

REPRESENTATIVE OF THE AUTHORITY AS A SUBJECT OF ADMINISTRATIVE RESPONSIBILITY

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Provides the analysis of the legal category of «representative of the authority» used in administrative law. Shows examples of empowering individuals with instructive powers in respect of those who are not in the service depending on them. Discusses the distinction between instructive powers of the representative of the authority and organizational and instructive ones of the officials. Defines the real composition of subjects of administrative responsibility that are covered by the legal category of “representative of the authority”.

Keywords: the representative of the authority, administrative responsibility, administrative responsibility of the representative of the authority.

In the normative definition of an official in the Code on Administrative Offences of the RF founded identity between the person permanently, temporarily or under special powers exercising functions of a representative of the authority and a person legally vested with instructive powers with regard to persons that are not in the service dependence of him [5].

Commenting on the article 2.4, Code on Administrative Offences of the RF, A. N. Guev defines a representative of the authority as a person with “(in accordance with the rules established by law, such as Law on Civil Service, Law on FSS (Federal Security Service), Law on Police) instructive powers (so his instructions, orders, etc. are necessary for execution by other citizens, organizations, officials) in respect of persons who are not his subordinates. For example, orders given by a police officer in accordance with articles 10-12 of Law on Police must be executed by all citizens and organizations «[15]. It seems to us that this comment is not much different from the rule vested in the Law.

In another comment of Code on Administrative Offences of the RF considering representative of the authority, has been given an explanation that “we are talking

about officials of law-enforcement and state control bodies. Functions of representative of the authority can be implemented temporary, permanently or in accordance with a special authority” [19].

A more detailed definition of the representative of the authority gave authors of the commentary, edited by Eh.G. Lipatova and S.E. Channova [18], using the legal position of the judicial bodies that is set out in resolution of The Plenary Session of the Supreme Court of the Russian Federation № 6 of February 10, 2000 “about judicial practice in cases of bribery and bribery in a profit-making organization”.

In the shown resolution establishes that «representatives of the authorities should be considered as persons exercising legislative, executive or judicial power, as well as public employees of supervisory or controlling bodies, legally vested with instructive powers with regard to persons who are outside of the service dependencies or with the right to make decisions obligatory for execution by citizens and organizations regardless of their departmental subordination « [25]. Therefore, the authors of the commentary list the following persons, who, in their view, fall within the legal category of representatives of the authority:

- members of the Federation Council, deputies of the State Duma, deputies of legislative governmental body of subjects of the Russian Federation,
- members of the Government of Russian Federation and executive bodies of subjects of the Russian Federation,
- judges of Federal Courts and justices of peace,
- endowed with appropriate powers prosecutors, tax authority, customs bodies’ employees, the Ministry of Internal Affairs of the Russian Federation and the FEDERAL SECURITY SERVICE of the Russian Federation ones,
- government auditors, state inspectors and controllers,
- military personnel in carrying out their duties of keeping public order, safety and other functions, in which soldiers possess instructive powers [18].

It seems to us that in this context, the representatives of the authorities should include officials of local self-governments, that is elected or contracted (labour contract) persons, with executive and instructive powers conferred to solve local issues and (or) to organize the activity of the body of local government [8].

It is significant that in the above comments has been made a reservation that the representatives of the legislative and judicial authorities are special subjects of administrative responsibility. Also specific subjects include representatives of a law-enforcement agency and Armed Forces of the RF [18].

As we see the expression “given with instructive powers by law order” is broader than interpretation given by A. N. Gueva in which as an example has been viewed empowering individuals by instructive powers only on the basis of the law. We believe that empowering the authority with powers, in accordance with the law order is not the same as giving powers by established Law. However, none of the above comments views establishment of instructive powers by subordinate legislation in the manner prescribed (established) by law. We believe that this is related to the understanding of the principle of legality in the activities of public figures which is defined at the legislative level of rights and responsibilities (competence and powers) those persons but not in subordinate legislations. That’s why obligatoriness for subjects of management of representative’s of the authority instructive powers also should be established only by law.

Contextual search of the phrase “instructive powers” in reference and legal system “GARANT” was shown in Federal Law No. 54-FZ of June 19, 2004 on “Meetings, rallies, demonstrations, processions and picketing” in which a norm is provided on empowering of an organizer of public activities to perform instructive functions for the organization and performing of public activities [9]. This law in accordance with legal definition of a representative of the authorities in Code on Administrative offences of the Russian Federation, in fact transfer into mentioned category any person (including those who aren’t public or municipal servants) on the base of empowering this person instructive functions in respect of persons who are not in direct dependence of him. Only powers’ area of this representative of the authorities is limited by organization and holding of a public activity.

