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ADMINISTRATIVE MISCONDUCT: CONCEPT AND GENERAL CHARACTERISTIC

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The concept, general characteristic and signs of administrative misconduct are explored in the article on the basis of its comparison, including sameness, with administrative offense.

The author concludes that the concept of administrative misconduct is an integral and essential part of the concept of administrative offense and that as misconduct may be considered a less serious deed than an administrative offense.

Keywords: administrative misconduct, administrative offence, administrative responsibility, signs of administrative offence, signs of administrative misconduct, elements of subjective composition of misconduct.

Concept of administrative misconduct was firstly legislatively introduced in 1980 in the Fundamentals of Legislation of the USSR and the Union Republics on Administrative Offenses [1], later clarified in article 10 of the Code on Administrative Offences of the RSFSR [2] in which, under administrative offense (misconduct) was recognized a wrongful culpable (intentional or negligent) action or inaction encroaching on the state or public order, socialist property, rights and freedoms of citizens, on the established order of management, for which the legislation provided for administrative responsibility.

Concept of administrative misconduct was not included in the Code on Administrative Offences of the RF (hereinafter – CAO RF) of 2002 [3], the legislator has enshrined only the concept of "administrative offence". According to article 2.1 CAO RF under administrative offence recognize wrongful culpable action (inaction) of a physical or legal person, for which CAO RF or laws on administrative offences of the constituent entities of the Russian Federation establish administrative responsibility.

Development of legislative technique has led to the specialization of legal norms. In particular, in order not to repeat the general features of misconducts dozens of times they have been "factored out" through enshrining by the norms of the General Part of CAO RF. That is why the text of any norm, which establishes administrative responsibility, does not contain a complete list of all the signs of offence composition. For a correct understanding the content of a specific composition, in addition to a specific article of normative act, it is necessary to consider its relation with the norms of the General Part of CAO RF, with other parts of legal framework [6, 329].

Administrative offence has four signs: public danger, wrongfulness, guiltiness and punishability [12]. Administrative offence can be committed only culpably. Guilt is a mental attitude of a person to a deed and its consequences in the form of intent or negligence. The wrongfulness of a deed is that it violates administrative-legal prohibitions. Punishability lies in the fact that as an administrative offense may be considered only such a deed, for commission of which provide for administrative responsibility.

Public danger of administrative offence is that it actually inflicts or may inflict harm to public relations protected by law. Harm can be expressed both in causing material damage and in some other form.

Analysis of the scientific legal literature and stated in it positions of leading legal-scholars has led to a conclusion – despite the fact that the current CAO RF does not enshrine the concept of "administrative misconduct", all its specific signs and properties are included in the concept of administrative offense. As a legislative model of offence the composition of misconduct is an integral part of its normative basis and it forms the hypothesis of a norm establishing administrative responsibility.

It can be assumed that the composition of administrative misconduct is recognized as a statutory combination of signs, in the presence of which an antisocial deed is considered as an administrative offense.

As a phenomenon of reality administrative offence (misconduct) has a huge number of signs. Composition of misconduct is a logical construction, its legal

concept, reflecting the essential features of real phenomena, that is, certain anti-social deeds (actions or inaction). The legislator does not enshrines the signs of misconducts in legal norms of either General or Special Part of CAO RF, but only selects from them significant, distinctive features and constructs compositions. Thus, the logical construction of norm is enshrined in law and becomes a mandatory integral part of the basis of responsibility. The majority of administrative law theorists agree that the list of signs enshrined in the administrative-legal norm is a necessary and sufficient ground for the classification of a deed as administrative misconduct

According to D. N. Bakhrakh "A real deed is considered as misconduct only when it contains all the signs of composition mentioned in the norm; the absence of at least one of them means the absence of composition in general" [6, 340].

Misconduct like administrative offence has four elements of subjective composition: object, objective aspect, subject, subjective aspect.

The object of administrative misconduct is legal relations, which violate administrative-legal prohibitions. At that, as the common object of administrative misconducts recognize legal relations that are regulated by various branches of law, and protected by administrative-coercive norms, and as the generic object of misconducts recognize the block of legal relations, which constitutes an integral and independent part of the common object.

Specific object – a kind of generic object, specific group of legal relations that are common to a number of misconducts of the same kind. It includes, for example, administrative responsibility for violation of traffic rules, military registration, customs, tax legislation.

The objective aspect of misconduct is a system of signs provided for by the norms of administrative law, which characterize its external manifestations. The most important among them is the one that determines the deed itself, the varieties of which can be represented by action and inaction.

Deeds may also have other signs. Be repeated, systematic, continued, etc. Features of unlawful conduct in lasting and continued misconducts have great importance for deeds' classification. As lasting misconduct should recognize an action or inaction, after which a legal obligation is not being executed for a long time. In the base of a lasting breach lies a not carried out by a person for a long time legal obligation not to violate legal prohibitions or, on the contrary, obligation to commit an action stipulated by a norm of law. It is characterized by continuous exercising of violation, most often through long inactivity. The starting point of misconduct is an action or inaction that has resulted in prolonged violation of legal prohibition or

prolonged failure to comply with the obligations. It ends actually with the termination of the violation or legally with bringing of guilty person to responsibility.

