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TOWARDS THE QUESTION ABOUT LEGAL NATURE OF COURT PROCEDURE ON THE CASES OF DISCIPLINARY OFFENCES¹

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The author notes that the norms governing the activities of court on the application of disciplinary responsibility require an appropriate legal registration, and disputes under jurisdiction of the Judicial Disciplinary Tribunal should be treated according to the rules of administrative court procedure.

Argues that proceedings on cases of disciplinary offences of judges or other persons employed in public positions should possess certain peculiarities because of the special legal status of these persons.

Keywords: court procedure, disciplinary offences, proceedings on cases of disciplinary offences, disciplinary responsibility, Judicial Disciplinary Tribunal, disciplinary courts.

Disciplinary responsibility, along with other types of legal responsibility, is applied in the prescribed procedural order. In jurisprudence procedural form of disciplinary and legal coercion is characterized as extrajudicial, since measures of disciplinary impact have always been applied and are applied within the framework of official (managerial) subordination [11].

However, the analysis of the current Russian legislation and law-enforcement practice detects in the justice system the existence of judicial procedures, in which the issue of application of disciplinary punishments is being resolved.

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In this case it is about the right of judges of garrison military courts to apply disciplinary arrest to military personnel for serious disciplinary offenses [3], as well as about individual powers of competence of Judicial Disciplinary Tribunal [2].

Possibility to apply disciplinary measures during court proceedings determines the issue on the nature of procedural form under which the courts impose disciplinary punishments.

It would seem that it is clear about the essence of court procedure, within which Judicial Disciplinary Tribunal administrates justice. According to law, this judicial body reviews:

- complaints of citizens, whose judicial powers were prematurely terminated by the decision of the Higher Judges' Qualifications Board of the Russian Federation or the decision of the Judges' Qualifications Board of a subject of the Russian Federation for committing disciplinary offences, against the mentioned decisions of Judges' Qualifications Boards;

- requests from the Chairman of the Supreme Court of the Russian Federation or the Chairman of the Higher Arbitration Court of the Russian Federation on the premature termination of the powers of judges for committing disciplinary offences in cases where the Higher Judges' Qualifications Board of the Russian Federation or the Judges' Qualifications Board of the subjects of the Russian Federation is refused to satisfy the presentations of the chairmen of federal courts concerning the termination the powers of judges for committing disciplinary offences in the manner prescribed by chapters 23 and 25 of the Civil Procedure Code of the Russian Federation [1], taking into account the peculiarities established by the Federal Constitutional Law "On Judicial Disciplinary Tribunal" and the Regulations of Judicial Disciplinary Tribunal (see part 1 article 6) [2].

Consequently, the legislator determines that the competence of the so-called Disciplinary Tribunal is implemented through civil proceedings, subject to certain procedural peculiarities provided for by the Federal Constitutional Law and Regulations [6].

Meanwhile, it is no secret that court procedure to resolve public-law disputes – is an element of administrative justice. And, therefore, it can be argued that the disputes that fall into jurisdiction of Judicial Disciplinary Tribunal should be considered according to the rules of administrative court procedure.

However, the draft Code of Administrative Court Procedure (hereinafter – CACP RF) attributes to the category of administrative cases those ones that are associated with contesting decisions of the Higher Judges' Qualifications Board and decisions of Judges' Qualifications Board of the subjects of the Russian Federation

concerning contesting decisions to suspend or terminate the powers of judges or to suspend or terminate their resignation, except for cases of termination of the powers of judges for committing disciplinary offences (paragraph 3 part 1 article 23 of the Draft [4]).

Accordingly, the cases that are attributed by the Federal Law to the competence of the Judicial Disciplinary Tribunal may not be considered under the rules of administrative administration of justice [4].

Thus, it is presumed that contesting the decisions of Judges' Qualifications Boards concerning application of such measure as premature termination of the powers of judge in connection with the commission of a disciplinary offense is not a subject-matter to administrative-legal dispute.

In this case, it is not entirely clear why contesting of the acts of Judges' Qualifications Boards, which affect the status of judge, possibly violate its rights and freedoms, must be implemented in the courts of general jurisdiction under the rules of administrative court procedure, namely in the Judicial Disciplinary Tribunal in the form of civil court procedure.

