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ADMINISTRATIVE OFFENCE OF A PUBLIC CIVIL SERVANT: CONTENT OF THE SUBJECTIVE SIDE

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Researches the various forms of guilt for committing by a public civil servant of an administrative offence. Examines the strong-willed and intelligent points of the willful guilt of a public civil servant. Here is given the author's position on correlation of intentional guilt and diligent misconception. Introduces a new kind of negligence that contains strong-willed and intelligent features which are different from the criminal law. Examines correlation of careless form of a guilt and juridical error.

Keywords: an administrative offence, a subjective side of an offence, a form of guilt, intent, negligence.

Subjective side of an administrative offence of a public civil servant is his mental attitude to an illicit deed and its consequences. The guilt of delinquent and optional signs such as purpose and motive are considered by legal science as an essential sign of the subjective side of an administrative offence.

Determination the guilt of a person in commission of offence is dictated by the presumption of innocence and the absence of fault in committed tort excludes the administrative penalty. As rightly pointed out in the commentary to article 2.2 of the Code on Administrative Offences of the Russian Federation edited by Salishheva "guilt is one of the most important features of any administrative offence" [9]. Determination of the fact of committing an administrative offence by a particular official is not enough for bringing him to administrative responsibility, should be determined degree and form of his guilt, motives and other inducements which have made the official to commit an administrative offence, i.e. to find out a subjective side of this administrative offence.

Due to the fact that the Code on Administrative Offences of the Russian Federation does not include differentiation of fault's content depending on the administrative and legal status of the delinquent – natural person, whom it as

a subject of the administrative responsibility has in a particular administrative and tort legal relation (natural person, official, driver, an individual entrepreneur, etc.) and in our opinion, forms of guilt may have different content, for example, for a natural person and public civil servant, we believe that it is necessary to consider the distinctive features of fault's content of classical forms of guilt occurring in administrative law.

Administrative offences of public civil servants, in our opinion, may be committed not only intentionally but also by negligence. The normative definition of intent, as we see it, does not allow its different interpretations.

The norms of the Code on Administrative Offences of the Russian Federation (CoAO of the RF) provides for a natural person, and more precisely for an individual subject of the administrative law, two types of fault – intent and negligence [1]. Many authors of legal literature agree that the Code on Administrative Offences of the Russian Federation distinguishes between direct and indirect forms of intent. For example, A.N. Guev associates with direct the intent of a delinquent such his actions in which the offender:

- realizes the wrongfulness of his actions (e.g., the person committing a pilferage realizes that unlawfully encroaches on another›s property);
- anticipate the injurious consequences of his deed;
- wishes their offensive [4].

A.N. Guev associates indirect intent with the realizing by the offender of unlawful nature of his actions and the foreseeing its harmful effects, however the offender «explicitly does not wish the harmful effects, but consciously allowing them to happen or does not care about them"[4]. The examples, given by A.N. Guev in the comments in the part of various types of intent, refer to delinquent – a natural person, but not to a special subject of administrative responsibility – an official and especially a public civil servant.

Should be accepted the correct remark of authors of the other comment to the Code on Administrative Offences, that the description of signs of both forms of guilt: intent and negligence in the CoAO of the RF is very close to the description of the form of guilt contained in articles 24-26 of the Criminal Code a the RF [9]. Close resemblance of the mentioned norms is natural, because the distinction between a crime and administrative offence largely follows the objective side of offences' structure rather than subjective [9].

There are a number of administrative offences' structures, the penalty for the commission of which comes only in the presence of intent in delinquent's actions, in articles of the Code on Administrative offences of the RF.

For example, intentional destruction or damage of printed materials relating to elections, referendum; intentional destruction or damage of another's property; intentional failure to meet the demands of a prosecutor; willful damaging or tearing down stamp; intentional damaging of an identification card of a citizen etc. [1]. However, with respect to a public civil servant, the presence of intent in administrative offense structure is not only an obligatory condition of administrative responsibility but rather aggravating factor for bringing to administrative responsibility.

