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## DISCIPLINARY PROCEEDINGS OF THE PRISON SERVICE OFFICERS IN THE LIGHT OF HUMAN RIGHTS' STANDARDS

### HUMAN RIGHTS REGULATIONS SOURCES IN DISCIPLINARY PROCEEDINGS OF THE PRISON SERVICE OFFICERS

The 21<sup>st</sup> century international law system is highly complicated and can be described as multicentric one<sup>2</sup>. The system is characterized as "one legal area where are

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<sup>2</sup> E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, „Państwo i Prawo” 2005, No. 4, p. 3 et seq.; A. Kalisz, A. Kustra, *Polemika. Wokół problemu multicentryczności systemu prawa*, „Państwo i Prawo” 2006, No. 6, p. 85 et seq.

many equal sources of law which do not form a hierarchical system”<sup>3</sup>. The system might be interpreted<sup>4</sup> and classified according to different criteria. The basic delimitation mechanism, as to my mind, is a territorial scope of legal norms. On that ground two areas of international law could be distinguished – global and regional ones. The first one applies worldwide, the second one continentally. In the regional European dimension, there are two main legal systems, one created by Council of Europe and the other one by the European Union. Each of them will be considered in the context of international standards influencing the disciplinary proceedings of the Prison Service officers<sup>5</sup>.

It is crucial to present the division in international law norms in terms of their applicability. They can be distinguished between those which are binding in the Polish legal system (hard law) and those which are not binding normative standards (soft law)<sup>6</sup>. The latter has only an attribute of postulate and implement in practice the pave a way function. Among the first category it is possible to categorize self-executing norms and non self-executing norms. The first ones create direct rights for individuals and are suitable for direct application by the courts and the administration, also in the disciplinary proceedings of the Prison Service officers<sup>7</sup>. They will be examined in this paper.

The central place in universal international hierarchy of sources of law is occupied by the International Covenant on Civil and Political Rights (ICCPR)<sup>8</sup>. In Article 14 it recognizes and protects a right to justice and a fair trial. It has two aspects – the organizational one “competent, independent and impartial tribunal established by law” which applies only to court stage of disciplinary proceedings; and the second one regulates universal procedural standards that apply to all repressive procedures. As examples could be presented:

- the presumption of innocence,
- being informed promptly and in detail of the nature and cause of the charge,
- having adequate time and facilities for the preparation of defense and to communicate with counsel of his/her own choosing,
- examining or having examined the witnesses against him/her and obtaining the attendance and examination of witnesses in his/her behalf under the same conditions as witnesses against him/her,
- not being compelled to testify against himself/herself or to confess guilt.

All of the above listed guarantee mechanisms could be *ab exemplo* used also in the disciplinary proceedings. The aim is to protect interests of a charged officer at the official service stage (etap służbowy)<sup>9</sup>.

<sup>3</sup> W. Lang, *Polemika. Wokół problemu multicentryczności systemu prawa*, „Państwo i Prawo” 2005, No. 7, p. 95 et seq.

<sup>4</sup> See J. Helios, W. Jedlicka, *Interpretacja prawa wobec wyzwań multicentryzmu*, [in:] *Lokalny a uniwersalny charakter interpretacji prawniczej*, ed. P. Kaczmarek, Wrocław 2009, p. 143 et seq.

<sup>5</sup> See B. Baran, *Postępowanie dyscyplinarne w sprawach funkcjonariuszy Służby Więziennej*, Warszawa 2016, p. 78.

<sup>6</sup> Z. Hołda [in:] *Prawo karne wykonawcze*, ed. J. Hołda, Z. Hołda, Warszawa 2006, p. 57.

<sup>7</sup> See B. Baran, *Postępowanie dyscyplinarne w sprawach...*, p. 79.

<sup>8</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entry into force 23 March, in accordance with Article 49.

<sup>9</sup> See B. Baran, *Postępowanie dyscyplinarne w sprawach...*, p. 80.

Analogical regulations exist in the European law. The leading one is the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) signed in Rome in 1950 and entered into force on 3<sup>rd</sup> September 1953. Poland ratified it 19<sup>th</sup> January 1993. It should be underlined that the Convention directly refers to the Universal Declaration of Human Rights, what is clearly visible in the preamble of the Convention which states that European countries governments' "take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration". It is said that the Convention has made positivisation<sup>10</sup> of individual rights proclaimed in the Declaration<sup>11</sup>.

