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The Reform in the Administrative System, Aspects of Progress or Form of Discrimination of the Public Officer?

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Abstract: The current social, economic and political status determined the issue of O.U.G 74/13 which regards some measures for improvement and re-organization of the activity of National Agency of Fiscal Administration, also for modification and completion of some legal acts and of H.G 520/2013 regarding organization and operation of National Agency of Fiscal Administration, legal acts which even if they are suppose to reform the administrative system, they reflect some problems regarding the legality of the release from the office of the public clerks, this measure being applied arbitrarily and discretionary, violating at the same time the right to work of the public clerks. The present work analyses some aspects regarding the legality of applying two legal acts issued by the Government, which are O.U.G 74/2013 and H.G. 520/2013, which were considered by the issuer as being necessary in relation to the process of re-organization of activity of National Agency of Fiscal Administration. We are analyzing at the same time all the irregularities found in practice, because applying the O.U.G 74/2013 and H.G. 520/2013 generated discriminations, on one hand caused by the confusion determinate by the writing of the legal acts, and on the other hand, by the enforcement of some legal provision which generated an conflict with other legal acts. Even though the main purpose of these legal initiatives was to reform, restructure and reorganize the activity of National Agency of Fiscal Administration, enforcing these legal acts led to a series of illegal acts even abusive, which violates the fundamental rights ensured by the Constitution, referring to the right to work, and also the guarantees offered by the law 188/1999R regarding the Status of Public Clerks.

Keywords: reorganization; absorption; public administration

1 Introduction

The legislator has considered necessary to adopt the order O.U.G. 74/2013(Official Monitor, Part I no. 389 / 2013) and the decision H.G. 520/2013(Official Monitor, Part I no. 473 /2013), on taking into account certain weak points of the National Agency of Fiscal Administration (ANAF), such as the low level of voluntary conformity, hence the need acutely felt of action to combat fiscal evasion[2] as well as the administration of a portfolio of risks by the fiscal administration regarding the conformity of the contributors with the fiscal legislation[3], to improve the services offered to the contributors and the diminishing of conformity costs.

Other weak points taken into account by the legislator were represented by the organisational structure, especially that of the territorial system, implying high costs of administration, reaching the

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[2] Note of substantiating the Ordinance of emergency of Government no. 74/2013 regarding some measures to improve and reorganize the activity of the National Agency of Fiscal Administration, as well as to modify and complete some normative acts.

[3] The note of substantiation to the Government Decision no. 520/2013 regarding the organization and functioning of the National Agency of Fiscal Administration.

creation of a large number of fiscal organs, as well as the inefficient distribution of staff among the different activities of the fiscal administration[1].

At the same time, there were taken into account the creation of a regional level in order to reduce the number of reports to the office of the National Agency of Fiscal Administration, the improvement of planning and control, the creation of an anti-fraud structure by reorganizing the operative control, the implementation of a new strategy of human resources and the simplification of the decisional process.

2. Related Work

The literature in the field is unanimously appreciating the fact that the unique power in the state (constituted based on sovereignty) needs, in order to exert itself, a (state) apparatus that, in view of a coherent functioning, uses articulated structures organized based on the criterion of the function (Zaharia, Budeanu-Zaharia, Chiuariu, 2000).

By applying some normative acts described by us, it was disposed the reorganization of the General Direction of Public Finances following the fusion by absorption according to art. 10 paragraph 2 in O.U.G. 74/2013 and taking over the activity by the General Regional Direction of Public Finances.

To accomplish the legal dispositions, the president of the National Agency of Fiscal Administration issued Order no. 1104/2013 and Order 1107/2013, disposing by the latter to take some measures in order to apply the valid legal dispositions regarding the public officers in the organizational structures in reorganization.

This order issued by the president of the National Agency of Fiscal Administration has into account to eliminate from the public functions of execution of the public officers.

