

## APPLICATION OF DISCIPLINARY PENALTIES

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**Abstract:** Each branch of law acknowledges a specific form of liability. Therefore there are several forms of liability: disciplinary, civil, criminal, etc. These forms of legal liability are characterized by specific conditions of substance and form (way of establishment, embodiments, etc.). Therefore, the commission of an infringement determines the intervention of legal liability and the application of penalties. The penalty is a means to materialize liability and it will take its shape. In this scientific approach we intend to analyze the application of disciplinary penalties to civil servants.

**Keywords:** legal liability, disciplinary liability, civil servants, disciplinary penalty

### 1. Introductory remarks

The penalty is the element of structure of a legal norm which stipulates the consequences of non-compliance. It is the measure taken against the will of those who violate the provisions of the legal norm and is applied by bodies specially empowered in this regard. The penalty materializes the legal liability of the infringer of the legal norm, ensuring the efficiency of law in general (N.Popa, 2012).

The application of the penalty is aimed mainly at: repairing damage and restoring the infringed order, straightening the culprit and his reintegration into society, preventing future antisocial acts.

According to the nature of social relations regulated and given the social danger of the acts of infringement, we can distinguish the following categories of penalties: civil, criminal, administrative, disciplinary (A.Sida, D.Berlingher, 2012).

Regarding the concept of legal liability, it is not uniformly defined and explained in the literature. Most defining summaries are made in terms of the civil and criminal law in the sense of the meaning of "obligation" to incur civil or criminal penalty. At the same time, some authors (Gh.Bobos, 2009) point out that legal liability is not and cannot be seen as a mere "obligation to incur a penalty" but, in a broader sense, as a "way of achieving state constraint" as a legal relation of coercion which

is aimed at penalty. Hence, the conclusion that the concept of "legal liability" and that of "penalty" are not identical or synonymous. They are correlative and entail each other, in that legal *liability* usually involves *penalty* (i.e. coercive measure against a wrongful act and its author), the penalty being in this context the concrete materialization of liability. "Liability" therefore constitutes the legal framework for enforcing the penalty, while the "penalty" is the coercive measure imposed for breach or non-compliance with a specific legal norm (A.Sida, D.Berlingher, 2012).

## 2. The application of disciplinary penalties to civil servants

Disciplinary liability occurs only as a result of commission of a disciplinary offense by a civil servant voluntarily or through negligence.

Disciplinary penalties may be imposed only after the preliminary investigation of the crime committed by the civil servant and his hearing. The hearing of the civil servant shall be recorded in writing under penalty of nullity, and the civil servant's refusal to appear in court or to give and sign a declaration regarding the alleged disciplinary infringements shall be recorded in the minutes. During the administrative investigation, if the civil servant who committed a disciplinary infringement can influence the administrative investigation, the head of the public authority or institution has the obligation to prohibit his/her access to documents which may influence investigation research or, where appropriate, order temporarily transferring the civil servant to another compartment or another structure of the public authority or institution.

The investigation procedure for disciplinary infringements committed by civil servants is conducted taking into account the following principles (these principles are laid down in Art. 19 of the *Government Decision no. 1344 of 31 October 2007 on rules of organization and operation of disciplinary commissions*, published in "Official Gazette", no. 768 of 13 November 2007):

- *the principle of presumption of innocence*, according to which the civil servant is presumed innocent of the deed seized before the disciplinary committee as an infringement as long as his guilt has not been proven;
- *the principle of guaranteeing the right of defense*, which recognizes the civil servants right to be heard, to present evidence in his defense and to be assisted or represented during the administrative investigation procedure;
- *the principle of contradictoriness* entails the obligation of the disciplinary commission to provide and persons on divergent positions to express themselves on any act or fact which is related to the disciplinary infringement brought before the disciplinary commission (V.Vedinas, 2004);
- *the principle of proportionality*, according to which a correct ratio must be observed between the seriousness of the disciplinary infringement, the

circumstances of its perpetration and the proposed disciplinary penalty to be applied;

- *the principle of legality of the penalty*, according to which the disciplinary commission or the head of a public authority or institution must propose and establish only disciplinary penalties provided by law;
- *principle of unique penalty*, according to which only one disciplinary sanction can be applied for committing a disciplinary infringement;
- *principle of celerity of procedure*, according to which the disciplinary commission is required to proceed without delay to the settlement of the case, complying with the rights of people involved and the procedures prescribed by law;
- *the principle of mandatory opinion*, according to which each member of the disciplinary commission is required to adjudicate each complaint pending before the disciplinary commission.