The structures of intentionally committed administrative offences allocate the appropriate words and phrases in the dispositions of legal norms, for example: "concealment" (of documents, facts), "evasion" (of actions execution), "refusal" (in providing documents), "failure to follow", "compulsion" (to action execution), "dissemination" (of information), "impeding" (lawful activities or implementation of rights), "deliberately false" (drafting of documents), "interference" (into lawful activity). Professor D.N. Bakhrakh also noted the use by the legislator of the words "deliberately false", "deliberate", "concealment", "using hiding place", "willful damage" [3, 488]. We believe that no one should expect the recognition by the delinquent the intent in his administrative offence; therefore the legislator undertook consolidation of the necessary signs in the relevant articles of the special part of the Code n Administrative Offences of the RF, analyses of which in most cases lets to make a conclusion on the subjective side of an administrative offence structure.

Some authors have noted that there were formal structures of administrative offences in the Code on Administrative Offences of the RF, where intentional guilt is in understanding by person illicit nature of committed action or inaction [9]. This is acceptable, in view of the fact that the issue of recognition the wrongfulness of committed action does not arise, since it's an obvious inadmissible action. In these cases, you do not need the fact that delinquent exactly knows which body carries out administrative jurisdiction for fulfillment a certain action, what punishment will follow the commission of an offence.

It seems to us that in the material structure of administrative offences the willful guilt also includes attitude of offender to caused harmful effects. In the case with a public civil servant this subject of administrative and tort relations must anticipate these consequences and wish their offensive, or knowingly allow their offensive. Conscious allowance of harmful consequences' offensive describes intent as indirect if there is no desire of their occurrence.

Each of these types of intent includes inherent intelligent and strong-willed aspects. Intelligent aspect may be expressed in recognition by public civil servant committing an administrative offence of the harmful and illicit nature of his deed at the time of commission of the deed, an also in foreseeing of socially dangerous consequences of the deed. It is believed that when direct intent takes place there should be awareness of the opportunity or inevitability of dangerous consequences' offensive and when indirect one – only opportunity.

Volitional aspect of direct intent of public civil servants' tort deed consists of his wish of socially dangerous consequences' offensive and strong-willed aspect of indirect intent excludes such a wish but provides conscious assumption of socially dangerous consequences or indifferent attitude to them.

It seems to us that the awareness by the public civil servant socially dangerous nature of his tort deed means knowledge, understanding of the delinquent that committed by him action or refraining from doing this action harms to public legal relations.

A priori is considered that public civil servant in his professional activities should be governed by the laws and know them, the activity must be lawful and not cause harm to citizens and legal entities. For example article 15 of Federal Law No. 79-FL of July 27, 2004 on Public civil service of the RF establishes as obligations of public civil servant the compliance with the Constitution of the RF, federal constitutional laws, federal laws, other normative legal acts of the RF, constitutions (statutes), laws and other normative legal acts of subjects of the RF and also compliance with the rights and legitimate interests of citizens and organizations [2].

Therefore, to determine the intent of tort deed of a public civil servant it is not required, in our view, to establish the existence of the intellectual aspect which is inherent to intent, i.e. to prove that public servant was realizing the illegality of committed action. As we see it, this is perfectly consistent with the principle that ignorance of the law is no excuse. If a public civil servant didn't realize that his action or inaction was prohibited and punishable by law, it is clear that a person occupying the post of public civil servant does not correspond to the requirements for persons recruited for public civil service.

Indication of awareness of the harmful nature of the action or inaction in our view can take place in respect of a public civil servant with a view to strengthening the administrative responsibility for intentional tort deeds of a public civil servant in comparison with administrative offences committed by negligence.

But, as we know, there are exceptions to all rules. And as we see it, such exceptions can be in cases of administrative offences of a public civil servant that

is largely attributed to the discretionary powers of the public authorities, and secondly with the lack of an adequate legislative base. Professor D. N. Bakhrakh noted that "sometimes public administration is forced to act in the absence of an adequate legislative basis. For example, when it is "tricked" by the legislative, power adopting laws for execution of which Administration doesn't have Finance. Or this: in recent years, the Constitutional Court of the Russian Federation has adopted a number of decisions which have recognized unconstitutional some norms of Russian law, but the relevant legislative changes are not immediately introduced to the legislation. And then, the Administration has to act in legal vacuum" [3, 412-413].

