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DISCIPLINARY OFFENCE OF A PUBLIC SERVANT: CONCEPT AND GENERAL CHARACTERISTIC

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The analysis of normative legal acts on public service leads to the conclusion that there is no single definition of "disciplinary offence" in the legislation and confirms that there are problems of disciplinary responsibility at the border of the sciences of administrative and labor law.

Revealing the essence and nature of service legal relations that are associated with bringing of public servants to disciplinary responsibility is associated with the determination of the legal nature of disciplinary responsibility of public servants.

The author notes that during implementation of disciplinary responsibility of public servants within the framework of protective legal relations, we should talk about the existence of basic material protective legal relations for disciplinary responsibility of public servants, which arise within the framework of a complex continuous service legal relation.

Keywords: public servants, disciplinary responsibility, disciplinary offence, misconduct, offence, administrative misdemeanor.

Disciplinary relations take a special place in the system of service legal relations and represent themselves a special kind of administrative-legal relations that relate to "intraorganizational managerial relations associated with ensuring the activity of public authorities" [9, 46-47]. Detection of the essence and nature of legal relations associated with bringing of public servants to disciplinary responsibility is due to the determination of the legal nature of disciplinary responsibility of public servants.

A disciplinary offence is interpreted as illegal culpable violation of labor or service discipline by an employee (worker), which entails disciplinary responsibility [13].

Legal problems of disciplinary responsibility are at the junction of the sciences of administrative and labor law. Traditionally, in the legal literature disciplinary responsibility is considered as labor responsibility [7, 54-59]. But, there is a position, according to which allocate a special disciplinary responsibility – disciplinary responsibility of public servants [8, 18-20].

Experts in the field of personnel management estimated that in any workplace 5% of working people are disciplined by nature, another 5% will break the rules, regulations and working conditions under any circumstances, and the conduct of the other 90% depends on the control of the leadership [10].

In accordance with paragraph 35 of Resolution of the Plenum of the Supreme Court of the RF No. 2 from March 17, 2004, as amended on December 28, 2006 "On Application of the Labor Code of the Russian Federation by the Courts of the Russian Federation", failure to observe job duties by an employee without valid reasons is recognized as failure to execute or improper performance at the fault of the employee of assigned to it labor duties (violation of requirements of the legislation, obligations under employment contract, internal labor regulations, job descriptions, regulations, orders of the employer, technical regulations, etc.).

In the scientific literature allocate two kinds of disciplinary responsibility: general, under the Labor Code of the Russian Federation (hereinafter – LC RF), and special that is applied to public servants in accordance with the statutes and regulations on discipline. The list of penalties of the general disciplinary responsibility under article 192 of LC RF is exhaustive. Employers cannot introduce any additional disciplinary penalties.

In the statutes and regulations on discipline may provide for more severe penalties than those imposed on workers under general disciplinary responsibility.

Moscow City Court in the ruling on the case No. 33-1172 dated January 24, 2012 [6], referring to articles 21, 189 and 192 LC RF, explained that as a disciplinary

offense may be considered only such wrongful actions (inaction) of an employee, which are directly associated with the performance of its job duties. Justification for the use of an employee disciplinary action, including in the form of a reprimand, is the fact of an employee of a disciplinary offense, they must also be complied with the statutory procedure for disciplinary proceedings. Justification for the application disciplinary penalty to an employee, including in the form of a reprimand, is the fact of committing by an employee of a disciplinary offense, at that, statutory procedure for imposing a disciplinary penalty must be observed. Refusal to exercise an unlawful order of the head is not a disciplinary offence.

Public servants as a party of disciplinary legal relations have a special legal personality that is a part of their administrative legal personality [12, 23]. The object of disciplinary service legal relations is the conduct of public servants, the level of service discipline, which reflects a quantitative and qualitative assessment of their conduct. It should be noted that when exercising disciplinary responsibility of public servants within the framework of protective legal relations we should talk about existence of elementary material protective legal relations on the disciplinary responsibility of public servants, which emerge within the framework of complex continuous service legal relation.

There is no single concept of disciplinary offense as a ground for the disciplinary responsibility of public servants in existing legislation on public service and public service relations. So, according to article 57 of the Federal Law No. 79-FL from July 27, 2004 "On Public Civil Service of the Russian Federation" [4], disciplinary offense is defined as "failure to execute or improper performance at the fault of a civil servant of assigned to it official duties", for which "the representative of the employer has the right to impose disciplinary penalties". At that, disciplinary offence of civil servants is expressed in violation of service discipline (article 56).

According to paragraph 1 article 28.2 of the Federal Law No. 76-FL from May 27, 1998 "On the Status of Servicemen" [3], disciplinary offense is defined as "wrongful, culpable action (inaction) expressed in violation of military discipline, which, in accordance with the legislation of the Russian Federation, does not entail administrative or criminal responsibility". Thus, unlike disciplinary offense of civil servants, disciplinary offense of servicemen "is associated with violation of military discipline".

