Considerations Regarding the Judicial Institution of Mobility and the Engaging of the Disciplinary Responsibility of Public Servants

Associate Professor Alina Livia NICU, PhD
The University of Craiova
alnicu@yahoo.com

Abstract: The present paper aims at emphasizing the need to improve certain regulations regarding public service. Starting from the principle of stability in one's position and from the judicial institution of mobility as two of the means by which the Romanian legislator tries to ensure "a stable, professional, transparent, effective and unbiased public service, in the citizens' interest, as well as in the interest of public authorities and institutions in public central and local administration", I analyzed a few negative aspects created in the social practice by the regulations regarding the disciplinary responsibility and liability of public servants, suggesting a few rephrasing that we appreciate as being able to remove the practical negative effects.

Keywords: public service, criminal liability, disciplinary liability

According to Article 75 of Law no. 188/1999, republished, regarding the Status of Public Servants, "The guilty breach of duties at one's workplace attracts disciplinary, contravention, civil or criminal liability, according to each case". Disciplinary breach is defined by the legislator as follows: "The guilty breach by public servants of the duties corresponding to their public office and of professional and civil behavior norms that are stipulated by laws represents a disciplinary breach and triggers disciplinary liability."[1]

The public servant is an important element of any collectivity in an administrative and territorial unit. He is the one who must put legislation into practice, and the importance of his social role comes precisely from the fact that legislation establishes the fundamental values of the collectivity[2], sets the necessary instruments to recognize and respect these values and legitimates the use of coercive force of the state or of the local collectivity, if need be, in order for each citizen to have, related to the established values in legislation, a behavior that corresponds to judicial norms. Consequently, during this historic stage in Romania, for the ordinary citizen, without much judicial culture, the one who is too little interested in the accuracy of the terms competence, attributions, public interest, public welfare, social scope, and who is mainly interested in his family's living standard, the public

[1] Article 77 Paragraph 1, Law no. 188/1999 on the Status of Public Servants, republished.
[2] Nicu, Alina Livia, *Drept administrativ*, Bucureşti, Editura Didactică şi Pedagogică, 2007, p. 41-64.

servant is synonymous with a man who has the right to order and to control, a "representative of the party in power", the one from whom the citizen expects solutions for every problem. Such representation of the idea of public servant is important because it has had consequences at a judicial level. It regards the fact that social discontent triggered an attitude of hostility, from the part of the citizen towards the members of public service in general, and towards the public servant in particular, as all the social and professional failures are reproached to these people under the label of "bureaucracy" or "corruption". Social psychosis has been reached, regarding the bad quality behavior of the public servant. The representatives of the civil society acted so that terms such as "decisional transparency in public administration", "free access to the information of public interest" become judicial reality through the adoption by Parliament of Law no. 544/2001 regarding the free access to the information of public interest, and Law no. 52/2003 regarding decisional transparency in public administration. It has been militated in favor of the assurance of a minimum of protection of the public servant both in his relationship with the citizen, and in relation with the law itself, towards the settlement of their professional and staff rights and obligations, in order to settle, in detail, the stages in the evolution of their career, aspects regarding the responsibility of the public servant and the engagement of his responsibility. At the same time, public servants frequently sustained the need for their activity to be rightly appreciated, from the point of view of both the social importance of their work, and its quality, and for the stability of their function to be assured, so that the political color of one government shouldn't be a decisive factor in the loss of one's job. Thus, in 1999, the first form of Law no. 188/1999 was adopted, regarding the Statute of Public Servants, a law that once put into practice, generated situations that determined successive modifications. So, regarding the concept of public service and the image of the public servant, two tendencies have been noticed. On the one hand, civil society asked for the creation of a legislative frame which should direct as strictly as possible the behavior of public servants, in order for them to act best for the simultaneous and correlated realization of the individual and public welfare. On the other hand, public servants and other members of the staff in public administration, required regulations that should determine the public to treat them with due consistency and respect, considering that, although sometimes the results of their work are not at the level of their efforts, nevertheless, their results and the efforts that were made towards those results should be equally appreciated. One can establish that, next to the requirement regarding proper payment, the most important requirement of public servants was the regulation of the principle of stability in one's office, as a means of protection against the action of political agents that could remove them from their office just for political reasons.

