EXCEEDING SERVICE DUTIES BY THE PUBLIC SERVANT. CONSEQUENCES. ASPECTS OF JUDICIAL PRACTICE

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Abstract: *This paper aims to analyze the legal consequences of exceeding the job duties of a public servant during their exercise. Given that there are many situations in the practice where public officials, during the working hours, perform other activities than those in the job description or even personal activities, we consider that the present approach is of interest for both the academic environment and legal practitioners. Thus, we will analyze the implications of exceeding the service duties in terms of the legislation in force both in the criminal and in the disciplinary liability context of public servant. The unpredictable character, ascertained by the Constitutional Court of Romania, of the constitutive elements of the offense of abuse of service has determined anticorruption prosecutors to initiate a criminal investigation and to prosecute civil servants for such activities. Although we admit that civil servants have to exercise their duties with the utmost diligence, we consider that exceeding the service duties or carrying out personal activities, during the working hours, cannot have criminal connotations and can be classified as disciplinary offense at most. In the following, starting from a situation encountered in the recent jurisprudence of Romania, we will try to argue with examples from the judicial practice what are the consequences of exceeding the service duties by the public servant, but especially why this misconduct cannot have criminal connotations.*
Keywords: *public servant, abuse of office, disciplinary offense technology, anticorruption*

Due to the controversies in the jurisprudence, on the sanctioning of public officials, who undertake activities during work hours not provided in the job description, a clear delimitation is needed between the situations in which we find ourselves in the presence of the abuse of service as provided by the Criminal Code in Title V "Corruption and Service Offenses" or the situations where exceeding the attributions is a disciplinary offense. In court practice, some courts had divergent views on the framing of a crime as a crime of abuse of service, or on the contrary they excluded it from the criminal sphere, considering that the overrun of the job attributions through the execution of some activities not included in the job description represents a disciplinary offense. However, the doctrine is unanimous in considering that in order to be in the presence of a crime of abuse in service, the material element must be committed in the exercise of "service duties which must be understood as all that falls upon a clerk according to the rules governing that service or who are inherent to that service" (Udroiu, 2014, p.376).

As we can see, in the absence of the premise of the offense represented by the existence of the service duties stipulated in the job description, the deed cannot be sanctioned according to art. 297 of the Penal Code, but it is a disciplinary offense. Referring to the opinion of the judges of rights and freedoms of the Bucharest Tribunal and Court of Appeal - Criminal Section, we focus on the cases in which the DNA conducted the criminal prosecution for abuse of office, claiming that the activity during the service, which is not contained in the job sheet, constitutes abuse of office. In front of the court were invoked defenses in which the offenses committed by a

civil servant in the exercise of the service duties that are not part of the job description were excluded from the scope of the criminal offense and they are not in themselves crimes.

In the above analysis, DNA prosecutors accused defendant G.N. with the fact that during January-April 2015, intentionally, he led H.L.M. and A.S., civil servants to perform their duties in a defective way by performing the surveillance of the person named S.A., with the consequence of prejudicing the legal interests of the local police and of obtaining undue non-patrimonial benefit. The defense invoked, in respect of the crime of incitement to abuse of service, whether the clerk obtained for himself or for another undue advantage, that from the statements of witnesses VV, BS, AF, BN, CI, in the criminal prosecution file, and from their job descriptions resulted that the surveillance of activities are not within their service duties. Considering that the surveillance activities are not part of the service attributions nor of A.S. and H.L. (investigated in non-custodial manner) and local policemen (against whom no charges have been made), it is obvious that G.N. cannot be accused of committing the offense of instigation to abuse of office, this being also the unanimous practice of the courts in the country, according to which they performed act must enter the official's duties, otherwise the criminal liability is excluded.

In this context, it results that the subject of the analysis does not meet the constitutive elements of the offense provided and punished by art.13^2 of the Law no.78/2000 related to art.297 C.pen. Thus, if we admit the prosecutor's hypothesis, it would mean that any activity performed during a service by a civil servant, distinct from the service duties provided in the job description, should be legally framed as abuse of service, which is absurd and would send in derision the very notion of a crime of service. Including if the civil servants used the assets of the employing unit, these facts would not attract criminal liability, but a disciplinary and possibly patrimonial responsibility. Moreover, according to article 77 par.1 of the Law no.188/1999 r2 "the violation by the civil servants of the duties corresponding to their public function and of the norms of professional and civic conduct stipulated by the law constitutes disciplinary offense and attracts their disciplinary liability. According to par. 2 of the same law, the following acts constitute disciplinary misconduct: the violation of the legal provisions regarding the duties, incompatibilities, conflicts of interests and prohibitions established by law for civil servants ". The courts from Bucharest, Tribunal and the Court of Appeal have ruled that there is no crime of abuse in the service, bearing in mind that the imputed facts may at most be classified as disciplinary misconduct.