In some normative legal acts without clarification the concept of "disciplinary offense" legislator merely lists measures of responsibility, which are applied to employees in case of violation of legal prohibitions. So, the Law No. 3132-1 dated June

26, 1992 "On the Status of Judges in the Russian Federation" states that for a disciplinary offense a judge, except for judges of the Constitutional Court of the Russian Federation, may be subject to disciplinary penalty in the form of warning and early termination of the powers of a judge [1]. Another normative act, which expressly does not say about the concept of disciplinary offence, but outlines its signs in the general norm, is the Federal Law No. 114-FL from July 21, 1997 "On the Service in Customs Bodies of the Russian Federation" [2]. According to article 29 of the Law, disciplinary penalties may be applied to customs employees for breach of service discipline. It follows from this definition that the legislator did not include such signs as guilt and the wrongfulness in the concept of "disciplinary offence".

As any other offence, disciplinary offence has a combination of signs: subject, subjective aspect, object, objective aspect.

According to the general rules, the subject of disciplinary offense is a person who is in legal relation with a particular employer, and therefore has civil legal capacity and active capacity. Legal capacity and active capacity evidence not only on a certain age of a person, but also on its ability to be aware of its actions. Therefore, the ability to bear personal responsibility for a committed misconduct (delictual dispositive capacity) is a part of the legal personality of employees along with civil legal capacity and active capacity, and comes simultaneously with the latter. Specificity of public service relations differs from labor (civil-law) ones in the fact that public servants pass public service according to service contracts and it is a special kind of administrative legal relations. Therefore, in applying disciplinary responsibility to public servants it is necessary to manipulate with the term of administrative legal personality.

The objective aspect of disciplinary offense of public servant is formed from the elements that characterize it as a particular act of external conduct of a person. Disciplinary offences, as like other offences, are the behavior of people, rather than thoughts and beliefs. Indispensable elements of the objective aspect of disciplinary offence of public servant are:

- wrongful deed (action or inaction) by a public servant;
- infliction of harm to employer, society, the state;
- existence of a causal link between wrongful deed and harm inflicted.

Wrongfulness of the conduct of a public servant manifests in violation of service duties imposed on the employee by public contract, statute, official regulations, service regulations and other internal acts, and in addition is not limited to performance of only official duties. For example, a civil servant is obliged to perform the duties of public civil servant of the Russian Federation under article

15 of the Federal Law, including to observe restrictions, fulfill the obligations and requirements of official conduct, not violate the prohibitions provided for by the Federal Law and other federal laws, perform the duties stipulated by the Russian legislation on counteraction corruption, as well as to comply with the provisions of the Statute for public service of a certain kind.

An example of the wrongful conduct of a public servant can be absenteeism, being late for work, coming to work in a state of alcoholic intoxication, failure to perform (inadequate performance) of service duties, participation in an illegal strike, etc.

Mandatory element for the objective aspect of disciplinary offence of public servant is infliction harm by employee's non-performance or improper performance of its service duties. At that, harmful consequences, which occur as a result of various disciplinary offences, are heterogeneous in content. So, some disciplinary offences are characterized by real property damage. These are disciplinary offences with material composition. When committing other disciplinary offences, though the harm is less tangible, but still takes place (for example, breach of ethics of public servant official conduct). Such misconducts are referred to as misconduct with formal composition.

Subjective aspect of disciplinary offence is expressed in the guiltiness of an offender. The presence of guilt is a prerequisite for bringing a public servant to disciplinary responsibility. The legislation on the public service does not differentiate disciplinary offences depending on the form of guilt (intent, negligence), and there is no any indication on the presence of guilt in certain normative legal acts.

From the standpoint of the theory of law the existence of guilt is one of the prerequisites for bringing public servant to juridical responsibility, and since disciplinary responsibility, along with administrative and criminal one, relates to punitive types of juridical responsibility, then in this case there is rather the insufficient level of legal technique than the principled position of the legislator, which has established a differentiated approach to the grounds of disciplinary responsibility for various kinds of public servants [11, 78]. Additional argument for this assertion is paragraph 17 of the Disciplinary Statute of the Customs Service of the Russian Federation from November 16, 1998 [5], which stipulates that a breach of service discipline (disciplinary offence) is a culpable failure to perform or improper performance of official duties assigned to an employee.

It should be noted that the failure of public servant to perform its duties in connection to health conditions impeding the exercising of work is not a disciplinary offense. In this case, there is no guilt of the servant.

Thus, the analysis of normative legal acts on public service allows to draw a conclusion that there is no a single concept of disciplinary offence of public servant in the legislation.

A number of authors agree that public servant, as a subject of service legal relations, is obliged not only faithfully execute its service duties, but also perform other duties within the framework of service legal relation.

Therefore, disciplinary offence should be determined as a culpable, wrongful act of public servant, which lays in the non-performance or improper performance of its service duties, for commission of which the public servant may be subjected to disciplinary penalty. This definition must be unified in the legislation on public service.

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