In the matter of the disciplinary proceedings of the Prison Service officers the fundamental meaning has Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the UN Convention against Torture)<sup>12</sup>. From *lege non distinguente* argument it is possible to understand the Convention's provisions refer not only to criminal proceedings but also to other repressive, such as disciplinary, one. In Polish doctrine, it is stated that inhuman treatment is always degrading, and violation of dignity is degrading when it contains a high load of ailments dependent on duration of violations and its consequences for a human<sup>13</sup>. In the light of jurisdiction of the European Court of Human Rights<sup>14</sup> the essence of degrading treatment is "generating a sense of fear leading to degradation, even physical and mental collapse". It is clear that this statement fully refers to the status of charged Prison Service officer and all actions undertaken by the disciplinary authorities. Moreover, Article 2 and 3 of the ECHR should be taken into consideration. Both of them, in the wording context, refer to accused persons. The Court, in the case of Mikolajov vs. Slovakia (No. 4479/03), stated that under the term "accused person" should be also understand as "a person who is official informed by any national authority about being charged of act of offense". In the light of this judgment, "accused person" from the Article 6 ECHR may be used also to describe a charged Prison Service officer, also at the official service stage of the proceedings after being informed about issuing the decision of initiation of proceedings. It means that such regulations as stated above of the European Convention of Human Rights may be applied to a charged<sup>15</sup> Prison Service officer<sup>16</sup>:

- the presumption of innocence (Article 6.2 ECHR),
- right to be informed promptly in detail of the nature and cause of the accusation against him/her (Article 6.3a ECHR),

<sup>10</sup> Ibidem.

<sup>11</sup> Z. Hołda, *Ochrona praw człowieka w instytucjach Rady Europy*, [in:] *Europa. Zbliżenia. Kontrowersje. Perspektywy*, ed. E. Hałas, Lublin 2002, p. 13-14.

<sup>12</sup> Adopted by the UN General Assembly on 10 December 1984 and entry into force 26 June 1987.

<sup>13</sup> Z. Hołda [in:] *Kodeks karny wykonawczy ze skorowidzem*, Kraków 2006, p. 31.

<sup>14</sup> See Ireland v. Great Britain Case, 18 January 1978, cit. for M.A. Nowicki, *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa*, Warszawa 1998, p. 24.

<sup>15</sup> See B. Baran, *Postępowanie dyscyplinarne w sprawach...*, p. 81.

<sup>16</sup> The exception is Article 6 ECHR which states the right of free assistance of an interpreter which is only executed on the court stage of the proceedings. In the disciplinary proceedings of Prison Service officers it would have only marginal use.

- right to have adequate time and facilities for the preparation of his/her defense (Article 6.3b ECHR),
- right to defend himself in person or through legal assistance of his/her own choosing or, if he/she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require (Article 6.3c ECHR),
- right to examine or have examined the witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her (Article 6.3d ECHR).

Against this background, consideration should be given to what extent the Prison Service Act implements rights listed above. The start of consideration in this matter is a statement that they are carried out in many different ways<sup>17</sup>. The presumption of innocence (Article 6.2 ECHR) is fully reflected in the Prison Service Act's provisions. Also other rights such as right to defend himself or to be informed promptly about of the nature and cause of the accusation. In this paper the presumption of innocence and right to defense will be scrutinized.

## THE PRESUMPTION OF INNOCENCE IN DISCIPLINARY PROCEEDINGS OF THE PRISON SERVICE OFFICERS

The presumption of innocence principle in the disciplinary proceedings of the Prison Service officers is a directive according to which the accused should be considered innocent until his guilt<sup>18</sup> is proven and confirmed by a final disciplinary ruling. This provision implements one of the fundamental civilization standards into all coercive proceedings, in which the subject is a sanction for the charged person. It directly correlates with Art. 42 § 3 of the Constitution. What should be emphasized here is the subjective dimension of the aforementioned provision which relates to the charged person (oskarżony), and not the accused (obwiniony). However, from the argumentum *a fortiori*, it can be also applicable to the accused. This interpretation is in coincidence with the standards of procedural fairness<sup>19</sup>.

An important issue is a question of the temporal dimension of the rule of presumption of innocence. In my opinion, based on the textual wording of the provision, it applies to all stages of the disciplinary proceedings until the disciplinary ruling will become final and declare the guilt of the accused. It does mean that the directive is also applicable at the stage of appeal. What is more, I stand on the position that it also applies to the renewal proceedings if the disciplinary ruling does not say guilty<sup>20</sup>. This interpretation option has justification in the argument *lege non distinguente*<sup>21</sup>.

<sup>17</sup> See B. Baran, *Postępowanie dyscyplinarne w sprawach...*, p. 82.

<sup>18</sup> See D. Korczyński, *Wina jako przesłanka odpowiedzialności dyscyplinarnej funkcjonariuszy służb mundurowych*, [in:] *Węzłowe problemy prawa dyscyplinarnego w służbach mundurowych*, ed. P. Józwiak, K. Opaliński, p. 13 et seq.