As we think in a normative definition’s context of a representative of the authorities in the mentioned category should be included private security guards, the order of application of instructive powers of which is established by the Law of the RF No. 2487-I of March 11, 1992 on Private Detective and Protective Activities in the RF. If there is a contract to provide security services and during implementation of the interfacility and carrying regimes within the object of protection, as well as during transportation of protected goods, money and other property private security guards have the right to:

- 1) Require staff and visitors of the object to keep the interfacility and carrying regimes (compliance rules of interfacility and carrying regimes installed by client or customer, should not contradict the legislation of the Russian Federation);

2) access to the objects of protection of the carrying regime, those persons who have documents entitling entry (exit), entry (exit) of vehicles, taking-in (-out), import (export) of property to the objects of protection (from ones), which is equivalent to prevent entry (exit) of persons and vehicles, undocumented;

3) produce within the limits established by the legislation of the Russian Federation, at the object of protection of carrying regime, examination of entering to the object (leaving the object) vehicles if it is suspected that these vehicles are used for illicit purposes, as well as the examination of property brought to (taken out) the objects of protection, with the exception of operational services State paramilitary organizations' vehicles. Inspection of the vehicles and property must be carried out in the presence of the drivers of vehicles and persons accompanying the vehicles and property;

4) apply physical force, special means and firearms in cases and by the procedures established by the legislation of the Russian Federation;

5) assist law-enforcement agency in solving their tasks [2].

It should be noted that the Legislative Act has direct links to the job description of a private security guard, which shall govern the acts of private guards at the objects of security [2].

Transport safety issues cannot be resolved without a vesting of instructive powers of public character to officials of private subjects in their respective fields of activity as air, sea and land transportation. On the basis of an analysis of federal laws' norms one can define private legal entities with instructive powers over persons who are not directly dependent on the first.

For example, a person with instructive powers is an aircraft commander. In order to ensure the safety of the flight of an aircraft, he may order any person on board the aircraft and to demand their enforcement. "The Commander of the aircraft has the right to apply all necessary measures, including enforced execution measures against those who represent a direct threat to the security of the aircraft flight and refused to obey the orders of the Commander of an aircraft. Upon arrival of the aircraft at the nearest airfield, the Commander of the aircraft have the right to remove such persons from the aircraft, and in case of commission of the act containing the characteristics of an offence, refer them to law-enforcement agencies «[1]. According the article 84 Air Code of the Russian Federation instructive powers are given to the workers of air traffic security services. Paragraph 3 of the mentioned article stipulates that the «air traffic security services have the right to detain persons violating the requirements

of safety of the flight for the transfer to law-enforcement agency, as well as baggage, cargo and mail containing items and substances, prohibited for air transportation and, in cases where the life or health of the passengers and crew of an aircraft or other citizens are in danger, apply measures in accordance with the legislation of the Russian Federation. Air traffic security officers in the line of duty are allowed to carry and use service weapons in accordance with the procedure established by federal laws" [25].

According to article 67 Merchant Shipping Code of the Russian Federation orders of the captain of the vessel within his authorities are obligatory for execution by all persons on board of the ship. Also the ship master have the right to isolate the person whose actions do not include elements of a crime by the criminal legislation of the Russian Federation, but threaten the security of the vessel or the persons and property[6]. Similar powers are given to the ship master according to the Code of the Inland Water Transport of the Russian Federation [4].

Captain of the sea ship may refer to the competent authorities of a foreign State, if provided for by an international treaty of the Russian Federation, the person to whom the captain of the ship has the reasonable grounds for believing that he has committed an offence against navigational safety, with the exception of citizens of the Russian Federation, as well as permanent resident of the Russian Federation without citizenship. In this case the ship master if possible before the vessel enters territorial sea of a foreign State shall submit if feasible to its competent bodies notification about his intention to hand this person to them and about the reason of this transfer, as well as provide the evidences to the authorities [6]. The ship master is given other powers vested in the legally specified circumstances.

Paragraph 36 on the Rules of service provision for the transport by rail of passengers and cargo, luggage and freight for personal, family, household and other needs, not related to business, has defined persons who have powers of removing a passenger of the wagon (instructive power). In addition to servants of Internal Affairs to the representatives of the authorities (in the context of the Code on Administrative Offences of the Russian Federation) are included:

- medical workers - in case of passenger disease that interferes the possibility of his travel or threatens to the health of other passengers, if it is not possible to place him separately;
- employees of the carrier who are responsible for monitoring of the presence

of passengers' travel documents (tickets) – if a passenger travels without a travel document (ticket) or with an invalid travel document (ticket) and refuses to pay the fare in the manner determined by the rules of carriage of passengers, baggage, freight [10].

