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RESPONSE
of an official opponent
to the dissertational research of Minnigulova Dinara Borisovna
on the topic of "Administrative-legal status of public civil servants
and the problems of its realization",
submitted for academic degree of a Doctor of law,
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University of a name of O. E. Kutafin

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Dissertational research of D. B. Minningulova is devoted to a rather important topic that has great scientific and practical meaning. The relevance of the work is due, above all, the fact that the functioning of the Russian state as a whole, its ability to successfully meet the challenges of the XXI century is directly related to the high efficiency of the system of public administration. However, this efficiency cannot only be achieved by reforming the state apparatus itself, and requires filling it with highly qualified state servants.

Currently, public service reform in the Russian Federation continues under the provisions of the Decree of the President of the Russian Federation No. 261 from 10.03.2009 "On the Federal Program "Reform and Development of the Public Service in the Russian Federation (2009 - 2013)". According to this document the main directions of reforming and development of public service system in the Russian Federation are:

- formation of the public service system of the Russian Federation as a complete state-legal institute, creation a system of the public service management;
- introduction to the public service of the Russian Federation effective technologies and modern methods of personnel management;
- increasing the efficiency of the public service of the Russian Federation and the professional performance productivity of public servants.

It is quite clear that the implementation of these directions requires extensive research, substantial doctrinal elaboration. With regard to public civil service, many of these issues are solved in the thesis of D. B. Minnigulova, what determines not only its relevance, but also practical significance.

Despite the fact that the issue of the administrative-legal regulation of public civil servants activity has been repeatedly reflected in the works of legal-scholars (as well as representatives of some other sciences), it currently remains topical, as it can be stated that to date legislation on civil service in this area contains many gaps and ambiguities.

The thesis D. B. Minnigulova basing on the achievements of legal thought has brought in the administrative-legal science fundamentally new generalizations and conclusions concerning the administrative-legal status of public civil servants, has formulated provisions proposed for defense.

All this allows significant expanding of the scientific understanding on the content of administrative-legal status of public civil servants and its implementation in practice. The said above is consonant with the aim of the dissertation research, which consists of the developing a strategy of progressive development of public civil service through the prism of improving the administrative-legal status of civil servants and the synchronization of its private-law and public-law components, finding an optimal model of the administrative-legal status of civil servants that would be able to reflect the current needs of public administration and ensure continuous improvement of the work of the State Machinery. This aim, in the view of the opponent, has been achieved by posing and solving major research tasks.

In the thesis research the author put forward and justifies a number of proposals that are worthy of all-round support. So, we can agree with the conclusions on the fact that legal responsibility should not be included in the structure of the static legal status of public civil servants as it arises independently and only in special cases; on the impossibility of applying civil-law responsibility to public civil servants; on the need to address a number of gaps in the legal regulation of public civil service; on the swearing-in of public civil servants, and etc.

We find very important the proposal of the author on the need for amendments to article 73 of the Federal Law "On the Public Civil Service of the Russian Federation" in order to reflect in it the possibility of application the norms not only of labor law, but also other sectors of the Russian law: "to relations regulated by this Federal Law and subordinate normative legal acts containing the norms of service law". This proposal is not only of doctrinal importance, because its realization

will help to solve many problems arising in the practical functioning of the institute of public civil service.

D. B. Minnigulova also reasonably notes almost the full lack of proper regulation of relations of social partnership at public civil service in the current period. The author's proposal on making amendments to the Federal Law "On the Public Civil Service of the Russian Federation" should be supported.

Position of the dissertator on the establishment by the current legislation the duty of public civil service by a person who has signed a contract for training with the state body merits approval. D. B. Minnigulova in this case correctly notes that such a legal structure is in conflict with article 32 of the Constitution of the Russian Federation, and, in fact, is a forced labor. Solution proposed by the author – to establish an alternative provision, which provides for a return of money spent on training, if they have been allocated from the budget – completely eliminates this problem.

One of the unregulated areas of service relations at public civil service is the sphere of material responsibility. This gap is also suggested to be filled in the peer-reviewed thesis; the author pays a lot of attention to the grounds of material responsibility of public civil servants, the cases of limited, full material responsibility, and etc.

