

# BRIEF CONSIDERATIONS REGARDING THE PUBLIC SERVANTS ADMINISTRATIVE-DISCIPLINARY LIABILITY

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## Abstract

The recent legal changes in the field of administrative law have led to a unitary regulation of many judicial institutions, by means of codification. However, in the Administrative Code, we can notice an insufficient allocation of regulation space for administrative liability. Legally, on one hand, there are general provisions regarding the public servants' liability, the administrative-disciplinary liability regulated by the Administrative Code, and, on the other hand, we have special Statutes for a whole series of categories of public servants. Therefore, we speak of common law in the matter of administrative liability, represented by the Administrative Code, but also by special legislation, namely "Statutes", on different domains.

In recent jurisprudence, the Romanian Constitutional Court has ruled regarding disciplinary sanctions, analyzing the „warnings” method taken in the matter of police officers, as prevention measure against committing disciplinary misconduct. Therefore, the pretext that we use in the present study is to check the validity of the current legislation regarding the administrative-disciplinary liability, having as starting point the adopting of the Administrative Code, in the sense of observing what is administrative-disciplinary misconduct and what are the administrative-disciplinary sanctions applicable to public servants.

In the end, we will present the conclusions we reached through our study, based on the legislation, doctrine and judicial practice.

**Keywords:** Administrative Code, public servants, disciplinary misconduct, disciplinary sanction, Romanian Constitutional Court.

## 1. Introduction

Adopting the administrative Code<sup>1</sup> in our law system gave us the joyous occasion to reanalyze a very important subject for scientific research in the legal domain, namely, judicial liability<sup>2</sup>. With this occasion we continue the analysis dedicated to liability in administrative law<sup>3</sup>, developing the subject of public servants' administrative-disciplinary liability<sup>4</sup>, one of the three forms of administrative liability. The doctrine showed that: "liability presupposes that a person or authority has to explain and justify its own actions. In administrative law, this would translate through the fact that any administrative body must respond for its acts in before the administrative, legislative or judicial authority"<sup>5</sup>.

If in philosophy everything is transient, "All things before our eyes are changing very quickly: they

will either vanish, if it is true that substance is a unit, or they will disperse"<sup>6</sup>, in the life of the city, society evolves, knowledge discoveries are amazing and law is static, requiring a permanent (re)correlation of legislation to the social life. At the same time, we mention another aspect that we considered in the analysis performed on the personnel from public administration<sup>7</sup>, namely that the national administration was forced to adapt to the communitarian acquis: "in the conditions of acceding to the European Union, member states have taken on the obligation to incorporate the EU judicial norms in their judicial order"<sup>8</sup>.

The suggested topic is current, referring to the analysis of recent legislation, bringing to light the Constitutional Court jurisprudence that refers to disciplinary sanctions applied, regulated by special Statutes, more precisely pertaining to police employees. The administrative Code philosophy

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<sup>1</sup> Government Emergency Ordinance regarding the administrative Code no. 57/2019, published in the Official Journal no. 555 from 5th of July 2019, last modified through Government Emergency Ordinance no. 4/2021 (...), published in the Official Journal no. 117 from February 3rd 2021.

<sup>2</sup> E. E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013.

<sup>3</sup> For more details about the administrative liability, see: A. Iorgovan, *Drept administrativ. Tratat elementar*, volume III, Proarcadia Publishing House, Bucharest, 1993, p.210 and the following or C. S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H.Beck Publishing House, Bucharest, 2016, p.210 and the following.

<sup>4</sup> See also: M. V. Cărăușan, *Drept administrativ*, volume I, Economica Publishing House, Bucharest, 2012, p.395 and the following.

<sup>5</sup> I. Alexandru, *Drept administrativ european*, Universul Juridic Publishing House, Bucharest, 2008, pp. 259-260.

<sup>6</sup> Marcus Aurelius, *Gânduri către sine însuși*, translated from ancient greek Cristian Bejan, Humanitas Publishing House, Bucharest, 2020, p.78.

<sup>7</sup> For more on this subject, see: R. M. Popescu, *Jurisprudența CJUE cu privire la noțiunea de „administrație publică” utilizată în art. 45 alin. (4) TFUE*, in CKS e-book 2017, pp. 528-532.