In this respect, on 05.08.2013, following the application of the specifications E.G.D. no. 74/2013, Order no. 1104/2013 as well as Order no. 1107/2013, there were issued the decisions regarding the removal from the public functions of execution held by the public officers of certain sectors of activity.

To motivate in fact the decisions, there were mentioned the specifications of art. 10, paragraph 4 in E.G.D. no. 74/2013 where it is mentioned that: "*The general directions of the public finances formed according to the specifications of paragraph (3) overtake the activity and competences of all the general directions in the county of the public finances absorbed in the area of competence, as well as all the territorial structures subordinated to them."*, as well as the dispositions of annex no. 2 to the government decision G.D. no. 520/2013. The actual reason indicated for issuing these decisions was art. 99 paragraph 3 in Law no. 188/1999r (Official Monitor, Part I no. 365 / 2007) regarding the Status of the public officers mentioning that: "*In case of removal from the public function, the public authority or institution is forced to offer the public officers a note 30 calendar days before*."

3. Problem Statement

Reported to the normative acts indicated by us, we appreciate that they were applied in an arbitrary way, at discretion, favouring in fact some officers, since it was disposed by decisions to eliminate from their function some counsellors in certain services.

[1] Note of substantiation to the emergency Ordinance of the Government no. 74/2013.

According to the specifications of art.117 in Law no. 188/1999 "*Dispositions of the current law is completed with the specifications of labour legislation, as well as the regulations of the civil, administrative or penal common law, according to case, as long as they do not contradict the legislation specific to the public function*."

Thus, by the decisions of removing from their function mentioned above it was disposed to remove from the public functions of execution held by the public officers and to grant a note 30 calendar days before until the moment when the work reports stop, these decisions being actually decisions of work termination in the sense of the specifications of art.65 in the Code of labour.

We appreciate the decisions regarding the removal from functions as null, motivated by the fact that there are not observed the conditions of form required by the work legislation in respect of this type of decisions, since it is not mentioned the deadline when the decision can be contested or the competent court.

As mentioned also in the doctrine (Iorgovan, 2005), the administrative acts obey some rules of form and founding, a certain juridical regime in order to assure their legality, the principle of legality in the current constitutional system being one of the main principles of the public administration.

The decisions issued comprised also aspects regarding the note, and in this context we consider that they were issued by violating the law since, by definition, the note supposes the previous information of the other party about the work termination.

The purpose is to avoid the negative consequences produced by the one-sided termination of the contract, for the employee, the regulation of the note represents a warranty of the right to work and stability in work.

Thus, the note regarding the termination of work represents to inform the employee by the employer about the latter's intention to terminate their work contract in the near future.

Thus, the notification must be done before issuing the firing decision and not upon its issue because, according to the dispositions of art. 77 Code of labour, the decision to terminate the contract produces effects from the date of communication, which means that from that date the work relations stop. So that the deadline to contest it starts in the moment of communication based on the law, and the employer is not the one to settle since when the termination takes place in the conditions when the termination note was not respected.

According to art.76 letter b) in the Code of labour, the decision to terminate the contract must contain, obligatorily, the duration of the note, and by that we mean both the duration (number of days of note offered) as well as mentioning the date when the termination note started and its expiry.

We appreciate as being also important the obligation to inform the employee before issuing some decisions of termination about the termination of work, as well as about the duration of the note and the actual date when the note starts being valid, so that by not respecting these aspects it is violated in an arbitrary way the public officer's right.

In this sense, the Court of Appeal Bucharest, section VII civil, and for reasons regarding the work conflicts and social insurances, based on civil decision no. 6660/R on 18.11.2009 settled the fact that, "*The employer cannot dispose at the same time the termination and the realization of the note period. Thus, the employer has the obligation to communicate in written form to the employee that note period, before issuing the decision of termination because its issue and communication to the employee mean the termination of the individual work contract, so that a concomitant communication*

means not offering in fact the note. And, as its name states, the note is previous to the termination and has as purpose to inform the person whose position will be terminated about the decision to terminate their individual work contract on the date of the note deadline expiry."