It should be noted that the thesis D. B. Minnigulova is based on the use of a wide range of methods of scientific research, study and systematization a large amount of relevant regulatory sources and scientific literature. This allowed the author to comprehensively assess the current state of administrative-legal regulation of the status of civil servants, set the shortcomings in the legislative regulation and enforcement practice and the ways to overcome them, formulate indubitable conclusions and reasonable proposals.

However, according to the opponent, the submitted thesis, as well as any other work of this kind, has certain shortcomings. Despite the high level of research conducted by the applicant and along with the undeniable advantages of D. B. Minnigulova's work, some approaches of the applicant to the understanding of the considered issues seem either controversial and contentious, or insufficiently justified, deserving more attention, requiring author's clarification.

1. So, the author's position in relation to the essence and specificity of official legal relations seems controversial. Criticizing earlier concepts of the ratio official and labor relations in public civil service, the author comes to the conclusion that "the most appropriate is… differentiation of legal relations of civil servants into official and labor ones. Labor relations should be considered as

the content of official relations, and official relations – as the form and expression of labor relations. Labor relations are internal relations and are generally beyond the interests of external actors (citizens, legal persons, state bodies), and service relations, being external, are constantly under control – in sight of the state and civil society".

In fact, this approach repeats the position of many scientists of labor law (A. V. Gusev, L. A. Chikanova, B. K. Begichev, etc.) with the only difference that the D. B. Minnigulova changes the terminology used by these authors, naming official-labor relations just labor, and state-official relations just official. This concept has been repeatedly criticized by legal-scholars (Yu. N. Starilov, A. A. Grishkovets, S. E. Channov, etc.).

As such, official relations are relations that are directly associated with the organization and functioning of state and municipal service. Therefore, in the literal sense, only public relations arising in the apparatus of state and municipal administration and whose aim is to ensure its proper operation can be official relations. However, they can also occur outside the framework of a single state body, linking various bodies and their officials. Their main feature is associated with their target purpose – they are aimed either at the organization of state and municipal service (i.e. the establishment of posts, definition of the status of state and municipal employees, development of job descriptions and regulations, etc.), or at direct ensuring of their operation (entry on duty, assignment of military and special ranks, class ranks, diplomatic ranks, attestation and disciplinary proceedings, etc.).

Public relations themselves that arise in the implementation by state or municipal employee of their powers during interrelations with the external in relation to the apparatus of state and municipal management organizations and individuals, which D. B. Minnigulova names official, neither are official, nor always fall within the scope of administrative law norms. So, for example, an investigator from the Prosecutor's Office, directing to a witness summons for questioning, performs actions aimed at the implementation of law enforcement functions of the Russian state, that are, ultimately, state-managerial ones. However, its powers in this case are governed not by administrative, but by criminal-procedural legislation, and the arising legal relation is not of administrative-legal, but of criminal-procedural nature. It is quite obvious that this range of public relations should not be included in the subject of official-legal regulation. Otherwise, as rightly notes about this A. V. Gusev, "in the field of regulation of public service will get a truly enormous range of public relations, in which the state participates in the face of state bodies and acting on their behalf public servants".

2. D. B. Minnigulova's position on the need to use a service contract at public civil service can be criticized. In her dissertation research D. B. Minnigulova pays much attention to criticism of the works of those professionals who believe that a service contract takes a secondary position in respect to the act of appointment to the position of a civil servant, is purely formal in nature and, ultimately, may be painlessly excluded from the legislation on civil service. D. B. Minnigulova herself finds it impossible to refuse from a service contract as a ground for the emergence and specification of administrative-legal status of public civil servants, because, in her opinion, "in the act of appointment to the position of a public civil servant reflect only public-law features of the organization of public civil service, which did not disclose the features of the passage of the public civil service and the specificity of implementation of the administrative-legal status of public civil servants".

In this case, the author ignores the fact that, in contrast to the labor legislation, service one is much more formalized, and the appointment of a civil servant to the post through the issuance of an appropriate act already defines the conditions for its performance in accordance with the current legislation. Of course, the legislation on public civil service allows a certain individualization of conditions of service for a particular employee (for example, regarding the regime of service time, establishment of specific allowances to salary, etc.), but this individualization may be well implemented by the same administrative acts.