Disciplinary penalties provided by law shall be applied by head of the public authority or institution at the proposal of a collegial body called the Disciplinary Commission (V.Vedinas, 2004). This rule concerns all disciplinary penalties, except written reprimand. The disciplinary penalty of written reprimand may be applied directly by the person who has the legal competence to appoint to public office at the suggestion of the compartment in which the civil servant works. As regards the disciplinary sanctions applicable to magistrates, Law no. 303/2004 regarding the statute of judges and prosecutors sets the infringements from official duties, but also for acts that damage the image of the profession, for which the disciplinary liability of judges and prosecutors can be derived. (I. Deleanu, 2013). Disciplinary action in this situation shall be exercised by judicial inspection through the judicial inspector, the Minister of Justice or the President of the High Court of Cassation and Justice, who, in the case of prosecutors, is replaced by the general prosecutor of the High Court of Cassation and Justice (V.M.Ciobanu, T.C. Briciu, C.C.Dinu, 2013), and the Superior Council of Magistracy shall, through its sections, fulfill the role of court in matters of disciplinary liability of judges and prosecutors, for the actions stipulated in the Law on the status of magistrates no. 303/2004 and for the exercise of office duties in bad faith or with gross negligence, if the act is not an infringement.

Regarding the **disciplinary procedure**, it would include the following procedural steps: a preliminary investigation into the disciplinary infringement; application of the disciplinary penalty; enforcement of the penalizing decision and appeal of the disciplinary penalty (V. Negrut, 2002).

This procedure begins with the notification of the disciplinary commission of the public authority or institution in connection with a disciplinary infringement made by a civil servant. Referral to the Disciplinary Commission may be made by the

head of the public authority or institution, by the head of the department in which the civil servant works, or by any person who considers himself harmed by the act of a civil servant.

The notification shall be submitted to the registration office of the public authority or institution in which the civil servant works, namely the registration office of the public authority or institution where the competent disciplinary commission is constituted and reported for recording to the secretary of the disciplinary commission no later than three working days. At the same time the notification is forwarded to the president of the disciplinary commission. After receiving the notification, the president of the disciplinary commission will expeditiously set the term of the first meeting of the disciplinary commission and will convene the committee members.

The notification of the disciplinary commission is formulated in writing, not later than 1 year and 6 months after the deed notified as infringement and should be accompanied, when possible, by the documents that support it.

If the person filing the notification does not know the identification data of the civil servant who committed the infringement, the notification may include other identifying elements of the civil servant whose acts are notified as disciplinary infringements.

At the first meeting of the disciplinary commission, compliance with the deadline for submitting the notification shall be verified; the object of the notification is identified and the jurisdiction for settlement is established; the constituents of the notification are verified. If there are several notifications on the same matter against the same civil servant, they will be joined.

The disciplinary commission begins the administrative investigation procedure for the complaints that were not filed, setting the date and place of the next meeting and convening commission members, the civil servant and the person who filed the complaint.

Members of the disciplinary commission are convened by address, by the secretary of the disciplinary commission at the request of President. Persons to be heard are convened to present themselves before the disciplinary committee by the president of the disciplinary commission, by summons. The summons shall be communicated to the civil servant within at least 5 working days before the deadline, the failure to meet the deadline leading to invalidity of the summons procedure.

The communication of summons and all pleadings shall be made by the secretary of the disciplinary commission, personally, under signature of receipt, or by registered letter with acknowledgment of receipt, depositing evidence of communication on file. Together with the summons a copy of the referral will also

be served, as well as copies of documents lodged by the person who filed the complaint, if necessary.

The communication of summons by registered mail is made at the domicile or residence or mailing address of the summoned. The change of residence of one of the parties during the administrative investigation must be notified to the disciplinary commission.

If the person summoned refuses to accept the summons or to sign the receipt, minutes shall be prepared. The summons shall be deemed communicated to the parties even if the recipient has refused to receive or did not go to the post office to pick it up, although there is evidence of its notice. If a person summoned appears before the disciplinary commission in person or by proxy, any procedural defects are covered.

The summoned civil servant can formulate a plea encompassing the answer to all accusations in fact and in law of the, as well as the evidence that he wishes to use to defend himself.

The administrative investigation procedure can be carried out in the absence of the person who filed the complaint and the civil servant against whom the complaint was filed at their express request, except for the terms set for the hearing.