In the literature in the field (Zaharia, Budeanu-Zaharia, Chiuariu, 2000), it is appreciated that to be an administrative act, this one must have all the characteristics of the juridical document, according to the general theory of law, so that the public administration authorities should respect the legal specifications imposed, as well as the work legislation.

The decisions stating the termination, were issued based on some inexistent administrative document, Order no. 1107/2013, as long as, contrary to the dispositions of art. 11 paragraph 1 in Law no. 24/2000r (Official Monitor, Part I no. 260 / 2010) regarding the norms of legislative technique to issue the normative acts, the order mentioned was not published in the Official Monitor. Consequently, being unpublished, it cannot produce juridical effects, since it was never valid

In the literature in the field (Iorgovan, 2005) it is considered that it cannot be imposed the obligation to respect some normative act as long as it is not published. The law rule *nemo censetur ignorare legem* imposes also the conclusion according to which it cannot be imposed to some subject some behaviour before informing them about the content of the document.

Moreover, the decisions of termination were issued also with the violation of the specifications of art. 13 paragraph 4 in HG 520/2013 regarding the organization and functioning of the National Agency of Fiscal Administration, disposing that: "*Organization and functioning of the regional general directions of the public finances, as well as the structures mentioned under paragraph (3) are settled by the order of the Agency president with the agreement of the Ministry of Public Finances in the case of the structures coordinated methodologically by the structures of specialty in the own system of the ministry",* as well as the specifications of art. 10 paragraph 6 of E.G.D. no. 74/2013 where it is specified*: "The way to organize and function the regional general directions of the public finances, as well as the subordinated structures of them are settled by order of the Agency president, with the agreement of the Ministry of Public Finances in the case of the structures coordinated methodologically by the structures in the field in the own system of the ministry".* Thus, issuing some decision of termination for the execution staff can be done legally only with the previous approval and according to the Ministry of Finances, for these orders of termination not being such a note. As underlined also in the doctrine (Zaharia, Budeanu-Zaharia, Chiuariu, 2000), the note represents an important formality in view of issuing some administrative documents, representing a procedural condition previous to issuing the administrative document.

Moreover, the decisions contested were issued by the Regional General Direction of the Public Finances in the conditions where part of the work contracts signed with the public officers is the General Direction of the Public Finances and these contracts were signed after organized contexts, also of hiring in the position of counselor in the Service of Fiscal Inspection Juridical Persons.

Also, the discriminated officers were not informed about the reorganization after the fusion by absorption and overtaking the activity, about the overtaking of the whole service by the Regional General Direction of Public Finances Iasi, but were only requested to come in view of receiving the decisions of termination.

According to Law no. 67 on 22/03/2006 (Official Monitor, Part I no. 276 /2006), regarding the protection of the employees' rights in case of transferring the company, the unit or some of their parts, law which completes the normative frame, are mentioned under art. 5 paragraph 1 the rights and obligations of the transferor, deriving from the individual work contracts and the collective work

contract applicable, existent on the date of the transfer and that will be completely transferred to the assignee. In this sense, the dispositions of art.7 in the same law specifies that the transfer of the company, unit or some of their parts cannot represent a reason to individual or collective work termination for the employees by the transferor or assignee.

We also underline the fact that the reorganization of the General Direction of the Public Finances was done by violating the specifications of Law no. 188/1999 so that, according to the dispositions of art. 100 paragraph 4 "*the reduction of some position is justified if the attributions related to it are modified in proportion of over 50% or if there are modified the conditions specific to occupy that position respectively, regarding the studies*", and according to paragraph 5 of the same article" *in case of reorganizing the activity by reducing the positions, the public authority or institution cannot form positions similar to those eliminated for a period of one year from the date of the reorganization."*

In the literature in the field it is underlined the fact that the irremovability represents, same as the stability, a warranty that the state grants their officer that they will not be suspended or revoked but for disciplinary causes. It is different from the stability by the fact that the immovable officer will not be able to be moved with work, not even by promotion (Zaharia, Budeanu-Zaharia, Chiuariu, 2000).