<sup>8</sup> A. Fuerea, *Manualul Uniunii Europene*, 6th edition, revised and added after the Lisbon Treaty (2007/2009), Universul Juridic Publishing House, Bucharest, 2010, p.241.

regarding the categories of personnel that undergo activities that involve the public power regime is, on one hand, to submit the public servants to the rules mentioned by the administrative Code and, on the other hand, to allow the existence of special Statutes.

Administrative liability is mentioned in the Administrative Code Part VII, named „*Administrative liability*”, articles 563-579, but, regarding the administrative-disciplinary liability of public servants there is also Part VII, *Public servants' Statute*, Chapter VIII – *Disciplinary sanctions and public servants liability*, articles 490-497. We agree with the doctrine, according to which “we use the phrase *administrative-disciplinary liability* because, on one hand, we do not consider that the idea of *discipline* must necessarily be tied to the idea of service and to public authority/public servant and, on the other hand, we appreciate that it is just a phrasing that allows a clearer delimitation from the other two forms of administrative liability (...)”<sup>9</sup>.

The objective of this study is to briefly observe what are the actions that represent administrative-disciplinary misconduct and which are the administrative-disciplinary sanctions applied to public servants, by using the prevailing scientific research methods such as logical, deductive and comparative analyses.

## 2. The public servants' administrative-disciplinary liability

### 2.1. Disciplinary misconduct according to the Administrative Code

As the specialty literature indicates, “administrative-disciplinary liability represents the first form of liability that is specific to administrative law and it intervenes for committing actual administrative crimes, in the form of disciplinary misconduct”<sup>10</sup>. We mention the fact that disciplinary misconduct expressions are listed not in the public servants' administrative-disciplinary liability, but in Part IV, *Public servants' statute*, Chapter VII – *Disciplinary sanctions and public servants' liability*. Also, the Administrative Code has retained from former legislation on public servants (Law no. 188/1999 on the public servants' Statute<sup>11</sup>), which it abolished, the provisions regarding the liability of public servants.

Thus, according to article 492, para. 2 of the Administrative Code, the following actions are considered disciplinary misconduct:

- a. „Systematic delay in carrying out work;
- b. Repeated negligence in performing work;
- c. Unjustified absence from work;

- d. Failure to comply with work schedule;
- e. Interference or efforts to solve a demand outside the legal framework;
- f. Failure to comply with keeping the professional secret or confidentiality of secret work;
- g. Manifestations that affect the prestige of the public authority or institution in which the public servant performs their activity;
- h. Conducting activities with political character, during work hours;
- i. Unjustified refusal to comply to work attributions;
- j. Unjustified refusal to subject to work medicine control and medical expertise, following the recommendations made by work medicine doctor, according to the law;
- k. Breach of provisions that refer to duties and interdictions established by the law for public servants, other than those referring to conflict of interests and incompatibilities;
- l. Breach of provisions that refer to incompatibilities, if the public servant does not act to cease them within 15 calendar days from the date that the incompatibility occurred;
- m. Breach of provisions that refer to conflict of interests;
- n. Other deeds regarded as disciplinary misconduct in the normative acts in the field of public function and public servants or applicable to them”.

### 2.2. Disciplinary sanctions according to the Administrative Code

According to the doctrine, “there is a general principle of law according to which the breach of an obligation that comes from a judicial norm triggers the author's liability and the obligation to settle the resulted prejudice”<sup>12</sup>. As it has been noticed on a previous occasion, “disciplinary sanctions are”<sup>13</sup>:

#### “According to the legislation prior to the Administrative Code:

- a. Written reprimand;
- b. Diminishing the wage rights by 5-20% for a period up to 3 months;
- c. Suspending the right to advance in wage ranks or, if necessary, to promote in public office, for a period from 1 to 3 years;
- d. Demotion to a lower function for a period up to 1 year, with the corresponding diminishing of wage;
- e. Public office destitution.

#### According to the Administrative Code:

- a. Written reprimand;
- b. Diminishing the wage rights by 5-20% for a period up to 3 months;

<sup>9</sup> D. A. Tofan, *Drept administrativ*, Volume II, 5th edition, C.H.Beck Publishing House, Bucharest, 2020, p.299.

<sup>10</sup> V. Vedinaș, *Drept administrativ*, 10th edition, revised and updated, Universul Juridic Publishing House, Bucharest, 2020, p.571.

