

DISCIPLINARY LIABILITY OF THE MILITARY PERSONNEL

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Abstract: *Liability "occurs on the grounds of an already done evil", that is after committing an offense. Specific violations committed by public officials, including those with special status, is the fact that they can intervene while performing their function, either in connection with this performance or simply by the deviation from certain rules which have no direct connection, with the function, but which may question the prestige of the public employee. The disciplinary liability is a form of the administrative liability, together with the contraventional and asset liabilities.*

Keywords: *discipline, disciplinary deviation, legal liability, discipline responsibility, the military, disciplinary sanctions*

1. INTRODUCTION

Liability as a fundamental institution of law has, for the military, some special connotations resulted from their special responsibility, but not at such extent that this profession avoid the general principles of liability. As for civil employees, generally speaking, also for the military, liability occurs when executing their function or in connection with its execution, they deviate from the legal norms of their profession. Thus, the soldiers are passive subjects of the following forms of liability: disciplinary, contravention, material and criminal.

The disciplinary liability is a form of the administrative liability, together with the contraventional and asset liabilities. All three forms of liability occur as a result of committing administrative violations, the difference being that in the first two cases it is a sanctionary legal liability and in case of asset liability, we speak about a reparatory liability.

The term "discipline" comes from Latin, where the meaning was, on the one hand, system, rule, moral principles, good standing, and on the other hand, training, school, education, science, skill, meanings that we find today, respectively the assembly of the rules of conduct, of order, imposed on members of a group members for a proper functioning of its social organization and, of a particular domain of knowledge or branch of a science, field of instruction or area of learning curricula [1].

The discipline supposes the leadership right to formulate obligations and prohibitions, the authority to make them be observed and the power to apply sanctions if necessary. Mandatory in all areas of social life, discipline is essential to the military organization, being one of the determinant factors of the fighting capacity of the army, based both on the conscious acceptance of the established rules of conduct and the granted rewards and sanctions enforcement [2].

2. THE LEGAL NATURE OF MILITARY DISCIPLINE

The legal nature of military discipline is the law regarding the statute [3] which establishes among other duties of the military, to respect the military oath and the provisions of normative acts in force, the exact execution of the commanders' and chiefs' orders, the military being responsible for the way they fulfill the tasks entrusted to them.

The commander is the one responsible for the application of the military discipline norms within the structure he commands and the delegation of competence does not exclude entirely his liability. As a result, the legal nature of the military discipline is not related to the working right, it does not stem from a contract of employment but from a stipulated by law, that is why all the characteristic of an institution of administrative law meet. The importance of military discipline is that in many armies, the disciplinary norms should be grouped into a real "disciplinary law" as distinct institution, specifically recognized as military law and regulations exist to this effect.

The disciplinary deviation is a form of illicit behavior that manifests itself in a breach of the obligations by the military, obligations that result from laws, orders and regulations which, altogether, constitute the functional tasks of the military but also the military discipline content. Thus, the only legal basis for the disciplinary sanction is disciplinary deviation and where the military's act was noticed as well as a crime, the disciplinary proceedings shall be suspended until the non-initiation of the criminal prosecution or by the date on which the court dispose the trial discharging or cessation.

Disciplinary violation involves two minimum conditions of military, that is the quality of military duties and breach of a statutory duty. This means that the subject of the disciplinary offense stipulated by the military discipline rules can be only military and the disciplinary violations scope is limited to acts of conduct by which the military honor and dignity are compromised, the duties of service are violated by failing or faulty performance of functional tasks and mission accomplishment.

3. DISCIPLINARY RESPONSIBILITY OF THE MILITARY

Disciplinary responsibility of the military has the following features: it is based on the breach by a military of a report of administrative law; the active subject is always a military commander or a public authority, subordinated in the violated judicial report; it is based on the passive subject's guilt who has the capacity of administrative law within the violated juridical report; the sanctions have a systemic configuration.