The civil servant whose deed is investigated can appear before the disciplinary commission assisted by a lawyer.

The investigation of the disciplinary infringement involves:

- hearing the person who made the complaint;
- hearing the civil servant whose deed is the subject to the complaint;
- hearing other persons whose statements can lead to resolution of the case;
- collecting the information needed to solve the case, in the manner prescribed by law;
- administering evidence, verifying documents and statements.

The hearing of the civil servant whose deed was subject to complaint as infringement and the person who made the complaint are recorded in a separate protocol. They are to be heard separately unless requested by either party and with the consent of the other, and the hearing can be done in the presence of the person who filed the complaint and a civil servant whose deed was subject to complaint. If the event that persons being questioned will not or cannot sign the report, this will be indicated in its content. Refusal of legal persons summoned to appear at the hearings will be mentioned in the minutes and will not hinder administrative investigation.

During the hearing, the person who filed the complaint and the civil servant whose deed is being investigated are obliged to propose means evidence. Following the administration of evidence, the disciplinary commission will prepare a report which will record the administrative investigation results. The report filed by the

disciplinary commission upon the completion of administrative investigation will propose the applicable disciplinary penalty or, where appropriate, dismissal, having regard to the conclusions of the majority of its members. Separate opinions shall be made and substantiated in writing and shall be annexed to the report of the disciplinary commission.

After debating the case, the disciplinary commission may propose:

- *applicable disciplinary penalty*, when the disciplinary infringement by the civil servant was proved;
- *dismissing the case*, if the commission of a disciplinary offense is not confirmed, as well as in the following cases: within 3 months from the date of termination of service of the civil servant whose deed was subject to complaint as a disciplinary infringement, if he has not regained this position in the mentioned period; on the death of the civil servant.

The individualization of the disciplinary penalty applicable to the civil servant will be made taking into account the following criteria:

- causes for committing the disciplinary infringement;
- circumstances in which the disciplinary infringement was committed;
- the civil servant's degree of culpability;
- the seriousness and consequences of the disciplinary infringement;
- the conduct of the civil servant;
- the existence of the disciplinary precedents of the civil servant, which were not canceled as provided by law.

If several facts were reported in the same complaint as infringements committed by the same civil servant, the disciplinary commission will propose, following administrative investigation, applying a single disciplinary penalty, taking into account all disciplinary infringements.

If the disciplinary commission proposes the application of disciplinary penalty for which the law establishes certain minimum and maximum limits, it will also propose their duration and, where applicable, the percentage of reduction of salary or the rank or position to which the demotion penalty is to be applied.

The report of the disciplinary commission shall be prepared within five working days of the completion of the administrative investigation procedure and notified to the head of the public authority or institution where the civil servant works, the person who filed the complaint and the civil servant whose deed was subject to complaint.

The documents resulting from the investigation carried out by the disciplinary commission, except for the report on the proposal for penalties, shall be kept confidential by its secretary, if the disciplinary commission meetings were not public.



The reports published on the penalty proposal are published by the disciplinary commission at the headquarters of the public authority or institution in which it operates.

The head of the public authority or institution shall issue the administrative penalty act within 10 days from the receipt of the disciplinary committee's report. The administrative penalty act shall be notified to the penalized civil servant within 5 calendar days from the deadline when the act must be issued.

If the head of the public authority or institution applies another penalty than that proposed by the disciplinary commission, he is obliged to give reasons for this decision (A.Trailescu, 2008).

The administrative penalty act is an act of authority in terms of its legal nature, written form and justification of the disciplinary penalty under the terms established by law as essential conditions of validity of the administrative act. The administrative act shall be attached to the report of the disciplinary commission, under penalty of nullity.

Disciplinary penalties may be imposed within one year from the date of notification of the disciplinary commission the on disciplinary infringement, but no later than 2 years after the commission of such an offense (A.Trailescu, 2008).

If there are indications that the civil servant's deed meets the constitutive elements of an offense, the disciplinary commission proposes to the head of the public authority or institution to notify prosecution bodies thereof. If the act of the civil servant was notified both as a disciplinary infringement and as an offense, the disciplinary liability procedure is suspended until the disposition of dismissal or waiver of prosecution or until the date on which the court orders conviction, waiver of punishment, acquittal or termination of criminal trial. If there are indications that the act committed by the civil servant may engage civil or tort liability, the disciplinary commission has the obligation to take the necessary legal steps in notifying the competent bodies.