It seems to us that in the administrative and legal torts of a public civil servant may be present good-faith misconception that is the will to commit a tort deed which corresponds with a lack of awareness of the action's delinquency, but, on the contrary, public servant, committing an illicit action, believes that his actions are legitimate. Legal practice knows cases of "good-faith mistakes" which have been more reflected in tax legal relations. For example, when considering tax disputes, take place cases of release from liability on the grounds of good-faith misconception of a person brought by a tax authority to responsibility for committing tax offenses. However, these cases are related to the offender, who is a managed party in public legal relations. As rightly noted by A. B. Bryzgalin, categories of "ignorance of the law" and "good-faith mistake" have different content and meaning. According to the opinion of the author of practical tax encyclopedia good-faith mistake is a "person's misunderstanding (erroneous interpretation) of the precise meaning of the legislation norm on taxes and fees, which objectively arises due to confusion, ambiguity and/or inconsistency of its content, but in conditions when the person acted with the necessary degree of diligence and prudence with a view of the proper execution of his obligations" [10].

Thus, identification of good-faith mistake of an offender in an administrative offence is only possible through determination of uncertainty, ambiguity and/or controversy of breached and guarded by the Code on Administrative Offences of the Russian Federation legislation norms to which the offender gave wrong (incorrect) interpretation, and the fact that the offender had taken measures aimed at understanding the correct meaning of the norms, but for whatever reasons he did not do it correctly.

Considering that legal relations protected by the Code on Administrative Offences of the Russian Federation are regulated by the norms of various sectorial laws, the possibility of good-faith mistake of a public civil servant in the interpretation

of legislation is sufficiently large. We are fully agree with A. V. Bryzgalin and ready to spread his conclusions about circumstances indicating an ambiguity of norms of the current tax legislation of Russia, in legislations regulating legal relations in other areas. In particular, A. V. Bryzgalin pointed to:

- subsequent clarification of the content of norm by a legislator, when the latter, in his amendments to the Act of legislation on taxes and fees introduces refinements, expanding and narrowing its content;
- facts of the consideration constitutionality of this or that norm by the Constitutional Court of the RF;
- application of a norm and disclosure of its content in the appropriate court's judgment by the Higher Arbitration Court of the Russian Federation, with a view to achieving uniformity of judicial practice (this fact in itself shows that until the consideration of a norm by the Higher Arbitration Court of the Russian Federation it did not have an uniform interpretation);
- ambiguous i.e. contradictory judicial practice of various courts of Russia (that is, when on the same issue, different courts make different conclusions) [10].

However, there is one but, the wording of article 19.1 of the Code on Administrative Offences of the Russian Federation takes into account the "good-faith mistake" of an offender and categorizes the deed committed under the misconception as an administrative offence – *unauthorized, contrary to federal law or other normative legal acts, implementation of their real or* ***alleged right****, not causing significant harm to citizens or legal entities.* It should be stressed that this norm of law involves infringement of the procedural norms of Law which define the "procedure for the exercise" of right.

Evidences supporting the existence of a "good-faith mistake" (otherwise juridical mistake) are administrative and legal disputes resolved judicially not in favor of the administrative jurisdiction bodies and disputes which have no effect on the officials of these bodies for unlawful decision, action or inaction giving rise of administrative and legal dispute. Unfortunately, the quite formed institute of appeal against unlawful decisions and illicit actions or inactions of the power authorities and their officials is not bordered by the institute of administrative responsibility on the part of power authorities' officials, which have made unlawful decision or committed an illegal action or inaction.

In contrast to the direct intent, strong-willed moment of indirect intent is that the perpetrator doesn't wish onset of socially dangerous consequences, but consciously allows their offensive or is indifferent to them.

In addition to dividing intent to direct and indirect in order to study the causes of administrative-legal delinquency of public civil servants in certain administrative-legal relations, its determinism, by analogy with the theory of criminal law, the intent should be distinguished with help of one more ground – the time of its inception, which shares the tort deed on premeditated and suddenly emerged.