This was accomplished through the introduction in Article 3 Letter f of Law no. 188/1999 among the principles at the basis of the public office exercise of the principle "stability in the exercise of public office." As a reply, civil society

considered that these principles generate the development of the spirit of routine, immobility, and they favor the phenomenon of corruption.

The Romanian legislator considered as necessary the counterbalancing of the principle of stability in office, with the judicial institution of mobility[1], and decreed as motives of mobility: the effectiveness of the activity of public authorities and institutions, the public interest, and the public servant's interest in the development of his career. According to the provisions in article 87 Paragraph 3 of Law no. 188/1999, if the mobility of executive public servants and of management public servants is decided in the public interest, public servants cannot refuse the transfer or movement to another unincorporated department or structure of the public authority or institution, except the following situations: "a) pregnancy; b) that person raises his/her minor child by himself/herself; c) his state of health, proved by a medical certificate, will be worsened by a transfer; d)the transfer is made to a location where proper accommodation conditions are not provided; e) that person is the only provider for his family; f) strong family reasons justify the refusal to accept the transfer". The sanction for the refusal expressed by the public servant regarding the measure of transfer and movement in any other situation is dismissal from office. This regulation triggers certain questions. In order to understand the determinations of these questions, we start from the fact that, in Article 56 of Law no. 188/1999, republished, it is specified that: "The occupancy of public office is done through: a) promotion; b) transfer; c) redistribution; d) recruitment; e) other ways that are specified by the present law." In Article 57 Paragraph 1, it is specified that "Recruitment for the purpose of entering the corpus of public servants is made by contest, subject to availability of the vacant public offices reserved for that purpose by the plan for the occupancy of public offices." In what follows, in the same article regulations are specified for "the minimum seniority in the specialization of the studies necessary to take part in the recruitment contest that is organized for the occupancy of executive public offices", "the minimum seniority in the specialty of the studies necessary to take part in the recruitment contest that is organized for the occupancy of management public offices", and in Paragraph 7 of the same article it is specified: "In order to take part in the recruitment contest that is organized for the occupancy of management public offices, the candidates must be M.A. graduates, or have postgraduate studies in the field of public management, management, or the specialization of the studies that are necessary for the occupancy of the public office". All these regulations show that any person who wants to become a public servant takes part in a contest that is organized in relation to a specific position

[1] Article 87 Paragraph 1, Law no. 188/1999 on the Status of Public Servants, republished: "1) The mobility inside the public servants personnel is realized through the modification of working relations as follows:

a) for the effectiveness of the activity of authorities and public institutions;
b) in the public interest;
c) in the interest of the public servant, for the development of his career in the public office."

inside a structure in public management. His/her option, in most cases, has at its basis his/her preference for a certain type of activity and for a certain institution.

Moreover, the experience that he/she gained in a certain public office along the time helps the public servant to solve more easily and better the tasks that are related to his job. In order to draw a conclusion regarding mobility as a means of modification of working relations, the analysis of all regulations related to the means of modification of working relations is imposed. Thus, the delegation measure is temporary and we consider that the present way of regulation of the situations in which delegation can be refused, and of the conditions in which delegation is made, corresponds to the present stage of social relations development. Delegation is also a temporary measure, and we consider that the regulations regarding this means of modifying working relations are in favor of the public servant. Regarding the modification of working relations through transfer, we consider that the regulation is appropriate, as the public servant's will is not restricted or determined one-sidedly by the public interest, in the sense that two types of transfer are regulated, namely: transfer following the public servant's request, where the public servant's will is the starting point in determining the measure, and transfer in behalf of the public office, regarding which, in Paragraph 3 in Article 90 of Law no. 188/1999, the legislator imposed that "it can only be done following the written acceptance of the public servant that is being transferred". Regarding the modification of working relations through transfer inside another compartment of the public authority or institution, in the case of definitive transfer, the public servant's written consent to transfer is needed, transfer that is made on the initiative of the manager of the recruitment structure, or the public servant's application in the case of transfer on the public servant's initiative, so, the manifestation of the public servant's will being decisive in the materialization of the working relations modification measure, the regulation is appropriate.