Thus, in the judiciary practice (Court of Appeal Iasi, 2006) it was showed that the "*reorganization, efficiency do not suppose removing from positions the officers so that on the vacant positions other persons could be hired, especially since it is proved that the plaintiff made the object of a professional evaluation. The principal of stability in exerting the public function is a fundamental principle on which it is built the system of the state administration, independent from the statuses based on which the public institutions work, partially in the work reports and thus the administrative practice to dispose the termination by reducing some positions with partially changed names and the sphere of attributions is abusive, actually being a masked formula to remove the public officers in the position to make possible the hiring of other persons*".

Relevant in this sense is the sentence (Court Brasov, 2012) pronounced by the Court of Brasov, where the instance admitted the action, motivated by the fact that "*the accused made no proof that the reduction of the position was determined by the modification of the specific attributions in proportion of more than 50% or the modification of the conditions regarding the studies being absolutely obvious that this reduction was not done according to art. 100 paragraph 4. Because G.D. 566/2011 is a normative act less important than the dispositions of Law no. 188/1999, the accused cannot defend herself only by invoking the fact that the plaintiff did not request and obtained the cancelling of G.D. 566/2011."*

4. Solution Approach

We consider the decisions issued at obviously illegal because they were issued by violating the legal specifications, respectively E.G.D. no. 74/2013, G.D. no. 520/2013 and in fragrant contradiction with the note of founding on which it is based the order OUG no. 74/2013 regarding improving and reorganizing the activity of the National Agency of Fiscal Administration.

We appreciate that by the note of founding it is attracted the attention by the international organisms (The International Monetary Fund, International Bank), as well as by the international experts on the necessity to reduce the positions occupied by the staff employed on the support functions and the necessity of increase the number of employees in some fields of activity, such as: fiscal inspection, juridical, IT.

This recommendation is based on the increase of efficiency of collecting and the efficiency in combating the phenomena of fraud and fiscal evasion, the measures being of priority for the near future.

The service of fiscal inspection juridical persons also has as main objective the control of tax payers juridical persons, the reduction of the phenomenon of fiscal evasion, the improvement of collecting taxes by the state budget.

On taking into account the recommendations previously mentioned, the natural measure to be adopted by the Regional General Direction of the Public Finances was that of increasing the number of staff within the service of fiscal inspection.

By terminating the contracts of some officers in a discriminatory way it is reached the situation of an illegal administrative act, issued in contradiction with the note of founding and the normative acts issued based on it.

Also from the note of founding it is noticed that before issuing the order OUG no. 74/2013 the number of employees allotted for the different structures at territorial level is not proportional with some indicators such as the number of tax payers administered or income realized.

For this reason, there are counties with high economic potential and a large number of tax payers having relatively reduced structures of fiscal administration.

The number of employees in the Regional General Direction of Public Finances is insufficient to support fields of activity such as fiscal inspection and the measure to termination some position can only be an obstacle in the functioning at optimum parameters of some service considered important by the international organisms.

From the organization point of view it is important to mention the fact that the structure of fiscal administration existent in Iasi County is not modified significantly, since the administration of public finances in the main city of the county will take over all the attributions of the old general direction of the county public finances.

Terminating a whole service such as the fiscal inspection does not represent a measure to redistribute the employees by the departments involved by normative acts, but an illegal measure with disastrous effects on the whole activity of the Regional General Direction of the Public Finances in Iasi in the field of fiscal inspection.

Even though the total number of employees at the National Agency of Fiscal Administration compared with the number of tax payers fits the average of the fiscal administrations in other European countries, it was not noticed the necessity to redistribute the employees both among the county structures and among the administration functions, in the sense of staff migration from the massive processes with reduced added value towards the more complex functions, such as the fiscal inspection.