The disciplinary sanctions are coercive means, stipulated by law, whose purpose is to defend the disciplinary order, to develop the spirit of responsibility and accountability for the accomplishing the work duties, the rules of conduct as well as the prevention of acts of indiscipline. They are expressly and limiting stipulated by law, having both an educational character but also preventive.

Establishing disciplinary responsibility for soldiers who have committed disciplinary violations is done by sending them, as appropriate, in front of the Honour Board, trial council or prior research commission where they always have the right to the audience, defence and petition. Nevertheless, those who consider themselves mistreated by the applied sentence can address by written report to the direct superior of the person who issued the sanction decision and who is obliged to name a research commission. The decision proposed by the new research committee may maintain or cancel the disciplinary sanction or may apply another sanction. In its turn, it may be appealed in a court of law by administrative contentious in charge, in accordance with the administrative contentious Law in force.

The legality control of the act of punishment exercised by the administrative contentious is both a formal inspection and background control.

The formal control consists in verifying the legal procedure for application of the legal procedure sanction, that is the military hearing before the Honour Board or the court, as appropriate, the prior research, the document issued by the competent organ, etc.

Upon completion of the formal control, it will be determined whether the penalty is legal under procedural circumstances and if not, the sanction document will be sanctioned, so that the background control is unnecessary.

The background control aims at the checking the existence of military's fault, which can be done based on documents that have been the basis for issuing the notice of penalty, of his guilt, the consequences of the crime committed and the causal link between the act committed and the consequences produced.

As a result of the background check, it will be determined whether the conditions of applying the disciplinary sanction and whether the individualization of the penalty was correct.

If these conditions are not met, a notice of cancellation penalties will be provided, and if the penalty was not correctly individualised, the act of punishing shall be amended in order to apply a lighter penalty.

From our point of view, setting another disciplinary sanction, a lighter one, is possible only if such a penalty has been requested by the plaintiff military, because in this way the court gives what was not required and it will violate a general principle of procedural law, namely the principle of availability.

Also, in our opinion, changing the actual act of punishment, for the purposes of applying another disciplinary sanction, an easier one, must be also done by the defendant, military authority, according to the limits laid down in the final and irrevocable judicial decision of administrative court, whereas military authority is by law the sole disciplinary power over his subordinates [4].

The status of military personnel is governed by the constitutional provisions contained in Article 118 paragraph (2) of the Constitution, according to which the structure of the national defence system, the preparation of population, economy and territory for defence, as well as the status of military personnel are established by organic law, constitutional provisions under which the legislator adopted Law no. 80/1995 with regard to the status of military personnel. Enlisted and professional soldiers are subject to the Status of Enlisted and Professional Soldiers, approved by law (Law No. 384/2006 on the Status of Professional Soldiers and Enlisted, published in the Official Gazette of Romania, Part I, No. 868 of 24 October 2006).

By Decision no. 71 of 29 January 2019, the Constitutional Court of Romania declared that the provisions of Article 34, Article 35 paragraph (3) of the Law no. 80/1995 on the status of military personnel are non-constitutional. From the assessment made, the Court held that military personnel are the subject of a service relationship, and in the exercise of their duties under the law and the provisions of the military regulations, officers, warrant officers and non-commissioned officers are invested with the exercise of public authority, enjoying protection, according to the criminal law (Article 6 of Law 80/1995). This service report is initiated, executed and terminated under special conditions. As a consequence, the essential elements regarding the initiation, execution and termination of service relations inherently refer to the status of military personnel, a status to be regulated by organic law. At the same time, the Court notes that the evaluation of the activity and conduct of the military staff refers to the manner in which the service relationship is executed and, through the effects produced, may have the effect of modifying or even terminating it, namely the postponement of the next rank promotion

for 1 or 2 years (Article 33 of Law No. 80/1995), or the changeover from active-duty to reserves, as a sanction (Article 51, Letter e) of the Military Discipline Regulations] or promotion to the next rank (Article 32, Letter k) of the Regulation of the military discipline], the granting of defence and security weapons with engraved names, according to the law [Article 29 paragraph (3) Letter g) of the Military Discipline Regulation].