<sup>11</sup> Law no.188/1999 on the public servants Statute, published in the Official Journal no. 600 from December 8, abolished by Government Emergency Ordinance no.57/2019 regarding the administrative Code.

<sup>12</sup> R. M. Popescu, *Introducere în Dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p.189.

<sup>13</sup> E. E. Ștefan. *Manual de drept administrativ. Partea I. Caiet de seminar*, Universul Juridic Publishing House, Bucharest, 2019, pp.255-256.

- c. Diminishing the wage rights by 10-15% for a period up to one year;
- d. Suspending the right to be promoted for a period of 1 to 3 years;
- e. Retrograding to a lower public office, for a period of up to one year, with the corresponding wage diminishing;
- f. Public office destitution”.

Analyzing the two normative acts, Law no. 188/1999 on the public servants’ Statute (applicable legislation prior to the Administrative Code) and the current legislation (the Administrative Code), we notice there are few novelties regarding disciplinary sanctions:

- There is one new sanction: the diminishing of the wage rights from 10% to 15%, for a period up to one year
- “The right to advance” is rephrased and it is replaced with „the right to be promoted”
- “Demotion to a lower function” is rephrased and it is replaced by “retrograding to a public office of inferior level”.

### 2.3. Disciplinary misconduct according to the special Statutes

Regarding the Special Statutes, the Administrative Code, on one hand, expressly lists the special Statutes categories when it comes to a certain domain and, on the other hand, allows the performing of special activities, exceptional in character, for a certain category of public servants, expressly indicated, according to article 380, corroborated with article 370.

Thus, according to article 380, para. 1: “the public servants who fulfill the activities indicated in article 370, para. 3 (activities with special character in exercising the prerogatives of public power) may benefit of special statutes, if working within:

- a. Special structures of the Parliament of Romania;
- b. Special structures of the Presidential Administration;
- c. Special structures of the Legislative Council;
- d. Diplomatic and consular services;
- e. Institutions of public order and national security system;
- f. Customs structures;
- g. Any other public services established by law that meet the activities indicated in article 370, para. 3, letter h”<sup>14</sup>.

In the Administrative Code, “implicitly, two categories of public servants are established, **to whom the general statute applies** and those who benefit of,

and to whom the **special statutes** apply, regulated by special organic laws”<sup>15</sup>. The cited author continues: “the sectors in which **special statutes** may be added are, on one hand, listed by the Code but, on the other hand, there is a possibility to complete them with *other public services established by law*, that perform the activities indicated in article 370, para. 3, letter h”<sup>16</sup>.

Next, we are going to briefly present two special Statutes for the public servants categories: police personnel and penitentiary police personnel, with respect to disciplinary misconduct and disciplinary sanctions.

#### 2.3.1. The Statute of police personnel

The judicial regime of disciplinary liability applied to police personnel is regulated by Law no. 360/2002 on the Statute of police personnel<sup>17</sup>. Thus, according to article 57 of Law no. 360/2002 on the Statute of police personnel, the following acts constitute “disciplinary misconduct, if they were not committed in such ways that according to criminal law they are considered criminal offences, acts guiltily committed:

- a. Unfit behavior in work, family or society that affects the honor, professional probity of the police personnel or the prestige of the institution;
- b. Negligence, manifested in carrying out service duties or dispositions received from hierarchical superior or from authorities that indicated by the law;
- c. Repeated or unjustified delay in performing work;
- c<sup>1</sup>. Unjustified refusal to fulfill a work attribution mentioned in the job description;
- d. Overlap of work attribution or lack of solicitude in relating with the citizens;
- e. Unmotivated absence or repeated tardiness for work;
- f. Causing material damage to the unit that the person is a part of or to the patrimony of the Ministry of Internal Affairs;
- g. Breach of norms regarding confidentiality for the undertaken activities
- h. Non-compliance with the pledge of allegiance provisions;
- i. Illegal interference in the activity of another police employee;
- j. Intervention to influence the solving of certain requests regarding the satisfaction of any person;
- k. Breach of provisions that refer to tasks, incompatibilities, conflicts of interest and interdictions established by law”.

<sup>14</sup> Article 370, line 3, letter h) - „other activities with special character that regard the exercising of public authority in domains of exclusive competence of the state, according and in executing the laws and other normative acts”.

<sup>15</sup> V. Vedinaș, *Codul administrativ adnotat. Noutăți. Examinare comparativă. Note explicative*, Universul Juridic Publishing House, Bucharest, 2019, p.247.

