not expressly provided for, nor did the Constitutional Court consider it appropriate to extensively interpret the provisions of the Labour Code, in the sense of enshrining this principle through jurisprudence.

Another principle expressly provided by the Administrative Code is that of guaranteeing the right to defense. According to this principle, the civil servant has the right to have access to all existing documents in the case file, to be heard, to present evidence in his defense and to be assisted or represented during the administrative investigation procedure.

The right to have access to all existing documents in the case file can be exercised for the entire duration of the procedure and covers, as a rule, documents of any nature submitted by the parties, as well as minutes drawn up by the commission, together with all their annexes. A limitation of this right can intervene under the conditions of art. 492 para. (10) of the Administrative Code, according to which "during the administrative investigation, in the situation where the civil servant whose act was reported as a disciplinary offense may influence the administrative investigation, the head of the public authority or institution has the obligation to prohibit his access to the documents that can influence the research [...]. The measure is ordered for the entire duration that the civil servant can influence the administrative investigation". The legal provision covers any documents that can influence the investigation, therefore also those documents that would be in the case file. Being in the presence of a limitation of a right, the invoked legal provision must be interpreted restrictively, and the proof of the existence of the factual situation, respectively the concrete possibility of influencing the administrative investigation must be made prior to the restriction of the right.

Regarding the civil servant's right to be audited, it must be specified that the hearing is a stage of the administrative-disciplinary investigation procedure and has as its subjects the person who made the complaint and the civil servant whose deed was notified as a disciplinary offense, as well as other people who can provide information regarding the resolution of the case.

As a rule, the person who made the notification is heard separately from the civil servant whose act was notified as a disciplinary offense. However, if the parties agree, the hearing can be held in the presence of the person who made the notification and the civil servant whose act was notified (Article 41 paragraph (2) of Annex 7.

The summoning of the persons to be heard is done by the president of the disciplinary commission, by subpoena. The subpoena is individual and includes elements

required by law, under penalty nullity. To ensure the right to defense, the subpoena is communicated accompanied by a copy of the notification, as well as copies of the documents submitted by the person who formulated the notification. Also, the legal provisions establish a deadline for the communication of the summons, i.e. at least 5 working days before the deadline set for holding the meeting.

After receiving the summons, the notification directed against him and the documents submitted by the person who formulated the notification, the civil servant can formulate an objection, which includes the answer to all the factual and legal aspects of the notification, as well as the means of proof by which understands how to defend himself. According to art. 39 para. (2) of Annex 7, the objection is submitted by the deadline at which the disciplinary committee administers the evidence. We believe that the objection should be filed within a reasonable period before the date set for the hearing, to allow the persons heard to refer, in their testimony, to the answer to the factual and legal aspects of the referral.

The way the hearing is conducted and the parties' submissions are recorded and have the role of reducing the possibility of abuse, whether this abuse materializes by exerting pressure on the public official, or by distorting the submissions of the heard parties. Thus, the hearing is also recorded on electronic media, which is kept in the case file and constitutes an appendix to the hearing minutes. In turn, the hearing minutes contain both the questions posed by the members of the disciplinary committee and the answers of the person being heard.

Another constituent element of the right to defense is related to the presentation and administration of evidence. Thus, the person who made the notification and the public official whose act is being investigated have the obligation to propose the means of proof they consider necessary. In the hearing report, the deadline by which the means of evidence that were not requested during the hearing can be invoked, but not later than the deadline at which the disciplinary committee administers the evidence, is established. It follows, therefore, that before the date of the hearing, the deadline by which the disciplinary committee administers the evidence must be established and communicated to the interested persons. This term is a reference, as I have shown above, including for

the filing of the response by the civil servant, an essential act in the exercise of the right to defense.

The minutes of the hearing are signed on each page by all persons present at the hearings. Additions, deletions or changes are signed in the same way, under penalty of not being taken into account.

Regarding the administration of evidence, it may consist of documents and witnesses (art. 39 para. (3) of Annex 7). According to the law, evidence can be proposed by notification (art. 27 para. 1 letter d), by response (art. 39 para. (2), during the hearing by the person who formulated the notification and by the public official whose the act is investigated, as well as after the hearing, but not later than the deadline at which the disciplinary commission administers the evidence (art. 41 para. (3) and para. (7).