In the first instance, the Bucharest Tribunal, in case file no.15792/3/2015, by the ruling of the meeting of the Council Chamber dated 01.05.2015 stated that "for the existence of the offense, having regard to the provisions of art. 297 par. 1 of the Penal Code, it is necessary to perform an act in a defective manner. The term act used in the expression of art.297 par.1 C. pen, for the designation of action or inaction as a material element of the objective side, must be understood as being the operation to be performed by a civil servant or a clerk in the exercise of his duties. A civil servant or a clerk is in the exercise of his/her duties when he/she carries out activities related to his/her duties (those contained in the job sheet), and when he/she fulfills certain provisions received from hierarchical heads and given under legal conditions. Therefore, in order to appreciate in a probationary manner whether the defendants H. and A. participated in committing a crime of abuse of service in the form of the author, it is necessary to establish with certainty the attributions they have, which could be demonstrated only by attaching a job

description to the case file. Only in the hypothesis that such a document will demonstrate that, by the nature of the service duties, in the exercise of these duties, the two defendants had access to the database containing the personal data accessed, they could be reminded of the commission of an act of meeting the constituent elements of the abuse of service. In the case of the offense provided by art.13 ind.2 of Law no.78/2000, it is an aggravating variant of the offense provided by art. 297 C. pen, it is necessary to observe an immediate consequence of violating the rights or legitimate interests of a person. It is therefore necessary to retain an injury to a value protected by the law, the main passive subject of the offense being represented by the state as the holder of the social value, being also responsible for the good functioning of public bodies and institutions, of institutions or other legal persons of public interest. Therefore, not a crime against the person (blackmail, violation of private life), but a crime of service, assimilated to a corruption offense, to establish the existence of such an injury at the level of the institutions in which the defendants were incumbent".

Court of Appeal Bucharest - Criminal Section, by Ruling no.542/C, The sitting of the council chamber on May 8, 2015, in the contestation formulated, stated that "for the existence of the offence, having regard to the provisions of art.297 par.1 of the Penal Code it is necessary to conduct an activity in an improper manner. Therefore, to assess in terms of evidence if the defendants H. and A. participated in the commission of an offense of abuse of office in the form of authorship is necessary to establish with certainty the powers that they have, something that could be demonstrated by attaching the job description to the case file. Only in the event that such a document will demonstrate that by the nature of the duties, in the exercise of these powers, the two defendants had access to the database, will be used against them as they committed an act of such nature to meet the elements of the offense of abuse of office.

In the case of the offense provided by art.13 ind.2 of the Law no.78/2000, this being an aggravated form of the offense prescribed by art.297 of the Penal Code, is required to retain a track consisting immediate harm to the legitimate rights or interests of a person. It is therefore necessary to retain an injury to the value protected by law, the passive subject of the crime being the State as holder of social value, which is also responsible for the proper functioning of the organs and institutions, or other legal entities of public interest. Therefore, not being a crime against the person (blackmail, violation of private life), but a crime of service, assimilated to a corruption offense, it is necessary to establish the existence of such an injury at the level of the institutions in which the defendants were active". With regard to the crime of instigation of abuse of office, if the civil servant has obtained for himself or for another an undue advantage, the deed stipulated and sanctioned by art.47 of the Criminal Code referred to in art.13 ind.2 of the Law no.78/2000 with reference to art.297 of C. pen, the judge of rights and freedoms finds that they are not outlined, nonetheless proven the constitutive elements of the crime of abuse of office. Thus, the crime of abuse of service - according to the law that criminalizes it, art.297 par.1 C. pen - is the act of a civil servant who, in the exercise of his or her duties, does not perform an act or fails to do so and thereby causes injury or damage to the rights or legitimate interests of a natural or legal person ".

Therefore, in the present situation, we consider the Bucharest Court's solution to be correct, which, in the Ruling of the council chamber of 30.05.2015, noted "for the existence of the offense it is necessary to perform an act - that falls within the civil servants duties - improperly. The public servant is in the exercise of his/her duties when carrying out activities

related to his/her job (those contained in the job sheet), as well as when he performs certain activities ordered by the hierarchical chiefs and given according to the law. Or, the pursuit of S.A.M. and implicitly of the persons with whom she met - an activity allegedly instigated by GN, it is obvious (as it appears from the job descriptions attached by the prosecutor to the case file) that it does not fall into the job duties of civil servants involved in its oversight activity". In fact, even in the prosecutor's report it is expressly stated "no article of the Local Police Law no.155/2010 nor any of the attributions mentioned in the local police officers' records do not foresee the possibility of carrying out operative surveillance of persons". Therefore, there is no means of proof that the use of logistics, financial and human resources of state institutions for the personal interest of the defendant was done in the exercise of service duties, so that the instigation cannot target the offense of abuse of office but possibly another, provided by the criminal code in art.300, namely the instigation of usurpation of the function ("the act of a public servant who, during the service, performs an act which does not fall within his duties, if by such act one of the consequences provided in Article 297 of the Penal Code are caused"), crime for which in the case file there are solid evidence.