The civil servant dissatisfied with the disciplinary penalty may apply to the competent administrative court to annul or amend, as appropriate, the penalty order.

The effects of cancellation of a penalty from a court order, are *ex nunc*, i.e. retroactive, the civil servant being reinstated to the previous situation according to the principle: *quod nullum est, nullum producit effectum*.

Before notifying the administrative court, the civil servant dissatisfied with the disciplinary penalty of reprimand shall have to address the issuer of the administrative act which applied the disciplinary penalty, requiring revocation of that administrative act in full or in part (V.Vedinas, C.Calinoiu, 2007). This prior administrative procedure is mandatory (graceful appeal) and can be exercised within 5 days from the date of communication of the administrative penalty. In this

situation, the head of the public authority or institution will notify, within 5 working days from the date of registration of the complaint, the competent disciplinary commission to verify whether the penalty was applied in compliance with the law.

The disciplinary commission verifies whether the disciplinary penalty applied by the head of the public authority or institution has been applied in compliance with the law, and according to the result of verification, it shall propose that the head of the public authority or institution, as appropriate, maintain, amend or annul the penalty imposed. In case the appeal brought by the civil servant shall be dismissed in whole or in part, he has the possibility to appeal to the administrative court if dissatisfied, for cancellation of the disciplinary penalty.

For other disciplinary penalties, the civil servant may address the administrative court to annul or amend the administrative act through which he received the disciplinary penalty.

The administrative court may be seized within six months of the date of response to the administrative complaint or, where applicable, the date of communication of the administrative penalty. For good reasons the application for summons may be made to the administrative court after the expiry of the 6-month term, but not later than 1 year from the date of issuance of the administrative act appealed.

The administrative court tasked with settling the disciplinary action has the power to verify the legality of the penalty act, including as regards the way in which the administrative body individualized the disciplinary penalty. If the administrative court finds that the administrative act ordering the penalty is illegal, it shall decide the cancellation of the administrative act and may indicate the disciplinary penalty that could be applied to the civil servant. The sanction that the court can impose, following the cancellation of the administrative act, cannot be more severe than that imposed in the disciplinary proceedings, taking into account, in this case, the *non reformatio in pejus* principle which requires that the penalty imposed by court following the annulment of the administrative penalty be lower. In other words, the civil servant's situation cannot be worsened following their appeal. (A.Trailescu, 2008)

The administrative court may, at the request of the parties involved in the proceedings, amend the administrative act imposing the disciplinary penalty, in the sense of applying a milder disciplinary penalty, which is proportional to the seriousness of the infringement committed by the civil servant.

In the doctrine, two theses have been promoted regarding the possibility of the courts to amend the document ordering a disciplinary penalty for employees, in the sense of applying another disciplinary action thereby. One of the theses argues that, in case of the admission of the employee's complaint, the court may itself set a disciplinary penalty, which should, however, be milder (I.T.Stefanescu, 2003;



S.Ghimpu, A.Ticlea, 2001), and a second thesis, which considers such a possibility impossible (D.Firoiu, 1994). The orientation of judicial practice is in the sense of recognizing the possibility of the court to replace the disciplinary penalty of termination of the employment contract with another, milder penalty (C.Rosu, 2002).

### 3. Conclusions

Disciplinary infringements are those illegal acts that can be committed only by employees. Violations of service obligations by civil servants entail disciplinary liability. Such deeds are called infringements and shall be penalized with: reprimand, warning, wage cuts, demotion, suspension from office, disciplinary transfer and removal from office. These penalties are imposed by the governing bodies, by hierarchically superior bodies, etc. Disciplinary liability occurs only as a result of commission of a disciplinary offense by a civil servant, voluntarily or through negligence. Disciplinary penalties may be imposed only after the preliminary investigation of the infringement committed by the civil servant and his hearing. With regard to disciplinary proceedings, it includes the following procedural steps: a preliminary investigation of the disciplinary infringement; application of the penalty; execution of the penalty decision and appeal of the disciplinary penalty. The civil servant dissatisfied with the disciplinary penalty may apply to the competent administrative court to annul or amend, as appropriate, the penalty order. In the doctrine, two theses have been promoted regarding the possibility of the courts to amend the document ordering a disciplinary penalty on employees, in the sense of applying another disciplinary action thereby. One of the theses argues that, in the case of admission of the employee's complaint, the court may itself set a disciplinary penalty, which should, however, be milder, whereas the second thesis considers such a possibility impossible.

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