The civil servant therefore has the right to present evidence in his defense having knowledge of both the content of the referral and the evidence that was proposed through the referral, a copy of which will be communicated to him with the subpoena. However, it does not follow from the provisions of the Administrative Code what is the regime for communicating the evidence after the hearing, more precisely, what is the concrete way in which the public official whose act is being investigated can have knowledge of and can respond to the evidence presented by the person who formulated the notification. Art. 43 stipulates that the administration of the evidence involves their "analysis", but without specifying by whom and, from the systemic interpretation, it follows that the analysis is carried out by the disciplinary committee. It is true that art. 45 stipulates the obligation of the disciplinary committee to ensure unrestricted access of the civil servant to the documents used in or resulting from its activity regarding the act reported as a disciplinary offense, but its obligation to notify the civil servant of any new evidence submitted after the date of the hearing is not established. This aspect should be regulated in the future, in order to limit the possibility of abuse in the matter of administrative-disciplinary investigation.

Regarding the hearing of witnesses, the legal provision is summarized to establish that their hearing is done in compliance with the provisions of art. 41 of Annex 7, which, however, does not clarify whether the public official whose deed is being investigated participates or not in the hearing of the witness and, therefore, also whether he has the

right to ask him questions. Also, there is no provision for the commission's obligation to notify the public official that the witness's hearing took place and that he could have access to his statement, in order to exercise his right to defense.

These aspects must be managed by the disciplinary commission by applying another principle that governs its activity, namely adversariality, according to which the commission has the obligation to ensure to persons in divergent positions the opportunity to express themselves regarding any act or fact that is related with the disciplinary offense for which she was reported. Therefore, the interpretation of the articles that stipulate the conduct of the disciplinary procedure must be carried out in compliance with the principle of adversariality, which requires the disciplinary commission, for example, to communicate to the civil servant any documents submitted after the date of the hearing by the person who made the referral and information regarding the hearing of witnesses. Finally, the guarantee of the right to defense is carried out, according to art. 17 para. 1 lit. b the final thesis of Annex 7 by recognizing the right to be assisted or represented during the administrative investigation procedure. The right is recognized both to the public official whose deed was notified, and to the person who formulated the notification. Thus, pursuant to art. 32 para. (4) of Annex 7 each of the two parties may participate in the administrative investigation personally or may be assisted or represented, upon request, by a lawyer or a representative of the trade union of which he is a member. Of course, the representation of the official will make it impossible to hear him, which is an eminently personal procedure, which is likely to bring into question the relevance of the establishment of the measure of representation. With regard to the right recognized by the person who made the complaint, this fact is related to the specificity of the administrative-disciplinary responsibility, the disciplinary committee can also be notified by a person who considers himself injured by the act of a public official (art. 26 para. (1) letter a) of Annex 7).

In common law, the employee only has the right to be assisted, the possibility of representation being excluded. Thus, the employee can be assisted, at his request, by an external consultant specialized in labour legislation or by a representative of the trade union of which he is a member. The specialized external consultant can be, according to art. 233^1 para. (4), a lawyer, an expert in labour law or, as the case may be, a mediator

specialized in labour law, who, through his active role, will insist that the parties act responsibly to extinguish the conflict, respecting the rights of employees recognized by law or established by employment contracts. *De lege ferenda*, mediators could be granted the right to assist the official whose act was reported, for the same reasons for which this is established in labour law.

III. Principles regarding the conduct of the procedure

Two other principles concern aspects directly related to the activity of the disciplinary committee. Thus, according to the principle of swiftness of the procedure, the commission has the obligation to proceed without delay to the solution of the case, without thereby prejudicing the rights of the persons involved or violating the procedures provided by law. The principle of the obligation of the opinion requires each member of the commission to pronounce by vote, when drawing up the report on the resolution of each notification pending before the disciplinary commission. The refusal to pronounce by vote constitutes a disciplinary offense, under the conditions of art. 492 para. (2) lit. n) from the Administrative Code.

Finally, the activity of the disciplinary commission is also based on the principle of processing security and the confidentiality of personal data. Based on this principle, the commission's activity must be carried out with the implementation of appropriate technical and organizational measures, in order to ensure an appropriate level of security of personal data. Given the complexity of the technical and organizational measures, we believe it is more appropriate to require the committee to "observe" the technical and organizational measures established by the competent staff, the "implementation" of such measures involving activities that could exceed the competence of the committee.

Provided for in paragraph 3 of the same article 17, a number of other principles complement the principles stated above. Thus, the members of the disciplinary committee exercise their duties respecting the principles of independence, stability within the committee, integrity, objectivity and impartiality in analyzing the facts and in making decisions.

As it follows from the analysis carried out, the principles on which the activity of the disciplinary commission is carried out are also the principles of the administrative-

disciplinary procedure and have the role of ensuring compliance with a complex set of rights and legitimate interests, including the rights of the civil servant or of the person who considers himself injured by the act of the public official. In future research, the activity of the disciplinary commission will be deepened, both in terms of the exercise of administrative and functional duties, in order to identify those aspects that could be taken over by the disciplinary commissions under the labour law regulation, but also for promoting proposals to improve the legal provisions in force.

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