There are questions regarding the restriction imposed by Article 87 Paragraph 3 of Law no. 188/1999, which says that the fact that public interest has precedence, is justifying enough to force a public servant, under the sanction of dismissal, to accept transfer or movement inside another unincorporated compartment or structure, except the cases that are specified and limited by Article 89 Paragraph 3 of Law no. 188/1999. Thus, we consider that the sanction of dismissal following this refusal is excessive, even related to the standard "public interest". Who defines public interest? The only legal definition of public interest is provided by Article 2 Paragraph 1 of Law no. 554/2004 regarding administrative court, which says: "legitimate public interest – that interest which relates to lawful order and constitutional democracy, the guarantee of the citizens' fundamental rights, liberties and duties, the satisfaction of the community's needs, the realization of the public authorities competence;" but this definition only refers to the legitimate interest of the person who can submit an application to the administrative court and, anyway, it doesn't contain concrete elements that can be quantified, and the achievement of

these elements cannot be verified when the public servant is being imposed the modification of working relations. So, who defines public interest? We consider it is necessary that the legislator introduce a clarifying text in Law no. 188/1999 regarding the meaning of this concept, as long as it has a decisive role in the modification of the working relations of the public servant, practically being a reason for restraint of the liberty of choosing one's workplace[1] and for losing a gained right, because the respective public servant held a certain office following a contest, a position that he chose, whereas forcing him to develop his activity in another office, in another structure, even if by keeping his salary level, that is a misuse of law, and this misuse of law must be at least justified or hidden behind a legal basis. For example: "public interest" is the prevention of natural disaster occurrences, or the diminishing of the effects of these disasters, the defense of legal order and of constitutional democracy, acting in order to guarantee the citizens' fundamental rights and liberties, etc., the lack of personnel in an area that is economically disfavored, a thing that would lead to the blocking of the activity in some public institutions. As we showed in Article 2 Paragraph 3, it is mentioned: "The activities which are developed by public servants, which imply the practice of public power attributes", a term that is referred to in the definition of the concept public office in Article 2 Paragraph 1, there also needs to be mentioned the objectives of general character that can be registered under the concept "public interest". Such a specification of the words "public interest" would put aside, to a certain degree, the action triggered by subjective criteria regarding the use of mobility, and the public servant's one-sided determination of will, it would be acceptable.

Regarding the engagement of public servants' disciplinary liability, we consider a few adjustments of the legislative frame are necessary. Thus, in the analysis on which we support our suggestions, we start from the provisions of Paragraph (7) Article 77 of Law no. 188/1999 which establish that "During the administrative investigation, in the situation in which the public servant, having committed a disciplinary deviation, can influence the administrative research, the manager of the public authority or institution has the obligation to deny the public servant's access to documents that can influence the investigation or, according to each case, to dispose the temporary transfer of the public servant to another compartment or structure of the public authority or institution." This text, in the present form, doesn't distinguish between management public servants and executive public servants, a thing that is normal considering the regulation character, but the question is: what happens when the deed that is considered to be a disciplinary deviation has been committed by a person who holds the position of

[1] *The Constitution of Romania*, revised in 2003, article 41 "Labor and Social Protection of Labor", Paragraph 1: "The right to work cannot be restrained. The choice of one's profession, trade or occupation, as well as the choice of one's workplace is free."

general manager inside the independent administrative authorities, executive manager inside the deconcentrated public services, and executive manager inside the decentralized public services under the authority of the local public administration authorities?

According to the provisions in Article 79 of Law no. 188/1999:

"(1) Disciplinary commissions are created in order to analyze the deeds that are perceived as disciplinary deviations and in order to propose disciplinary sanctions which can be enforced upon public servants in public authorities or institutions.

(2) A representative of the representative union organization must also be part of the commission or, according to each case, a representative who has the vote of the public servants majority for whom the disciplinary commission is organized, in the situation in which the union is not representative or there isn't a union of public servants.