As an example, we want to show that at the level of Iasi county for a service having 69 counsellors at the moment and 58 in the new staff organisation it was imposed a plan to receive 224,000,000 lei/month, each inspector having a plan to receive 3,862,069 lei.

On the other hand, the situation in Iasi area is as follows:

Table 1. Situation in Iasi area

County	No. Positions before reorganisation	No. positions after reorganisation	Plan to receive / month	Plan to receive / inspector
Bacau	78	78	121.000.000	1.551.283
Suceava	46	46	102.000.000	2.217.392
Botosani	38	38	65.000.000	1.710.527
Vaslui	42	42	62.000.000	1.476.191
Neamt	44	44	99.000.000	2.250.000

As obvious from the table above in Iasi county there is a very high degree of charge/inspector, the natural measure according to the normative acts issued and the founding note was to increase the number of inspectors in the service of fiscal inspection juridical persons.

Even though the reason that caused the issue of these normative acts aimed at the line to follow in order to eliminate these dysfunction, to strengthen the fiscal system and use the resources at maximum capacity and in conditions of efficiency[1], we consider that the measure disposed by the decisions regarding the termination for public officers is illegal and leads to blocking the activity of that service.

The point of view of the President of the National Agency of Fiscal Administration[2] informed the Regional General Direction of the Public Finances, was expressed in the sense that all the measures necessary for the process of reorganization must respect the principles mentioned by Law no. 188/1999 without affecting the good functioning of the institution.

By terminating a whole service and reducing the number of fiscal inspectors, it was adopted an abusive measure that does not assure the coherence of the process of reorganization but only the creation of the premises to apply some discretionary measures.

At the same time, the contested decisions touch the right to work regulated by art. 41 paragraph 1 in the Constitution, infringing at the same time the dispositions of Directive 2000/78/CE regarding the equality at the work place, on taking into account the fact that terminating the individual work contracts is not based on any reason of professional nature.

Directive 78/2000/CE represents a general frame that guarantees the respect of equality of treatment among the persons in the European Union, regardless of their origin and beliefs, age and sexual orientation, when it comes to access to some work place or a profession, promotion, professional formation, conditions of employment and employing the labour.

In the doctrine(Iancu, 2007) it is underlined the opinion that the right to work cannot be limited, being in the light of science accepted, the right of any human being to assure their resources necessary to live by their work. This characterization led to expressing the opinion that the right to work is inherent to the human being, natural and imprescriptible.

Also, the right to work supposed actual actions of the state, being governed by the principle formulated in art. 22 in the international declaration of the human rights, stating: "*Any person, as member of society, has the right to social security. They have the right, by national effort and*

[1] Founding note to the Emergency Ordinance of Government no. 74 /2013.
[2] Address no. 801986/07.08.2013.

international collaboration, on taking into account of the organization and resources of each country, to obtain the realization the economic, social and cultural rights necessary for their dignity and free development of their personality."

5. Conclusions

Thus, assuring these rights – economic, cultural, social – means efforts of the state, actual actions and measures, in general an active policy (Vrabie, 1999), representing at the same time the social and material conditions of life, education and the possibility of their protection (Vieriu, Vieriu, 2005).

Contrary to the facts in the literature in the field, because of the termination of the whole service, were adopted a series of measures with strong economic and social impact, so we consider that when issuing the decisions the Regional General Direction of the Public Finances must also respect the specifications of Law no. 62/2011 regarding the social dialogue.

In this sense, before issuing the decisions, the Regional General Direction of Public Finances Iasi was obliged to consult to commission of social dialogue formed at county level.

Thus, we appreciate that the decisions regarding the termination of public functions for the public officers issued by the Regional General Direction of the Public Finances Iasi without respecting the specifications of Law no. 62/2011, as being null.

In conclusion, terminating the position of the public officers at discretion leads to the impossibility of increasing the efficiency of collecting and combating the phenomena of fraud and fiscal evasion.

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