But consideration of cases on the termination of powers of judge, due to the request of the Chairman of the Supreme Court of the Russian Federation or the Chairman of the Higher Arbitration Court of the Russian Federation concerning premature termination of powers of judges for committing disciplinary offences, was left outside the framework of project regulation for obvious reasons, since the draft CACP RF was built in accordance with the concept of administrative complaint as the basis for administrative court procedure.

If to turn to the content of the Federal Law "On the Court Procedure Concerning Grave Disciplinary Offences in Application of Disciplinary Arrest to Servicemen and Execution of Disciplinary Arrest" [3], it becomes clear that the procedural form regulated by this legislative act allows one to implement substantive norms on the so-called special disciplinary responsibility of servicemen. This implementation is ensured by means of administrative-procedural norms (procedure for bringing of militarized servants and students to disciplinary responsibility is settled by administrative-procedural norms [7, 591]).

Judges of garrison military court, applying, in fact, the measures of disciplinary-legal coercion, are not subject to the disciplinary power, they administer justice according to the norms of administrative-procedural law. Gross disciplinary offense underlying a case considered by the military court – is an administrative offense, for which a serviceman, in accordance with the Code on Administrative Offences of the Russian Federation, shall be subject to disciplinary responsibility

when CAO RF for such administrative offense provides for punishment in the form of administrative arrest (see Annex No. 7 to the Disciplinary Statute of the Armed Forces of the Russian Federation [5]).

According to M. Ya. Maslennikov, detailed peculiarities have place in application of disciplinary arrest. The scientists believes that the essence, the procedure for applying and execution of disciplinary arrest in respect of servicemen – is the same administrative arrest applied in respect of so-called special subjects of administrative responsibility. This is the difference between them, but identical signs are almost all the rest:

- cases on application of administrative and disciplinary arrest (short-term deprivation of liberty) are considered by the judges of the courts of general jurisdiction;
- in both cases there is reduced length of proceedings and the status of parties to proceedings on the mentioned cases that is regulated procedural-legal norms;
- in both cases judges make decisions on the application of arrest and even presentation concerning elimination of the causes and conditions that contributed to the commission of relevant misconducts;
- in both cases the procedure for review of court decisions on the application of arrest is essentially the same [11].

The idea of establishing administrative courts that ensure the implementation of disciplinary responsibility of servicemen in the form of arrest is supported by K. S. Lihovidov [10]. In summary, it should be noted that the norms governing the activity of court concerning the application measures of disciplinary responsibility require an appropriate legal formalization. Thus, according to M. Ya. Maslennikov, the leaving of the procedures for application disciplinary arrest in respect of servicemen and citizens called up for military training as a stand-alone law is irrational [11].

The special legal literature increasingly expresses an idea about the need to create in the Russian Federation a system of disciplinary courts. In this connection, it is proposed to exclude from the competence of Judges' Qualifications Boards the powers to consider cases on disciplinary offences of judges [12, 7].

According to Sh. A. Kudashev, the resolving by not a state, not a judicial body of such important issue as premature termination of powers of a judge as a disciplinary measure, incredible as it may seem, decreases the level of independence of judges. Not always resolving of such issues by a corporate body means compliance with “the purity of staff” and the constitutional rights of citizen – judge [9].

Moreover, the right to impose certain, more strict measures of disciplinary responsibility against public servants and officials who are in special public-law relations with the state may be included into the competence of disciplinary courts.

It should be noted that the operation of such courts in the world practice is based on constitutional provisions. For example, in Germany the Basic Law of the Federal Republic of Germany (part 4 article 96 of the Constitution of the Federal Republic of Germany) establishes that the Federation may establish for any person, who is involved in public-law service relationship with it, federal courts to resolve cases in disciplinary proceedings and proceedings on complaints [8].

As you know, the Constitution of the Russian Federation does not contain provisions on disciplinary court procedure, what, in turn, is not a reason for leaving without resolving the issue on the form of justice, under which courts hear cases on the application of disciplinary responsibility measures. And, if the application of disciplinary arrest to servicemen as subjects of special administrative responsibility may be fit into the framework of administrative-judicial process, then the proceedings on cases of disciplinary offences of judges or other persons holding public office, of course, should have some special features, at least because of the special legal status of such persons.

