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Abstract

The specialized practice often raised the issue of ambiguity between the terms of civil servants and officials, this matter being the sensitive issue of our case. However, according to Law 176/2010 regarding the integrity in performing public positions and dignities, amending and supplementing Law no. 144/2007regarding the establishment, organization and functioning of the National Integrity Agency, the provisions of this law shall apply under the provision of article 1 paragraph 31 to persons with management and control duties, as well as to civil servants, including those with special status who operate in all central or local public institutions or, as appropriate, in all public institutions.This material aim is to analize specific differences between public positions and dignities in order to prove if a national secretary working for a public institution subordinated to the romanian government could be considered a civil servant.

Keywords :
civil servants, officials, individual administrative act, motivation, revocation.

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This question arises just amid the implementation of a ministerial order and its subsequent acts regarding the dismissal of the National Secretary of a public institution subordinate to the Romanian Government, the legal regime of the documents of his appointment and dismissal thus helping us see the extent to which such person may be classified as a civil servant or not.

Thus, according to art. 5 paragraph. 3 of H.G. no. 239/2001 *the national secretary of such a structure was appointed by order of the Minister and as per Law no. 554/2004 of the administrative order, an order of the minister, which appoints a person, whoever the person is, as the national secretary of a public institution subordinated to the Romanian Government, is, undoubtedly, an individual administrative act.*

According to the Romanian legislation in force, the administrative provisions (particularly the normative ones but some individual as well) must be substantiated by right and in law, otherwise they are nullified. Although the law literature brings into question other individual administrative acts as well, acts that should not be motivated (e.g. the driving license), however, the same doctrine recalls the cases where, undoubtedly, these acts must be justified, as it may happen with an order of the Minister which removes from office a person who occupied a position in the central administration structures for several years.

Analyzing the case of this category of acts, the author Ovidiu Podaru from Cluj, professor of administrative law, provides in his article called '*Actul administrativ. Forma si elemente de forma***'** a nuanced presentation of the need of motivating categories of individual administrative acts. The same author noted that 'without doubt, the problem of reasoning and its lack is raised more strictly in the case of individual administrative documents'. Among the analyzed documents he also refers to documents detrimental to individuals, e.g. documents based on which he/she suffered some form of sanction.

Or, we believe we fit the situation described above because the unjustified revocation of a person from a position where, moreover, he did not have any form of prior sanction, but was announced just 2 days before that he had to hand over the documents to the General Secretary of the public institution, cannot be otherwise qualified but a sanction and an extremely drastic one.

The same author from Cluj states the fact that '*as long as the motive represents the objective element and not the psychological one, in fact or in law which precedes the act and justifies its issuance, the reasoning represents its justification within the*

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act'. (Podaru, (2007):48-49.). There is no evidence of the Minister's motivation order of the revocation nor any legal basis leading to it and, especially, to the unexpected replacement of the Secretary with another person, with no prior justification on the level of professionalism related to the quality of his work.

In the absence of the motive or the error of the motive we are presented with a declaration of invalidity which cannot be motivated because the government or its representatives did not express a valid will. This invalidity is even more evident as the lack of reason violates the fundamental human rights and freedoms of the revoked person (Podaru , (2007) : 49) the case being about the flagrant violation of the self-image, dignity of the person who seriously suffered, including financially, being suddenly deprived of his means of living.

Appealing to the principle of legal symmetry and making a linguistic analysis of text of the Government Decision no. 239 /2001 it results that at the level of national leadership of such structures '*one will appoint a representative at the level of state secretary or General Director from the ministry*.' Or, the Romanian equivalent of what is meant by 'level' is equivalent, equal to, or having the same status or regime . Obviously, by interpreting 1 st artcile of the Government decision No 239/2001 -*The public offices*, mentioned and recognized also by Law no. 188/1999 (*the Regulation of civil servants*), it results that such a person clearly had, from the very beginning, the status of a civil servant.

In one of its reasoning even the Court of Appeal of Bucharest itself noted that in such cases, as the nomination for the position of National Secretary of such a structure is made based on an administrative document and 'the revocation of the position', when the revocation occurs, it will also be performed under a ministerial order, thus explicitly calling into question the term of '*position'*. (civil sentence no 5433/28.09. 2011, Court of Appeal Bucharest, unpublished)

Assuming that it is only a strictly literal interpretation of the term 'position', a fundamental law principle tells us that any ambiguous clause leading to the interpretation of an act or a contract shall be construed in favor (and not at the expense of -A.N.) of the one it refers to, this is why we believe that, here, the meaning of position must be interpreted as submitted by Law no. 188/1999.

Moreover, such a national secretary was perceived and classified as civil servant, having as evidence in court the results and qualifications received over time from his superiors, in such cases the institution providing

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the professional assessment sheets of the individual signed by five different ministers , which shows that the person in question received every time the qualification 'very good'.

Even the art. 69 of Law no. 188/1999 specifies in paragraph (1) that the performance appraisal of civil servants is done annually and after the evaluation the civil servant shall be given one of the following qualifications: very good, good, satisfactory and unsatisfactory, these qualifications being considered for advancement, promotion or dismissal from the position.

As per art. 5, the Methodology of assessing the professional performances of the employees is approved by Government Decision, proposed by The NACS (The National Agency of Civil Servants) after consulting the civil servants trade unions. Therefore, it seems unnatural for The NACS to adhere to the idea of assessing each year, for several years, successively, by 5 different ministers, a person who theoretically would not appear on the lists unless it took into account the fact that a national secretary of such an institution, subordinate to the Government, had the status of civil servant.