Ours examples show that the circle of persons to which the legislator has given authority to give orders to individuals not directly dependent to the first is much broader than one that has been determined by authors of the commentary to article 2.4 Code on Administrative Offences of the RF.

Unfortunately, analysis of juridical literature shows that legal scholars don't pay enough attention to the disclosure of composition the real subjects of administrative responsibility, united by the category of «representative of the authority». In a special course of lectures of B. B. Rossinskiy reproduces the norm of law on administrative liability of an official without an analysis of the shown by us category [22, 67-73].

D. N. Bakhrakh, describing the signs of a subject of the administrative offence, also doesn't disclose the category of a representative of the authority [14, 485-487].

The position of A. B. Agapov in respect of representative of the authority repeats the provisions laid down in the decision of the Plenary Session of the Supreme Court of the Russian Federation No. 6 of February 10, 2000 «on judicial practice in cases of bribery and bribery in a profit-making organization» [12, 46-47].

L. A. Kalinina, perceiving persons with powers of instructive nature in respect of third persons as those which have auditing powers and implement jurisdictions to hear cases on administrative offences (their competence is in chapter 23 of CoAO of the RF), however, considers that these persons cannot bear administrative responsibility in the context of article 2.4 CoAO of the RF [17, 64-65].

In educational-methodical complex, edited by N. M. Konin notes that «instructive powers of a public character are given to persons exercising State control or supervision (inspectors of Traffic Police of State Inspection on Traffic Security, tax inspectors, inspectors of sanitary and epidemiological service and so on).

In separate articles of the special part of Code on Administrative Liability of the RF legislator specifies what persons from the aforementioned list shall incur administrative liability. For example, for actions aimed at unlawful restricted liberty of trade (article 14.9 CoAO of the RF) administrative responsibility is taken by officials of executive bodies of subjects of the RF or ones of bodies of local government" [13, 123].

D. M. Ovsyanko identifying the representative of the authority with an official claims that “the officials (representatives of the authorities) are employees of public bodies whose powers of public nature beyond these bodies. Their instructive actions (powers) can be applied to citizens and legal entities, not subordinate to the service” [21, 90]. Later professor enumerates the following persons: prosecutor, investigator, police officer, tax police (now the body of tax police is missing), bailiff, State inspectors of auditing bodies, representatives of the State in joint-stock companies [21, 90].

It is no secret that the officials who may be empowered to carry out inspections by instructive act of the competent body to perform the verification shall include the head of the authorized body, the deputy head of the authorized body, heads and deputy heads of the structural subdivisions of the authorized body, as well as other public civil servants of the authorized body, official regulations of which provides for the examination of State control (supervision) in the appropriate area of state administration. However, not all their actions and requirements will be mandatory for the subject of management.

In this case the decision of a judicial body on prosecutor’s activity, which is set out in the administrative and legal dispute of economic unit, seems to be interesting. According to the judges of cassation instance, prosecutors «exercise special constitutional activity monitoring legislation and do not participate in economic activity, including with respect to the applicant, have no instructive powers while exercising monitoring compliance with laws, therefore their actions (inactions) don’t create obstacles to the implementation of entrepreneurial and other economic activity of the applicant” [11].

Of the results of judicial practices of bringing to criminal responsibility for crimes of corruption nature on results of work of courts for the Tula region - 1st half 2010, show that became criminally responsible the following representatives of the authorities:

- police officers - in 6 cases;
- workers of the Federal Service of Punishment Execution - 5;
- officers of justice - 3.

Cases where the representatives of the authorities have been correlated to persons holding positions in local government, and carrying out the functions of the authority of these bodies, haven’t took place in judicial practice “[20].

Study on the issues of administrative liability of an official, his administrative and legal status reveals the lack of scientific validity (doctriness) of legal constructions

of official and a representative of the Authority set forth in federal laws. They are built on the principle of mirroring concepts “an official – this is a representative of the authorities ...” and “a representative of the authorities – it’s an official ...” [16: 24].

Closest to our understanding is view of Yu. N. Starilov on representative of the authority, he points out the following signs:

- it is a law-enforcement officer,
- it is an official of a control body,
- it is an official that in the prescribed manner empowered instructive powers,
- instructive powers of the representative of the authorities apply to persons who are not in the service dependence of him [23, 370].

Yu. N. Starilov shows the presence of officials in the category of the representative of the authority that is correlated with ours examples of powers conferring of the captains of aircraft and ships, the persons responsible for the organization and conduct of public events, etc.

However, the question of the real subjects’ category of the representative of the authority will not be fully taken up, if not to explore the notion of “instructive powers” and the question of its obligation for managed entities.