References:

1. Civil Procedural Code of the Russian Federation from November 14, 2002, No. 138-FL [Grazhdanskii protsessual'nyi kodeks Rossiiskoi Federatsii ot 14 noyabrya 2002 g. № 138-FZ]. *System GARANT* [Electronic resource], Moscow: 2013.
2. Federal Constitutional Law No. 4-FKL from November 09, 2009 "On Judicial Disciplinary Tribunal" [Federal'nyi konstitutsionnyi zakon ot 9 noyabrya 2009 g. № 4-FKZ «O Distsiplinarnom sudebnom prisutstvii»]. *System GARANT* [Electronic resource], Moscow: 2013.
3. Federal Law No. 199-FL from December 01, 2006 "On the Court Procedure Concerning Grave Disciplinary Offences in Application of Disciplinary Arrest to Servicemen and Execution of Disciplinary Arrest" [Federal'nyi zakon ot 01 dekabrya 2006 g. № 199-FZ «O sudoproizvodstve po materialam o grubykh distsiplinarnykh prostupkakh pri primeneni k voennosluzhashchim distsiplinarnogo aresta i ob ispolnenii distsiplinarnogo aresta»]. *System GARANT* [Electronic resource], Moscow: 2013.
4. Draft Code of Administrative Court Procedure of the Russian Federation No. 246960-6 (as amended, adopted by the State Duma of the RF Federal

Assembly in the first reading 21.05.2013) [Proekt № 246960-6 Kodeksa administrativnogo sudoproizvodstva Rossiiskoi Federatsii (red., prinyataya GD FS RF v I chtenii 21.05.2013)]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2013.

5. RF Presidential Decree No. 1495 from November 10, 2007 "On Approval of the Basic Military Regulations of the Armed Forces of the Russian Federation" [Ukaz Prezidenta RF ot 10 noyabrya 2007 g. № 1495 «Ob utverzhdenii obshchevoinskikh ustavov Vooruzhennykh Sil Rossiiskoi Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2013.

6. Resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum Higher Arbitration Court of the Russian Federation No. 3/2 from February 04, 2010 [Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii i Plenuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 4 fevralya 2010 goda № 3/2]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2013.

7. Bakhrakh D. N., Rossinskii B. V., Starilov Yu. N. *Administrative Law: Textbook for Higher Schools. 3rd revised and enlarged edition* [Administrativnoe pravo: Uchebnik dlya vuzov. – 3-e izd., peresmotr, i dop.]. Moscow: Norma, 2007.

8. *Constitutions of Foreign States: Study Guide* [Konstitutsii zarubezhnykh gosudarstv: Uchebnoe posobie]. Compiler Professor V. V. Maklakov, 4th revised and enlarged edition, Moscow: Volters Kluver, 2003

9. Kudashev Sh. A. *Responsibility of Judges: Whether will Disciplinary Presence be Effective?* [Otvetstvennost' sudei: effektivno li budet distsiplinarnoe prisutstvie?]. Available at: http://www.juristlib.ru/book_10109.html (accessed: 9.09.2013).

10. Likhovidov K. S. Legislative Securing of Disciplinary Responsibility of Servicemen [Zakonodatel'noe obespechenie distsiplinarnoi otvetstvennosti voennosluzhashchikh]. *Pravo v Vooruzhennykh Silakh – Law in Armed Forces*, 2005, no. 2.

11. Maslennikov M. Ya. Russian Code of Administrative Procedure – Real and Self-sufficient [Rossiiskii administrativno-protsessual'nyi kodeks – real'nyi i samodostatochnyi]. *Administrativnoe pravo i protsess – Administrative Law and Process*, 2012, no. 2.

12. Osin V. V. About Judicial Disciplinary Tribunal and Protection of Citizens' Rights [O distsiplinarnom sudebnom prisutstvii i zashchite prav grazhdan]. *Advokat – Lawyer*, 2010, no. 2.