As we see it, while a suddenly emerged intent (the time from its emergence up to its realization is minimal) tort of an offender will be single and short-lived. When it is possible to plan a tort or repeat it many times, this is evidence of a premeditated intent.

It is no secret that willful deeds of an offender have certain motivations and objectives. The motive is an incentive that forces the offender to commit an unlawful act, and the objective is a conception of the offender on the result of his actions. The motive for committing an administrative-legal tort by public civil servants might be an interpersonal or intergroup conflict between parties of administrative-legal relations and wish of public civil servant to vex his opponent [6]. Cannot be excluded personal financial interest of a public civil servant who through tortious conduct in the administrative-legal relations pushes the management subject to quite certain decisions.

Motive and objective are not mandatory signs of subjective side of specific structures of civil public servants' administrative offences that is why in the science of administrative law they have only tort meaning.

In the context of the proposed by us structures of public civil servants' administrative offences [8] intentional form of guilt is provided in torts involved with active wrongful actions of an offender:

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- obstruction of the lawful activities of a lawyer,
- obstruction of the activities of public associations,
- official forgery (entering in official documents of knowingly false information, removal documents from the case materials),
- willful damage or elimination of documents,
- compulsion to give evidence,
- abuse of official powers and others.

It seems to us that the intentional tort action of a public civil servant has not only legal consequences, but also social and psychological. Administrative offences intentionally committed by a public civil servant discredit power authority as such not only to the victims but also to society as a whole. Therefore, the existence of

intent in the subjective side of an administrative offence of a public civil servant should be a ground for application to the offender of more stringent measures of administrative responsibility.

The second form of guilt, stipulated by law, is negligence which is divided in the legal literature to levity (arrogance) and inadvertence. The mentioned unit of negligence is traced in the text of part 2 of article 2.2. the Code on Administrative Offences of the Russian Federation, which highlights two possible circumstances of subjective side:

-offender foresaw the possibility of the harmful effects of his actions (inactions), but without sufficient grounds he or she presumptuously expected prevention of those consequences,

-the offender did not foresee the possibility of harmful effects, although he had to and could foresee them.

In the first case the negligence is referred to levity (arrogance), the second one is inadvertence.

It seems to us that of two types of negligence inadvertence is the most common because when committing any action public civil servant, as a rule, does not realize its unlawfulness, though must and could realize this. The reason for this is, in our opinion, "administrative enthusiasm" of a person on public civil service [13]. In the condition of the specified administrative enthusiasm public servant takes his action as a legitimate, accepts his rightness as absolute in any legal relation with a managed side. Public civil servant recognizing himself on a higher social level than others can only on this ground deny those who are below in the power hierarchy or have no relations to power.

It is considered that reckless guilt is defined in the law in relation to material structure of administrative offences and associated exclusively with the attitude of an offender to the consequences of his actions [9].

To determine the form of reckless guilt in an administrative offence of a public civil servant you should establish objective conditions in which was delinquent, and it should be remembered that the duty to foresee harmful effects is conditioned by the administrative and legal status of a public civil servant [2].

Reckless guilt is considered to be less dangerous than intentional one [11]. However, we believe that the consequences for the victim of an administrative legal tort committed by a public civil servant would not depend on the form of delinquent's guilt.

We should distinguish reckless guilt from innocent infliction of damage where a public civil servant is not responsible. For innocent infliction of damage

is typical that public civil servant is not obliged and cannot foresee harmful effects which arise from actions committed by him.