(3) The discipline commission can appoint one or more members and, according to each case, can require from the control departments inside the public authorities or institutions to investigate the facts that have been signaled and to present the results of the investigation activity.

(4) The disciplinary commission for highly-placed public servants is composed of 5 high public servants, appointed by a decision from the Prime Minister, following the proposal of the Minister of Interior and Administrative Reform.

(5) The way of creating, organizing and functioning of disciplinary commissions, as well as their membership, attributions, way of notification and the working procedure are established by Government decision, following the proposal of the National Agency of Public Servants."

According to the provisions in Article 2 of Government Decision no. 1344/2007, modified by Government Decision no. 787/2008 and Government Decision no. 1268/2008, "Disciplinary commissions are unincorporated deliberative structures, independent in the practice of their responsibilities, that have the competence to analyze the public servants' deeds that have been signaled as disciplinary deviations, and to suggest solutions, by individualizing the applicable disciplinary sanction or by disposing of definitely the notification, according to each case.", the commissions being created by " administrative decision of the manager of the public authority or institution"[1]. In this government decision, next to the general regulations regarding the creation of a disciplinary commission, there is a special section[2] in which special rules are established, in order to create disciplinary commissions in the following cases: "for several public authorities or institutions, in a situation in which less than 10 public servants carry on their activity inside one of

[1] Article 3, *Government Decision* no. 1344/2007, updated.
[2] Section 2, "Special norms regarding the creation and membership of disciplinary commissions".

these public authorities or institutions"[1], the commission constituted at county level, at the municipality of Bucharest level respectively, for the analysis and proposal of solutions for the notification regarding the actions of the secretaries of the administrative and territorial units, actions that have been signaled as disciplinary deviations[2], the commission constituted at national level for the analysis and proposal of solutions of the notification regarding the actions of county secretaries, and of the municipality of Bucharest secretary[3] and the commission constituted at national level for the analysis and proposal of solutions for the notification regarding the high public servants' actions, called the commission of discipline for high public servants[4]. These regulations specify that, except those cases in section II of Government Decision no. 1344/2007, disciplinary commissions are constituted according to the previsions in Article 79 of Law no. 188/1999 and Article 4 in Government Decision no. 1344/2007, updated[5], which means that they are constituted of public servants who are employed inside the respective public authority or institution, two members being appointed even by the manager of the public authority or institution. In the case in which the person who committed the act, which is considered to be a disciplinary deviation, is the manager of a deconcentrated or decentralized public service, it is obvious that, regarding the respective service, the provisions in Article 77 Paragraph 7 of Law no. 188/1999, republished, will be considered applicable, in the sense that, being able to influence

[1] Article 5, Government Decision no. 1344/2007, updated.
[2] Article 6, Government Decision no. 1344/2007, updated.
[3] Article 7, Government Decision no. 1344/2007, updated.
[4] Article 8, Government Decision no. 1344/2007, updated.
[5] Article 4, Government Decision no. 1344/2007, updated:
"(1) The disciplinary commission is composed of 3 permanent members, definitive public servants, appointed in office for an indeterminate period of time. Two members are appointed by the manager of the public authority or institution, and the third member is appointed, according to each case, by the representative union organization(s), or by the majority of public servants inside the public authority or institution for which the disciplinary commission is organized, in a situation in which the union is not representative, or there isn't a union of public servants. The election of public servants representatives is realized by secret ballot.
(2) For each permanent member of the disciplinary commission, a deputy member is appointed in the conditions specified in Paragraph 1. The deputy member carries on his activity in the absence of the corresponding permanent member from the disciplinary commission, in the case of the corresponding permanent member's mandate suspension, respectively, in the case in which his warrant expired before the appointed date, in the conditions of the present decision.
(3) Permanent members and deputy members of the disciplinary commission are appointed for a period of three years, having the possibility to renew their mandate.
(4) The president of the disciplinary commission is elected by the secret ballot of permanent members, from among themselves. In the situation in which he cannot form a majority, the member with the longest period of service in the public office will be elected.
(5) The disciplinary commission has a permanent secretary and a deputy secretary, appointed by the manager of the public authority or institution for a three-year period, having the possibility to renew their mandate. The permanent secretary and the deputy secretary of the disciplinary commission are not members of the disciplinary commission."