Continued misconducts consist of a series of identical unlawful deeds directed toward a common goal and constitute in their totality a single misconduct (repeated use of radio transmitting equipment, gross violation the rules of accounting of income and expenses, etc.). Continued misconduct represents several actions, each of which is a misconduct, but, as a rule, they are all joined together by one intent, and often committed in one place, using one and the same means. Continued deed starts from the moment of the first unlawful act and ends actually with the cessation of unlawful activity, so several of such violations also are treated as a single misconduct, or legally with bringing of person to administrative responsibility.

Deed is a rod, around which other signs of the objective aspect (method, time, place, etc.) are grouped.

Conducted research of judicial practice has allowed making an important conclusion that in investigation of administrative offenses (misconducts) the analysis of the objective aspect of a deed is not paid enough attention. Although, according to S. S. Alekseev, S. I. Arkhipov, it is a core, around which the rest of the signs of an offence are formed [4]. Often in administrative-legal norm, which describes a misconduct, indicate the place, time and means. The time of misconduct is recognized as a certain time period, moment or period of the day or year, in which the action or event was committed. The place of misconduct is a location, on which has happened, was happening, will happen an offence, the place can be an arbitrary. In the theory of criminal law and administrative law, time, place and method are referred to optional signs.

The subject of misconduct is a person who committed it, and whose deed contains a misconduct described in administrative-legal norm.

Under the current legislation, individual and collective subjects are recognized as the subjects of administrative violations. Individual subjects are citizens, foreign citizens and persons with special administrative-legal status (officials, military personnel, employees of customs authorities, etc.). All the signs of an individual subject can be divided into two groups: general and special. As general ones recognize such which any person brought to administrative responsibility should have. There are two of them: age from 16 years old and sanity. All the signs of a general subject are enshrined by the articles of the General Part of CAO RF. If a norm does not contain any special signs of subject, therefore, to responsibility under it can be brought anyone who has common signs of subject. In other words, such a norm enshrines the responsibility of a general subject. But if a norm

mentions special signs of subject, it means that it establishes responsibility of a person, who along with general signs has special signs. In other words, such a norm enshrines the responsibility of a special subject [6].

The subjective aspect of misconduct is a totality of signs characterizing the mental attitude of person to a committed deed. Its core is a guilt that can exist in the form of intent or negligence. Most often the legislator does not indicate other signs of objective aspect.

In a number of articles also indicate the form of guilt. Although the sign of the form of guilt is rarely directly included in compositions, obviously that some of deeds may be committed only intentionally. For example, petty theft, concealment of goods from the customs control.

Comparison of the content of the articles of CAO RF and the Criminal Code of the RF, which determine intent and negligence, allows to identify peculiarities of administrative-legal guilt. It is the guilt of misconduct, but not a crime. It involves awareness of the wrongfulness of actions, and not their public danger. It is associated with the relation to harmful, but not socially dangerous consequences [7].

The authors of the Handbook on Criminal Law A. V. Grishin, V. A. Kuzmin and V. A. Mayorov argue that any misconduct or offence is of anti-social nature because inflicts harm to any interest – social or legal ones. The difference of crime from misconduct (offense) lies in the nature or degree of public danger. Harm of crime is much more diverse and greater than harm of misconduct [8, 41]. Nature of public danger of crime depends on the object of encroachment, content of consequences of deed and form of guilt. Degree is a quantity of public danger of the crime of one nature.

According to M. I. Nikulin, administrative misconduct is "a means of resolving the contradiction between the need (real or falsely understood) of a man and prescription (prohibition) formulated in administrative-legal norm". This contradiction is not of antagonistic nature, is not long-continued, the attempt to solve it by means of offense is usually not caused by anti-social essence of offender, and is due to the weakening of internal self-control, the deformation of the evaluation criteria of public danger of a deed. To some extent this state of offender is due to the fact that the borders between administrative misconduct, especially when it concerns technical norms, and permissible behavior sometimes are insufficiently substantiated and understood [11, 82].

M. N. Kobzar-Frolova has a point of view that misconducts are less dangerous by its nature and consequences than crimes. They are committed not in criminal-law sphere and by criminals, but by ordinary citizens in various spheres

of economic, commercial, labor, administrative, cultural, family and industrial activity. And entail not punishment, but penalties [9, 19]. N. I. Matuzov and A. V. Mal'ko have similar positions [10, 209-210].

Thus, it can be concluded that the concept of administrative misconduct is a part and parcel of the concept of administrative offence, however, it is possible to assume, that misconduct might be recognized as a less serious deed than administrative offence.

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