Under our definition of an administrative offence of a public civil servant [5, 123; 7, 122]:

Administrative offence of a public civil servant – punishable deed not leading to criminal responsibility of a person occupying post in civil service, which has been committed in the performance of or in connection with the performance of public civil servant's duties and resulted in violation of the statutory orders in legal relations the sides of which are not in authoritative subordination or direct dependence, and compliance with these orders is encouraged by the norms of public law with a view of protecting the state or public order; property; health, rights and freedoms of natural persons; established order of administration; and also property rights and interests of legal entities, –

Public civil servant always has an opponent (the other party and not optional) in an administrative legal relation. If the party is a natural person or a legal entity, they are quite active in defending their rights and interests and, in foreseeing the result of public civil servant's tort deed, show him the illegality of his actions or decisions and as a rule indicating the violated norms of Law. In such circumstances, it is incorrect to speak about the existence of guilt in the form of negligence which, in our view, although has taken place in the first moment of administrative and tort legal relation, but subsequently transforms into intent (in view of the clarification by the opposing party of legal relation of not only the inevitability of harmful effects, but also the essence of the tort action of a public civil servant). In our view, if after this the public servant would insist on qualification of mental side of an administrative offence as if it has been committed through negligence, and that he has not anticipated the possibility of harmful effects of his actions (inaction), and then it is appropriate to consider his compliance with the occupied position of the public civil service.

It seems to us that scientists studying administrative Law unreasonably pay little attention to the study of the characteristics of the different forms of guilt, relying on sufficient research in the framework of the criminal law. In our view the subjective side of an administrative offence of a public civil servant could be characterized by awareness (foresight) consequences of his actions with simultaneous confusion about legality (lawfulness) of his actions (inactions). Practice shows that the majority of administrative legal disputes which were resolved in favor of natural persons or legal entities were associated with this assessment of actions committed by public civil servants in the status of an official of the administrative jurisdiction body. Examples are:

- bringing to administrative responsibility of an innocent person,
- assignment of obligations to pay excessively assessed taxes (double taxation).

Guilt in the above case could be described as intent, if not a delusion (juridical mistake) of a public civil servant about the addressee of managing impact in the ongoing legal relation, objective side and object of legal relation. It seems to us that such a combination of a subjective side can be described as carelessness, but in the form of negligence. Exactly the definition of negligence contains necessary characteristic of a public civil servant's tort behavior – non-fulfillment or improper fulfillment of his duties because of dishonest or negligent attitude to the service.

Therefore should establish sectorial definition of negligence in administrative Law as a form of careless guilt characterized by an intellectual and strong-willed moment, when the offender is aware, foresees and wishes the consequences of his actions, but does not realize their unlawfulness.

Objective side of an administrative offence of a public civil servant, which has been committed on imprudence with the form of guilt "negligence" that forms juridical base of administrative responsibility, is expressed in committing, on behalf of the administrative jurisdiction authority, by this public civil servant actions expressed within his competence, aimed on achieving legally formalized and concretized in legal act objectives of activity of administrative jurisdiction authority in respect of managed subject that is not a proper party of the regulated legal relation. This form of guilt, it seems, should be distinguished from juridical mistake which is characterized by the delusion of a delinquent regarding the adequacy of the view about the factual circumstances of the committed by him offence.

We agree that reckless guilt is less dangerous than intentional one. But it is precisely this variety as negligence according to given by us definition has the greatest manifestation in the administrative and legal relations which lead to administrative and legal disputes between administrative jurisdiction authorities and subjects of management.

Officials of the public civil service, on matters relating to administration are obliged to compare their actions or inactions with the objectives laid down for them by law, and harmonizing the legitimacy and appropriateness, not to infringe upon the principle of primacy of human rights and freedoms. This conduct of a public civil servant is caused by administrative discretion, i.e. conferring

managerial powers on a public civil servant is implemented by law within a certain range of permissible and on the basis of feasibility of an action in a particular case he can vary his conduct.

Carelessness in the form of negligence is characterized by a lack of intellectual and volitional aspects, i.e. public civil servant in this case does not wish and does not suppose onset of the harmful effects of his actions, and even more does not foresee such a possibility. However, the deed of a public civil servant is considered to be guilty, because he has a duty to be careful and cautious about possible consequences if there is a possibility to foresee them.

As we see it, recognizing negligence as a form of guilt, legislator was guided by two criteria – objective and subjective ones. The first obliges, in our view, public civil servants to anticipate the probability of occurrence of the harmful effects of his actions, and the second criterion implies public civil servant to be able to anticipate them.