D. B. Minnigulova after the manner of many representatives of the science of labor law, strongly emphasizes the liberalizing function of service contract, considering that it allows a public servant to achieve establishment of mutually acceptable for it and the employer conditions of performance (although she admits that at the present time, such a possibility is purely formal). However, it must be emphasized that the true liberalization of relations associated with the conclusion of a service contract in the civil service (i.e. a situation where the service contract terms are not imposed by the representative of an employer, but really formed by the parties) seems to us contrary to the very nature of public service and bearing a number of risks. This is due to the fact that under general rule the current legislation provides for competitive procedure for substitution of public civil service posts. Moreover, since the decision of contest committee about the won of a particular person is imperative, the representative of an employer in such a case must issue an act of appointment. However, after adoption of this act, at the conclusion of a service contract it will be at the mercy of requests of the appointed civil servant, because it will be obliged to conclude the service contract in force of the direct requirement

on this in article 13 and part 1 article 26 of the Federal Law "On the Public Civil Service of the Russian Federation", and it will not have any legal grounds for termination of appointment and dismissal from the civil service of this employee.

3. It is also difficult to agree with the author's position regarding the admissibility of participation of public civil servants in strikes. The dissertation substantiates author's findings that, firstly, the current legislation does not prohibit strikes by public civil servants (as well as termination of performance of their duties in other cases), and secondly, it is appropriate to allow such strikes and enshrine a corresponding right in the legislation.

In this connection it is necessary to note that, in accordance with paragraph 15 part 1 article 17 of the Federal Law "On the Public Civil Service of the Russian Federation" due to the passage of civil service a civil servant is prohibited to stop the performance of official duties in order to resolve an official dispute. D. B. Minnigulova believes that this prohibition applies only to individual official disputes. However, it is hardly possible to take such an interpretation, as in this case, the above norm would have to be formulated as the prohibition to stop performance of official duties in order to resolve an *individual* official dispute. Since, there is no such clarification it should be assumed that the legislature was going to prohibit civil servants to stop the performance of their duties in order to settle any official disputes.

Since, in accordance with article 398 of the Labor Code of the RF, strike is a temporary voluntary refusal of workers to perform job duties (in whole or in part) in order to resolve a collective labor dispute, the author's contention that paragraph 15 part 1 article 17 of the Federal Law "On the Public Civil Service of the Russian Federation" does not contain a clear "legal prohibition on strikes by civil servants" is clearly erroneous.

Also D. B. Minnigulova believes that public civil servants are not subject to prohibition of suspending work in the case of failure to comply with the due date of paying them wages and other sums of money under article 142 of the Labor Code of the RF. She makes such a conclusion on the grounds that article 142 of the Labor Code of the RF does not specify what exactly civil servants are prohibited to use this measure of self-protection. It should be recalled that, in accordance with part 1 article 2 of the Federal Law "On the System of the Public Service of the Russian Federation", the system of public service includes the following types of public service: public civil service, military service, law enforcement service. Thus, a civil servant in any case is a public servant and it, as a public servant, is expressly prohibited to stop the performance of its official

duties as a means of self-protection in accordance with article 142 of the Labor Code of the RF.

Defending the right of civil servants to strike, the author does not consider that the suspension of the activities of state bodies for a long enough period of time (inevitable in a strike) would make it impossible in most cases and the normal functioning of the subordinate state-owned enterprises and institutions, and significantly hampered the activities of other organizations that interact with these state bodies; would entail massive failure of the legitimate rights and interests of citizens.

Defending the right of civil servants to strike, the author does not consider that the suspension of the activities of state bodies for a quite long period of time (inevitable in a strike) would make it impossible in most cases the normal functioning of the subordinate state-owned enterprises and institutions; would significantly hamper the activities of other organizations that interact with these state bodies; would entail massive inability of exercising the legitimate rights and interests of citizens. Prohibition on the suspension by public servants of execution of their official duties is not a whim of the legislator, and an objectively defined by the need to prevent negative social consequences for the whole society.