<sup>16</sup> *Ibidem*.

<sup>17</sup> Law no. 360/2002 regarding the police person’s Statute, published in the Official Journal no. 440 from 24 June 2002, last time modified by Government Emergency Ordinance no. 36/2020 for modification and completion of some normative acts (...), published in the Official Journal no. 268 from 31 March 2020.

### 2.3.2. The Statute of penitentiary police personnel

The judicial regime of disciplinary liability that applies to penitentiary police personnel is regulated by Law no. 145/2019<sup>18</sup> regarding the Statute of penitentiary police personnel. The following are considered disciplinary misconduct, according to article 140 of Law no. 145/2019 (...):

- a. „Manifestations that affect the prestige of the authority or public institution where the persons work;
- b. Negligence and superficiality manifested while carrying out the work attributions, the legal dispositions or dispositions received from one’s hierarchical superior or the authorities named by law;
- c. Repeated and unjustified tardiness in performing work tasks;
- d. Unjustified refusal to fulfill a work attribution that is part of the job description;
- e. Manifesting unfit behavior towards the detained persons, which is against the law on the execution of punishments, or towards other persons that they have contact with during work;
- f. Unmotivated absence or repeated tardiness to work;
- g. Unjustified departure from work during work hours;
- h. Causing material damage to the unit that the person is a part of or to the patrimony of the National Penitentiary Administration;
- i. Breach of norms regarding confidentiality about activity or work;
- j. Exceeding the work attributions or illegal interference in the activity of another penitentiary police employee;
- k. Intervention to influence the solving of a request regarding the satisfaction of any person;
- l. Failure to comply to obligations foreseen by legal dispositions in their task, including those that are part of the penitentiary police personnel’s Ethical Code and the provisions that refer to incompatibilities, conflicts of interest and interdictions;
- m. Prohibiting or preventing the exercise of public liberties and union rights of penitentiary police personnel ;
- n. Tolerant attitude of hierarchical superiors regarding committing certain disciplinary misconduct acts by their subordinates;
- o. Conducting activities that are not related to work duties, of a nature to impact the execution of work attributions during work hours;
- p. Failure to comply to the obligations foreseen in article 119”.

Comparatively analyzing the disciplinary misconduct acts nominated by both special Statutes, we notice that when it comes to the penitentiary police personnel there is a greater number of acts that are considered disciplinary misconduct. For example, “Tolerant attitude of hierarchical superiors regarding committing certain disciplinary misconduct acts by their subordinates” is mentioned only for the penitentiary police person; We consider that a rethinking of the existence of this extremely general disciplinary misconduct is necessary, because the current text can lead to abuse in interpreting its content.

Also as an example, we present an act that is mentioned as disciplinary misconduct just for police personnel, but not for penitentiary police personnel, namely “Failure to comply with the provisions of the pledge of allegiance”. Well, we consider that this act may be considered disciplinary misconduct for all public servants, be it under the Administrative Code, be it under the special Statutes.

### 2.4. Disciplinary sanctions according to the special Statutes

Speaking about police officers, there are five disciplinary sanctions, gradually mentioned:

- a. ”Written reprimand;
- b. Wage diminishing by 5-20% for a period of 1-3 months;
- c. Postponement of promotion in professional ranks or superior functions for a period between 1-3 years;
- d. Demotion to an inferior office, up to, at most, the base level of the professional rank held;
- e. Dismissal from the police force”.

It is interesting to mention the definition of reprimand’s in para. 2 of the same article, namely: “*written reprimand consists of the official reprimand, addressed in written to the guilty policeperson*”.

We also mention that there is jurisprudence about article 58<sup>1</sup> on which the Constitutional Court<sup>19</sup> has recently ruled, appreciating that this article is not constitutional. The content of article 58<sup>1</sup> is: “*In order to prevent disciplinary misconduct from happening, the person mentioned in article 52, para. 2 may order the police person’s warning. In this case, the measure is taken in writing, it has administrative-prevention character and does not produce consequences on the work report*”.

Thus, in the case judged by the Constitutional Court, the authors of this unconstitutional<sup>20</sup> exception have shown that “the measure of warning has produced effects on their work report, being taken into account

<sup>18</sup> Law no. 145/2019 regarding the Statute of penitentiary police personnel, published in the Official Journal no. 631 from 30 July 2019, last modified by Government Emergency Ordinance no. 36/2020 (...), published in the Official Journal no. 268 from 31 March 2020.