The doctrine is unanimous in appreciating that "the action or inaction of the perpetrator refers to an act, to an assignment of service. In other words, the action or inaction by which the material element of the offense is carried out must be committed by the perpetrator in the exercise of his/her attributions, representing a violation thereof (Toader, 2002, p.269). For the purposes of art.297 of the Penal Code, the term "act" means the operation to be performed by a civil servant in the performance of his duties. Therefore, the material element is accomplished by actions or inactions. By means of actions, in the form of a variant, the basic form the active subject within the service duties fulfills an act in a defective manner, and by inaction, the same active subject does not fulfill an act causing damage or the violation of the rights or legitimate interests of a natural or legal persons (Dungan, n.d., p.16).

The expression "does not fulfill an act" means the activity by which the civil servant omits, does not carry out an act to be performed according to the duties of the service, thus an act "falling" in his task of realization, and by the expression "fulfills an act in a defective manner" means that the civil servant, while performing the act that falls within his job duties, that fulfillment is imperfect, inappropriate, defective. The action or inaction of a civil servant refers to an act that is not fulfilled or is being misconduct in the performance of his or her duties (Dungan, n.d., p.17). The abusive act (omisive or commissive) must be carried out in the exercise of the civil servants' duties or of another official, that is, on the occasion or during the exercise of the service. Abuse in service cannot be done outside the framework of the service. As a rule, activities related to service duties take place at the place where the act is to be performed and during the legal hours of service (Matei Basarab, 2008, p.572).

Broadly speaking, "abuse of office" means the illegal, inappropriate attitude of a civil servant or any other official who deliberately violates his or her responsibilities or duties, either by failing to do so or by abusing them, committed during or on the occasion of the exercise of the service, a violation that violates the legal interests of a person. Therefore, an official or civil servant is in the exercise of his or her duties when carrying out activities related to his job duties, both those contained in the job sheet and when he fulfills certain provisions received from senior hierarchical heads given under legal conditions (Boroi, 2006, p.299).

In this respect, it is also the majority jurisprudence of the Bucharest Tribunal, the Constanta Court of Appeal - criminal section and the Suceava Court of Appeal - criminal section. Thus, the Bucharest Tribunal stated that "the term" act "in the content of the offense of abuse of service should be understood as the operation that must be performed by the civil servant in the exercise of his/her attributions of service, which must be understood as all that falls within the responsibility of a clerk according to the rules governing that service or which are inherent in that service". The opinion of the judge of rights and freedoms of the Bucharest Tribunal, expressed in the case submitted to the analysis, is in line with the jurisprudence of the Constanta Court of Appeal, which stated that: "In the case, it was certain that the defendant did not have to perform, in his capacity of deputy mayor of the locality, no operation related to the activity carried out in the wind farm, which would have been related to the installation of machinery, administration or functioning, activity that could be influenced by faulty or non-performing the operation. In fact, the defendant, although knowing that he does not have any service duties in relation to the wind farm activity, tried to intimidate what the workers should have felt, determined by his capacity as deputy mayor, through excess power, violent physical circumstances, cause the interruption of the activity of the respective company, a situation that cannot be equated neither with the faulty fulfillment nor with the failure to fulfill an act that must be performed by the civil servant or clerk in the exercise of his duties. The necessity to perform the act of illicit acts in the exercise of the service duties in order to be in the presence of a crime of abuse of service results from the special legal object of this crime, which is represented by the social relations regarding the good functioning of the public unit or other legal entities where the clerk carries out his activity, to the proper conduct and performance of the service activity, which implies the honest and fair execution of the duties (Decizia penala nr.47, 2012).

The same opinion was also expressed by Suceava Court of Appeal: "According to the post, the defendant G.I. was included in the City Hall of Suceava County, as cadastre referent. From the content of the job attributions, it did not result that he had the obligation to submit the minutes of the possession and the documents necessary for the issue of the titles of ownership to the County Land Commission, these attributions belonging to the secretary of the Local Land Commission. Since the case did not result in the defendant performing his duties in the performance of his duties, he did not perform an act or did it in defective manner, it was correctly assumed that the constitutive elements of the crime of abuse of service are not met under the objective aspect" (Decizia nr.549, 2007). These jurisprudential opinions were also expressed in penal cases before the entry into force of the new Criminal Code, stating: "the unjustified refusal of the police to return the driving license as ordered by a court decision constitutes the offense of abuse of service against the interests of individuals" (Decizia nr.45, 1997).