the administrative investigation, the respective public servant's interdiction of access to the documents related to the investigation might be imposed, or the temporary transfer of the public servant to another department or structure (but the measure of suspension from the public office of the person who is administratively investigated is often resorted to, because there is not an option of transfer, as that person is the manager, and in the case of transfer to a lower position, there is a case of illegal demoting). So, the manager of the deconcentrated or decentralized public service finds himself in a situation in which he is being investigated by his own inferiors, who are either in favor of him – in the sense of protecting him – because they have been proposed by him to become commission members, or they can be against him following a personal reason. We must also underline the fact that, for this management public servant, even if he is proved innocent following the investigation, it will be very difficult to manage that service with the same authority after his investigation by a disciplinary commission that if composed of his inferiors. That is why, in our opinion, the present solution is not the best. Thus, we consider that the modification of the legislative frame must be done, either only by completion of section II of Government Decision no. 1344/2007, or by completion of Article 79 of Law no. 188/1999, and of section II of Government Decision no. 1344/2007. Thus, for the completion of Article 79 of Law no. 188/1999, we consider that there are two alternatives of proposal:

a) Some new paragraphs must be introduced, having the text: "For the analysis of facts considered to be disciplinary deviations committed by persons who hold the management position of a deconcentrated public service, a disciplinary commission is constituted, at national level, by order of the president of the National Agency of Public Servants.", and, respectively, "For the analysis of facts considered to be disciplinary deviations committed by persons who hold the management position of a decentralized public service, a disciplinary commission is constituted, by order of the president of the county council in the county in whose territory the decentralized public service is constituted.";

b) A paragraph must be introduced, with the text: "The person who holds the management position of a deconcentrated or decentralized public service will be investigated, for disciplinary reasons, by the disciplinary commission constituted inside the authority where the person who has the competence of appointment of the investigated public servant carries on his activity".

In the case of completion of only Section II of Government Decision no. 1344/2007, the text of Article 79 of Law no. 188/1999 remaining unchanged, we consider as necessary the introduction of the following texts:

a) ARTICLE 7 A

(1) By exception of provisions of Article 3, a disciplinary commission is constituted at national level, to analyze and propose solutions for the notifications regarding the actions of people who hold management positions in deconcentrated public services.

(2) The commission mentioned in Paragraph (1) is created by order of the president of the National Agency of Public Servants and it has the following membership:
a) a public servant inside the Ministry of Interior and Administrative Reform;
b) a public servant inside the National Agency of Public Servants, called the Agency in what follows.
c) a prestigious university professor, specialized in administrative law.

(3) The provisions of Article 4 Paragraph (2)-(4) are appropriately applied.

(4) The secretaries of the disciplinary commission mentioned in Paragraph 1 are provided by the Agency. The permanent secretary and the deputy secretary are appointed by order of the Agency president.

(5) The disciplinary commission mentioned in Paragraph (1) carries on its activity on the premises of the National Agency of Public Servants."

b) ARTICLE 7 B
(1) By exception from the provisions in Article 3, a disciplinary commission is constituted at county level, to analyze and propose solutions for the notifications regarding the actions of people who hold management positions in decentralized public services.
(2) The commission mentioned in Paragraph (1) is created by order of the president of the Count Council, and it has the following membership:
a) a public servant inside the specialized technical corpus of the County Council;
b) a public servant inside the Prefect's Institution;
c) a prestigious university professor, specialized in administrative law.

(3) The provisions of Article 4 Paragraph (2)-(4) are appropriately applied.
(4) The secretaries of the disciplinary commission mentioned in paragraph (1) are appointed by the county secretary.
(5) The disciplinary commission mentioned in Paragraph (1) carries on its activity on the premises of the County Council."

In conclusion, the improvement of the legislative frame is necessary, in order for all the public servants to feel that the principle of stability in office is a reality, not a judicial concoction, a conclusive example being represented by the regulations regarding the mobility of public servants mobility and the engagement of liability of deconcentrated or decentralized public services.