The essence of an objective criterion is that a public civil servant has the duty to anticipate the possibility of harmful consequences of this or that his actions because of his administrative and legal status, belonging to a particular body of administrative jurisdiction with its regulations, statutes and endowed with specific powers. For example, someone who orders instructions mandatory for execution and influences the emergence, modification or termination of the rights and duties of a managed subject, should have the duty to foresee the possibility of harmful effects as a result of his actions.

Subjective criterion of negligence is the ability, in our case, of a public civil servant to anticipate the onset of adverse consequences. The science of Criminal Law associates it with physical or intellectual data of a person in a particular situation. And besides, his individual peculiarities and specificity of the surrounding situation are important [11].

Establishing guilt in the form of negligence it must be proved that a delinquent has not shown the necessary attention and forethought as to implementation duties, and to the ability to foresee harmful effects. To recognize civilian public servants guilty of a form of guilt in the form of negligence needed set of objective and subjective criteria. To recognize a public civil servant guilty of negligence we need aggregate of objective and subjective criteria. It is well known that in criminal law, the absence of any of these criteria precludes guilt and, therefore, the criminal responsibility of an offender. However, it is unlikely such a rule suits an administrative offence of a public civil servant, because in this case the delinquent would simply evade responsibility.

If a public civil servant could not foresee the possibility of harmful consequences of his actions or inactions, then there is a case of inconsistency with the occupied position of a public civil service, excepting cases of committing administrative offences at the time of the insanity of the delinquent [1]. The cases, in which a public civil servant in performance of his professional activity should not foresee the consequences of his actions, are not allowed by law [2].

We allow an exception of public civil servant's fault, if an actual guilt in the form of negligence at the time of tort was a manifestation of the combination of extreme conditions requiring increased attention, immediate response and nervous-mental overloads caused by, for example, exhaustion, oppressing or overwhelming emotions, intellect, will, reaction to the news of the death of a loved one or his own terminal illness. The mentioned mental condition of the delinquent could also lead to a legal mistake, under which in the theory of criminal law is referred to the offender's misconception about the legal characteristics of a deed, or the actual circumstances determining the nature and degree of harm of the action.

Incorrect valuation of a public civil servant the deed committed by him, while in reality it is illegal (unlawful), can occur in the conditions of providing by law of wide discretionary powers to the public civil servant, when the legality of acts can be reliably assessed on the basis not of the letter but spirit of the law, and the guiltiness of the offender in such cases is difficult to prove. It should be borne in mind that in these circumstances, the assessment of public civil servants of his own acts quite strongly correlates with his intellectual and mental characteristics.

As we see it, going beyond the limits (excess) of discretion of a public civil servant does not correspond to neither ignorance of law nor his deliberate violation.

As can be seen from the analysis of stipulated by law forms of guilt, carried out with respect to a public civil servant, implementing the competence of the administrative jurisdiction authorities in the status of an official of these bodies he is a subject of administrative liability. What is more in many cases if he does not prove that while he was acting reasonably and prudent he undertook, within his competence, all relevant to normatively established criteria of effectiveness measures which are necessary to achieve legally formalized goal of activity of executive power body the guilt of a public civil servant will be considered established. A similar condition of guilt is proposed when applying disqualification as a punishment as a form of quasi-tort liability referring to an inefficient implementation of executive powers by a public civil servant [12].

It is felt that the guilt of an official (of a public civil servant occupying a post in executive power authorities) can be expressed through improper selection or supervision, and its normative vesting should be based on mixed (objective-subjective) approach, that together with the presumption of guilt forms the basis of a legal mechanism of responsibility for the inadequate management, which mediates the punishment of an official in case he or she will not prove that having acted reasonably and prudently undertook, within his or her competence, all relevant to normatively established criteria of effectiveness measures which are necessary to achieve legally formalized goal of activity of executive power body [12].

Summing up can be noted the following forms of guilt of public civil servants in their administrative and legal torts:

- intent: direct and indirect,
- negligence: levity, negligence and carelessness.

Moreover reckless form of guilt in the form of negligence relates some private cases of legal mistake (misconception), unlike those in the criminal law, to the guilty deeds referring to the specific of administrative and legal status of a public civil servant and the specific of committed by him administrative offences.

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