As a consequence, given that by the provisions of Article 34 and Article 35 paragraph (3) of the Law no. 80/1995 on the status of military personnel, the Minister is assigned to regulate some aspects regarding rewards, deviations from the military discipline, disciplinary sanctions, the organization and functioning of the councils of honour, the conditions for setting up councils of honour, the functioning of councils of honour, the appeals of the decisions of the councils, the organization and functioning of the appeal councils, respectively the evaluation of the activity and the conduct of the military personnel as part of some essential matters related to the service relationship and their status, and which are regulated by infra-legal acts, respectively by regulations that are approved by orders of the Minister of National Defence, the Court finds that all these elements must be regulated, according to Article 118 paragraph (2) of the Constitution, by organic law.

In particular, to comply with the provisions of Article 118 paragraph (2) of the Constitution, the Court points out that the above-mentioned essential aspects relating to the assessment of military personnel's activity and conduct as part of essential aspects of the service relationship and their status, the initial disciplinary procedure, the enforcement of disciplinary sanctions or the work of the discipline council activity and that of councils of honor and trial, including the arms regime (the granting of defence and security weapons with engraved names), must be regulated by organic law and the rules specific to the evaluation procedure must be explained and detailed by order of the minister of defence.

Normative orders are issued only on the basis of and in compliance with the law, and must be strictly limited to the framework established by the documents on the basis and in the execution of which they have been issued and cannot contain solutions that are contrary to its provisions. However, the provisions of Articles 34 and 35 paragraph (3) of Law no. 80/1995, before being amended by Law no. 101 of May 8, 2019 (published in the Official Gazette No. 371 of May 13, 2019), did not regulate the essential aspects related to the career of military personnel, but they delegated the regulation of these matters to the Minister of Defence. Thus, the Minister of National Defence was empowered to adopt military orders and military regulations that did not circumscribe to the constitutional requirements, as they allowed the adoption of legislative acts of an infra-legal rank that could modify the status of military personnel. Thus, there may have appeared some situations when some essential aspects concerning the execution and / or termination of military service relationships to be regulated by an administrative act that contained elements beyond the legal framework, even to be later on added to the law.

CONCLUSIONS

In conclusion, the administration put, as fundament of its entire activity, the application and observance of law, the principle of legality being one of the basic works of administration activity, including the military. Liability in any of its forms is determined by the committing of illegal acts, by the violation of the value system established by the city and recognized by law norms. In legal literature we find the thesis according to which in any branch of law we place ourselves, the liability has two purposes: to restore the violated legal order, causing a return to legality status; to express

a negative reaction to the author of the illicit act, with the aim of determining him realize the significance of his deed, to regret and, in the future, not to repeat it again. To talk about responsibility, it necessarily requires its relationship approach with responsibility. Responsibility precedes responsibility and can remove it. It involves observance by the individual of the value system established by the city, at a global or micro social level. If this value system is respected, man lives in harmony with himself and with others, with his society, as a whole. When the value system is denied, the man ceases to be responsible; he becomes liable for its unlawful behavior¹. The career military personnel must take responsibility as a priority in their behaviour. For them, there is no other value, more important than accomplishing his tasks; a belief emerged from rational understanding of phenomena. They must carry out their tasks, not because they are required to, but because they are convinced that it is their professional role.

REFERENCES

- [1] *Dicționarul enciclopedic*, vol. 2, Editura Enciclopedică București, 1996, p.107.
- [2] *Art. 2 din Regulamentul disciplinei militare, publicat în M.Of.*, Partea I, nr. 399 din 03.07.2013.
- [3] *Legea nr. 80/1995 privind statutul cadrelor militare cu completările și modificările ulterioare și Legea nr. 384/2006 privind statutul soldaților și gradaților voluntari*
- [4] *Art. 4 din Legea nr. 188/1999 privind statutul funcționarilor publici*, publicată în M.Of., Partea I, nr. 365 din 29.05.2007.