Analyzing all these factors, it is clear that as a national secretary of such an entity the person must have been treated and evaluated as a civil servant, occupying a position equal in rank to that of a civil servant with leadership attributions and that his assessment was conducted on legal grounds, i.e. with the agreement of The NACS and under the provisions established by the appropriate Government decision.

Furthermore, the legal doctrine defines the public position as the legal status of an individual legally appointed with responsibilities in achieving the competences of a public authority consisting of the rights and obligations which form the content of the complex legal relationship between an individual and the authority which appointed him/her (Iorgovan, A, (2005) : 83- 85, Coman Kund, L, Coman Kund, Fl, (2013) : 307, Apostol Tofan, D (2014), : 321-322), while the definition of public office (linked with the description of a public office as a legal status) represents, on the one hand, that accumulation of social relationships legally established between the individual who holds a public office and the state authority to which the position belongs and, on the other hand, the subjects of law on which the competencies of the respective authority are achieved. (Coman Kund, (2013), : 293).

By interpreting art. 2 paragraph 3 of Law no. 188/1999, republished, with reference to the activities of civil servants involving exercising public powers it results that, among the specific tasks of a civil servant, one must

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also consider the enforcement of laws and other regulations drafting laws and other regulations authority or institution-wise, ensuring their approval, management of human and financial resources or representing the interest of the public authority or institution in its relationship with the individuals or legal entities in the country and abroad within the limits set by the head of public authority or institution.

However, given the nature of the committee commissioned by the Government whose representative was the national secretary, it was more likely that the person who had such a role to be able to exercise the typical tasks of a civil servant (e.g. in terms of representing the interests of the public authority or institution in its relationship with foreign legal bodies).

The practical tendency of qualifying such person as a public official seems farfetched and we believe that his status is quite similar to the one of a civil servant. Moreover, according to art. 2 of Law No. 188/1999 the civil servant is the person appointed, as per the law, in a public position and the interpretation of the term in the broad sense is synonymous with that of public agent.' (Vedinaş, (2009), : 26**).** Moreover the status of a public official would have required specific responsibilities and rights which were not listed in the job description; instead, the individual in question fulfilled the duties of a clerk who worked for a certain ministry.

The symmetry of the legal act, scrutinized several times in similar cases, is, in our view, not acceptable, either as an order of the Minister of appointing a person (and especially the revocation one) in a public position, regardless of its nature, had to contain the legal justification of, for example, tasks or responsibilities that have not been promptly fulfilled by the civil servant, his wrongdoings or other wrongful acts which could have imposed his revocation. The symmetry of the legal act is justified only in terms of the nature of the appointment document, implicitly the revocation (by ministerial order), and the strength of its legal effects, but it does not refer to the content of the document itself.

Otherwise, as per the different opinion of two main judges of Romanian Constitutional Court underlined in the *Decision no. 334/26 June 2013 of the Constitutional Court of Romania*, the issue of legal symmetry in the field of public civil law was raised, showing that the Constitutional Court noticed that 'basing their decision on the principle of symmetry, the lawmaker did not take into account the fact that the application of this principle in civil law, the more so, in constitutional law and particularly in the organization and functioning of public authorities', is not possible. The principle of symmetry is a principle of private law, its application being ruled

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out in civil law. Therefore, the constitutional rules are asymmetric by excellence.' (*Decision no. 334 of 26 June 2013 on the unconstitutionality of the provisions of the Law, amending and supplementing the Law No.3/2000 on the organization and conduct of the referendum published in the Official Gazette No. 407 of 07.05.2013*).

What should be noted is that the stability of the civil servant (depending A.N.) entails the stability of the government, opposite to the instability of ministers. (Alexandru, (2003), : 3**)**, and the administration is by excellence responsible for protecting, as much as possible, the interest of the people. Last but not least, the essence of public service, the core of performing a public position, is its continuity.

Or, in this case, the principle of continuity and stability of the civil service has been broken, in violation of both the private interests of the person, thus having his/her rights infringed, and especially the interests of the citizens who need to have competent persons in the structures of the government, skilled at properly carrying out the projects they started regardless of the migrations and changes of their superiors. Moreover, the principle of stability is one of the fundamental principles governing the activity and status of the civil servant, being highlighted by art. 21 paragraph 1 of Law no. 188/1999 which devotes the mission of The NACS to create and develop a body of professional civil servants, stable and impartial. (Vedinaş, (2009), :.32.)

Conclusions

It is true that the specialized practice often raised the issue of ambiguity between the terms of civil servants and officials, this matter being the sensitive issue of our case.

However, according to Law no 176/2010 regarding the integrity in performing public positions and dignities, amending and supplementing Law no. 144/2007regarding the establishment, organization and functioning of the National Integrity Agency, the provisions of this law shall apply under the provision of article 1 paragraph 31 to persons with management and control duties, *as well as to civil servants, including those with special status* who operate in all central or local public institutions or, as appropriate, in all public institutions.

Therefore, such a person may be considered as part of the category of civil servants, especially in the context in which there was a report of subordination between the national secretary and the committee, which included a report of subordination between him and the team of colleagues

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where he performed his duties, a body of colleagues created by government decision and being considered a governing body.

This is why this relationship of subordination makes us wonder why one insists that such a person should have an official status, by default as senior civil servant, because such status would not have imposed an ongoing assessment on the fulfillment of his duties by the head of the authority for which he carried out his duties and this would not have entailed the subordination relationship as presented above.

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