4. One can argue with the author's approach on the directions of development of legislation on disciplinary responsibility of public civil servants. The author criticizes the position of those scholars (M. V. Presnyakov, S. E. Channov), who believe that the formation of the institute of public disciplinary responsibility at public civil service requires more formal compositions of disciplinary cases along with the simultaneous decrease of discretionary powers of the representative of an employer in these issues. According to D. B. Minnigulovoy "this attempt does not appear to be ... appropriate because it requires typifying the types of disciplinary cases (peculiarities of improper performance of official duties), what is quite unrealistic. In addition, it greatly limits the range of disciplinary punishments depending on the specific circumstances of a disciplinary case, the peculiarities of its commission and the identity of a civil servant".

It seems that the author in this case does not quite correctly understand the essence of the proposed concept of public disciplinary responsibility, which does not require typifying all kinds of disciplinary cases. Question is only of the formation of a system of public disciplinary cases encroaching on the entire system of proper functioning of the state apparatus, the responsibility for which must be incurred regardless of the desires of the representative of an employer. It is not only real,

but is already quite successfully applied by the legislator (see for example: Federal Law No. 329-FL from November 21, 2011).

The author's argument that in this case the representative of an employer has a significantly restricted choice of disciplinary punishment is in principle correct. However, such a restriction (but by no means complete elimination of choice!) seems to be more appropriate than a situation where the representative of an employer may by its unmotivated decision completely release a public servant, who has committed, for example, a corruption offense, from responsibility (and to do it repeatedly!). Meanwhile, this is what D. B. Minnigulova allows when she writes that "the representative of an employer being guided by the principles of individuation, appropriateness and fairness may reasonably choose the most suitable type of disciplinary punishment or opt out of bringing an offender to responsibility".

Such an approach that is possible for a commercial organization (when from committing a disciplinary offence by an employee may suffer only the interests of an organization) seems to us totally unacceptable in public service.

Then D. B. Minnigulova also writes: "the argument that at such an approach subjective factors may manifest is not valid, since subjective (personal) attitude always take and will always take a place in the organization of civil service". But just hardly valid is the author's position on the considered matter, since the indisputable fact that subjective attitude will always have place in official legal relations does not prevent the reduction of this subjectivity by legal means. The approach of D. B. Minnigulova in this case is seen as an abandonment of solution to this problem in principle.

5. Finally, proposals of the author about the need for adoption Federal Laws "On the Legal Status of Public Civil Servants of the Russian Federation" and "On Administrative Procedures of Realization the Status of Public Civil Servants of the Russian Federation" seem insufficiently justified. The proposal has been worded as one of the provisions submitted for defense, and is also repeated in the text of the thesis. However, at that, nowhere is stated: what, in fact, is the need to take certain federal laws on these issues and why they cannot get proper regulation in the basic Federal Law "On the Public Civil Service of the Russian Federation"? It seems that in this case the author should have to pay more attention to the arguments of her position, and, perhaps, it would make sense to develop in the very dissertation the concept and approximate structure of these laws.

These comments are to some extent polemical and advisory in nature, do not detract from the undoubted scientific value of the research, do not affect the overall

high assessment of the thesis of D. B. Minnigulova, and, as is evident from their content, are not of a fundamental nature.

Thesis abstract discloses basic ideas and conclusions of the work, author's contribution to the study, degree of novelty and practical significance of its results. It includes all the necessary attributes and compactly explains the study essence. The main provisions obtained in the course of scientific research are reflected in the publications of the applicant. They correspond to the research topic and fully disclose its content.

The foregoing allows to conclude that the dissertation work of Minnigulova Dinara Borisovna on the topic of "Administrative-legal status of public civil servants and the problems of its realization" fully complies with the requirements of paragraph 7 of the Provision on the procedure for the award of academic degrees, approved by the Decision of the Government of the Russian Federation No. 74 from January 30, 2002 (as amended on 20.06.2011, No. 475), and its author deserves the award of the academic degree of a Doctor of law, specialty 12.00.14 – administrative law, administrative process.