Management Science (management) is considering instructive powers under the assumption that their holders have the right to make decisions obligatory for those whom they affect. Among instructive powers there are general, linear and functionality associated with the adoption of the initiative decisions, involving vigorous actions. In fact, the powers - are limited rights of empowered person on the use of resources and command of the people.

Empowering individual instructive powers in the manner prescribed by law, is their delegation, i.e. transfer of tasks and powers to the person who assumes responsibility for their implementation.

Powers are delegated to the post, but not to the subject who is at this post at the moment. When the subject changes job, he loses his powers to old post and gets new ones, i.e. you cannot delegate if the post does not have a person, and therefore usually talk about the delegation of powers to the subject [26].

We take the position that there is a distinction between instructive powers and organizational and instructive functions. Organizational and instructive functions include, for example, direction of staff, placement and recruitment, organization of labour or work of subordinates, discipline, and application of measures for the promotion and discipline. Instructive powers are something different, although they are elements of control.

As pointed out by Yu. N. Starilov, under management “in the very general sense can be understood as targeted impact of management subject on management objects to create an effective, functioning system on the basis of information links and relations” [23, 24]. Any management process has the following characteristics: a) presence of subjects and objects of management as essential participants of the management; b) using various forms of subordination of an object to the subject of management. The science of administrative law deals with social public management, i.e. the management of public relations. For successful management (implementation of management functions) the subject of management is given necessary powers. According to Yu. N. Starilov, “social management should ensure the interaction of two factors: on the one hand, the power and authority of the management subject and management (in the broad sense, is the authority of the State), and on the other hand, the voluntary execution of people and their organizations of social norms, conscious obedience to the subject of the authority and management, as well as its orders” [23, 28].

Managing impact of the subject of representative of the authority is nothing more than determined by Yu. N. Starilov “sovereign management” - ““forcing” management (law-enforcement, attacking, “assaulting”, limiting subjects’ of legal entities, tough), i.e. applying measures of administrative coercion [23, 39]. Concurring with the views of the famous scientist, the main aspect of this management – the subjects of management (in our case the representatives of the authorities) have the right to apply measures of a security, warning, stopping, punishing and restorative nature.

However, we cannot mix power and authority. Authority has a real ability to influence the situation. Therefore you can have power without authority, and, on the other hand, have the authority, without power. The powers of the representative of the authorities establish that he is entitled to do, and the membership of the authority determines that he can really do.

In view of the stated we can notice that in the context of this category in Code on Administrative Offenses of the RF there are more subjects of authority than representatives of the authority. We understand that authority entities are all persons in the system of organs of State and municipal management, as well as those who are endowed with certain powers of State and municipal management. Broadly representative of the authority (as a subject of the administrative law) covers all categories of officials described in the notes and educational literature, reviewed in this article. However, in the context of the subject of administrative

liability the range of real subjects of the category “representative of the authority” is much less.

It should be pointed out that the representative of the authorities in administrative and tort legislation cannot be the person whose order, despite its legitimacy and membership of the authorities’ powers, is not accompanied by measures of coercion and may not be implemented by managed party. Coercive measures reinforce the orders of officials and law enforcement officers. Orders of other subjects of authority may be challenged by person to whom the order has been addressed. Thus, in ordinary daily life workers of public controlling or supervisory bodies empowered by law instructive powers, in relation to persons outside of the service dependence, practically are not representatives of the authorities. This, we believe, is associated with the subjective judgment of managed entities requiring power orders. By virtue of their own perception of the rule of law (unlawfulness) of authority’s order, feasibility of implementation managed entity under the law [3; 7] has a right to appeal against decisions and actions of government officials, local government, institutions, enterprises and their associations, voluntary associations or officials, civil servants, can exercise protection of his rights by default of the authority’s order followed by its appeal (or not). In this case from our point of view authorities’ order is conditionally mandatory. Bound by the authorities’ order can be achieved only by threat of unavoidable use of coercive measures.

Not by chance, as we see it, is the refusal of the judicial body in the terminology of authorities’ subjects of the notion of “representative of the authority”. Plenary Session of the Supreme Court of the Russian Federation No. 2 of February 10, 2009 on the Practice of the consideration of the courts on challenging the decisions, actions (inaction) bodies of state power, bodies of local government, officials, public and municipal servants [25], unlike the earlier judicial decision (resolution of Plenary Session of the Supreme Court of the Russian Federation No. 6 of February 10, 2000 on the Court practice in cases of bribery and bribery in a profit-making organization) hasn’t already contained the concept of the representative of the authority.

In sum, saying about representative of the authority, we can define the category as a special subject of administrative responsibility, including empowered persons whose delinquency manifests in public relations, where the subject is an administering party for persons not being in direct dependence of him, but this persons are not able to defend their legitimate interests by failure to execute illegal orders of representative of the authority.

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