We observe that the jurisprudence of the Bucharest Court of Appeal is constant in stating that: "the act of the defendants (deputy mayor and secretary of the mayoralty of a commune, respectively) to issue to a person, in the absence of a decision of the commission for the application of the Law no.18/1991 - the only entity authorized to decide in this regard - a certificate that falsely confirms the cancellation of the report on the possession of the injured party on a land, the certificate that the beneficiary submitted to the court, having gained cause in a process of servitude, constitutes not only the offense of intellectual falsification (Article 289 of

the Penal Code), but also the offense of abuse of service against the interests of persons (Article 246 C. Pen.) in concurrence" (Decizia nr.1088, 1988).

In this respect, the Supreme Court of Justice pointed out that: "by committing the offenses of intellectual falsification by the defendant as a clerk in the exercise of his duties, the content of which is characterized, according to art. 289 of the Penal Code, as a functionary of the active subject and committing the forgery in the exercise of attributions, can no longer respect the offense of abuse of service provided by art. 248, whose active subject is also a clerk, and the objective side is characterized by the defective fulfillment of his/her attributions, traits contained in the content of the forgery. As such, the provisions of art. 248 of the Penal Code are not incidents in question, neither in the conditions of the real concurrence nor in those of the ideal concurrence of crimes" (Decizia nr.1019, 1996). Thus, we observe that in accordance with the unanimous opinion expressed by the doctrine, the term "act" is used by a lawmaker in the sense of the operation that the perpetrator has to perform based on his responsibilities (Dongoroz, 1971, p.81). Correlatively, by failing to fulfill an "act" is meant the failure of the perpetrator to perform the operation he was about to perform, and by "failing to perform an act" it is understood to perform an operation other than what was to be done (Octavian & Tudorel, 1999, p.337).

Consequently, the omission or action of the perpetrator, in order to achieve the material element of the offense, must be performed in the exercise of his/her duties. The public servant or any other official is in the exercise of his/her duties when performing activities related to his/her duties. Usually, these activities take place at the place where the act is to be performed and during the hours related to the service. Finally, failure to perform an act or the defective performance of an act by a civil servant or by any other official in the exercise of his/her duties must result in the injustice of a person's legal interests. "Damage to a person's legal interests" means the violation of the interests of the person, who are protected by law. The scope of these interests is extremely wide; it includes all those possibilities of manifestation of the person, in accordance with the general interests of society, which the law recognizes and guarantees them. However, abusive exercise of service duties may, in certain circumstances, not only harm the legal interests of a natural person but also constitute a significant disturbance to the goodwill of an organ or state institution or other entity those provided in art.145 of the Penal Code or damage to their patrimony (Octavian & Tudorel, 1999, pp. 340-341).

Thus, the abuse of service through the constraint of some rights has alternative content, which can be achieved, in terms of the material element, either by the action of restraining the use or exercise of the rights of a citizen, either by the creation of inferiority based on nationality, race, sex or religion. In the first way of realizing the material element of the offense, the perpetrator, without any legal justification, prevents a citizen from using the rights he or she exercises in their entirety. In the second way, the perpetrator creates for the citizen, without any legal justification, a better situation than that of the other citizens. (...) Of course, this presupposes, in each case, the determination of the scope of the attributions service of the one who is charged with committing the offense.

CONCLUSIONS

Although in practice it happens frequently, exceeding service duties by civil servants instead of being regarded as a disciplinary offense is often seen by law practitioners as the crime of abuse of office in many cases both in court and in prosecution by the Anticorruption National Division. Prosecutors regard the exceeding of the attributions as the offense of abuse of service in the conditions in which an order of the superior has been executed by the public servant subordinated. However, we consider that if the civil servant does not denounce the superior and does not file a complaint against him at the Prosecutor's Office according to art. 267 of the Penal Code, he commits the offense of omission of the complaint consisting in the act of a civil servant "who, knowing the act of criminal law in connection with the service in which he performs his duties, fails to immediately notify the competent criminal authorities".

In the context in which the official executes the superior order and is not liable as author by the criminal prosecution bodies, one cannot even hold the hierarchical superior responsible for committing the crime of instigation to abuse of service. What happens if both the hierarchical superior and the subordinate, civil servants, are investigated and sent to trial for committing the offense of abuse of office, in the form of the author and instigation, criminal participation, consisting in exceeding job duties?

In this situation, we appreciate that, being attributions that do not enter the job description, the subordinate, civil servant could be accused of committing the offense provided by art. 267 of the Penal Code and also of committing a disciplinary misconduct. As far as the hierarchical superior is concerned, he/she must be accused of committing the offense of abuse in the service by failing to fulfill his/her duties, thereby causing harm to the interests of a natural or legal person. In conclusion, regarding the hierarchical superior, we cannot discuss about "exceeding service duties" because according to the job description he has the duty to delegate tasks and to give mandatory orders to subordinates.

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