<sup>19</sup> Romanian Constitutional Court decision no. 833 from 17 November 2020, published in the Official Journal no. 114 from 03 February 2021.

<sup>20</sup> For more on unconstitutional exception see: S. G.Barbu, C. M. Florescu, *Aspects concerning the admissibility of the exception of unconstitutionality*, Bulletin of the Transilvania University Braşov, Series VII, Vol 13 (62) No.2-2020, [http://webbut.unitbv.ro/Bulletin/Series%20VII/2020/BULETIN%20I/23\\_Barbu-Florescu.pdf](http://webbut.unitbv.ro/Bulletin/Series%20VII/2020/BULETIN%20I/23_Barbu-Florescu.pdf), pp.293-298, last accessed on 08.03.2021, 20.00 or I. Muraru, N. M. Vlădoiu, A. Muraru, S.-G. Barbu, *Contencios constituțional*, Hamangiu Publishing House, Bucharest, 2009, p.208 and the following.

when the approval to be named in the Judicial Police structures was withdrawn, respectively when the request to be promoted in function was rejected (par. 30)".

We extract some arguments of the Constitutional Court in accepting the unconstitutionality exception of article 58<sup>1</sup> of Law no. 360/2002 on the Statute of police personnel:

"The Court establishes that the dispositions of article 58<sup>1</sup> of Law no. 360/2002 indicate the warning is a managerial measure that is ordered in writing, has preventive character, but has no effect on the police person's work report (...) (par. 31);

The Court establishes that, although, according to legal dispositions the warning does not represent a disciplinary sanction and does not have any effects on the work report, in fact, applying this measure is linked to the idea of intervention with a role in disciplining the police person's conduct when a disciplinary misconduct of little gravity has occurred (...) (par. 33);

Besides, even if the police person's work report presupposes his/her subordination to their hierarchical superiors, the Court appreciates that this subordination must clearly be circumscribed to fulfilling the work duties and must not create the possibility to generate abusive or awkward situations, either from the hierarchical superior or from the subordinate, capable of affecting their dignity. Or, the fact that the legal text does not condition the warning on the existence of concrete, objective situations that could justify this measure of the hierarchical superior, may constitute the grounds for the manifesting of actions based merely on the desire to exercise authority towards a person who is in a subordinate position and who cannot properly defend themselves (...) (par. 36)<sup>21</sup>.

Regarding the penitentiary police personnel, the disciplinary sanctions that may be applied are six:

- "a. Written reprimand;
- b. Diminishing of the salary rights for the function with 5-10% for a period between 1-3 months;
- c. Postponement of the promotion to professional ranks or superior functions for a period of 1-2 years;

- d. Transfer to a lower function, up to the base level of the rank held;
- e. Revocation from a leadership position;
- f. Dismissal from function".

### 3. Conclusions

With respect to the judicial regime of the liability of public servants, the Administrative Code has taken on the content of Law no. 188/1999 regarding the public servants' Statute, without bringing any important changes regarding the listing of disciplinary misconduct and disciplinary sanctions.

From the analysis of the law, we derive that there is, on one hand, the common law of administrative-disciplinary liability for the public servants, and for this we analyzed the Administrative Code and, on the other hand, there are special statutes. For this, we have shown examples of what disciplinary misconduct and disciplinary sanctions are in case of two special categories, namely the police personnel and the penitentiary police personnel. For the penitentiary police personnel there is a greater number of disciplinary sanctions (six), in comparison to the police staff (five).

In conclusion, a gradual regulation for the sanctions was noticed, starting from the easiest written reprimand and ending with the worst, the termination of the employment contract or destitution from office. This philosophy of the lawmaker is in accordance to what our doctrine noticed, namely "*the educational character of the sanction*" that "aims at the social rehabilitation of the author"<sup>22</sup>.

At this moment, no analysis was performed on other aspects of the administrative-disciplinary liability, such as disciplinary investigation or disciplinary sanction individualization, but we envisage future research perspectives that could develop these subjects, as well.

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<sup>21</sup> *Ibidem*.

<sup>22</sup> M. Bădescu, *Teoria răspunderii și sancțiunii juridice*, Lumina Lex Publishing House, Bucharest, 2001, p.86.

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