<sup>19</sup> See B. Baran, *Postępowanie dyscyplinarne w sprawach...*, p. 111.

<sup>20</sup> Ibidem, p. 112.

<sup>21</sup> Ibidem.

The primary consequence of the presumption of innocence<sup>22</sup> is the burden of proof on the subject which acts as a prosecutor. The problem of disciplinary proceedings of the Prison Service officers is the fact that the rule was not expressly formulated in any provision. Therefore, the Roman legislative maxim is helpful here – *onus probandi incumbit*. In this proceedings it means that the burden of proof is on a disciplinary commissioner (rzecznik dyscyplinary). A prerequisite for a final disciplinary ruling and a punishment for an officer is to prove guilt by the disciplinary commissioner. The accused officer is not required to prove that he is innocent. The decision of acquittal<sup>23</sup> may be given in cases as follows: when the innocence was proven and in the situation when the innocence was not proven but guilt was not proven either. Only in exceptional cases the burden of proof may fall on the accused, if he refers to circumstances excluding responsibility<sup>24</sup>. Circumstances favorable for the accused also occurs on the basis of the principle in *dubio pro reo*.

## PRINCIPLE OF THE RIGHT TO DEFENSE IN DISCIPLINARY PROCEEDINGS' OF THE PRISON SERVICE OFFICERS

Right to defense is one of the fundamental directives of the procedural fairness according to which the accused has the right to defend his/hers interests in the disciplinary proceedings and be assisted by a professional counsel. In the described proceedings the defense has two aspects – substantive and formal. It is worth underlining that there is *no explicite* pointed in the Prison Service Act the notion of “right to defense” but there are indicated specific powers to which an accused officer is entitled to. As it is stated in the Polish doctrine the right to defense is valid only within the limits and forms laid down in the legal system<sup>25</sup>. It means that in the disciplinary proceedings of the Prison Service officers powers related to the use of the rights of defense are enumerated<sup>26</sup>.

The analyses of the right to defense will be started from the substantive aspect what means activities of the accused<sup>27</sup> in person during the proceedings. It involves all the legal actions taken in the course of proceedings, especially:

- submission of clarifications<sup>28</sup>,
- submission of evidentiary motions,
- participation in evidentiary activities,
- inspection of files,

<sup>22</sup> Presumption of innocence is a rebuttable presumption (*praesumptio iuris tantum*).

<sup>23</sup> See Art. 252 (1.1) Act on Prison Service.

<sup>24</sup> See. R. Giętkowski, *Odpowiedzialność dyscyplinarna w prawie polskim*, Gdańsk 2013, p. 234 et seq.

<sup>25</sup> M. Cieślak, *Polska procedura karna*, Warszawa 1971, p. 302.

<sup>26</sup> See B. Baran *Postępowanie dyscyplinarne w sprawach...*, p. 116.

<sup>27</sup> M. Cieślak, *Polska procedura...*, p. 302.

<sup>28</sup> See D.J. Galligan, R.H. Langan, C.S. Nicandrou, *Administrative Justice in the New European Democracies*, Oxford 1998, p. 29.

- submission of legal remedies.

A form of defense is also the right to remain silent due to the *nemo se ipsum accusare tenetur* principle (no man is bound to accuse himself) so banning mandatory self-incrimination<sup>29</sup>. In accordance with the *a fortiori* argument in the version of *a maiori ad minus* when the accused officer is entitled to refuse to provide clarifications, he is also entitled to refuse to comment or provide an answer when questioned. Here the question of possibility to lie in self-defense arises as a part of the right to remain silent. In my opinion the answer for the question should be negative. None of the provisions grant such a power and the text of the officer's oath obliges to act in accordance with the rules of professional ethics. So, if the accused officer decides to provide the clarifications he is obliged to tell the truth, otherwise he faces liability for giving false testimony<sup>30</sup>.

Generally, the right to remain silent has a wider context – it includes also the right to passive behavior during the proceedings. In particular, it means that the accused officer is not obliged to take part in evidentiary activities, also not being subjected to visual inspection and testing (e.g. body secretions). These kind of obligations are not included in the provisions of the Prison Service Act, same the standard of humanitarianism<sup>31</sup> of procedural fairness is realized<sup>32</sup>.

The right to defense in the formal context means possibility to establish legal counsel in the disciplinary proceedings what is *expressis verbis* stated in the Prison Service Act. It is optional and depends on the decision of the accused whether he needs the assistance of professional legal counsel or not. There is no obligatory professional legal representative assistance provided, even in case of doubts about the sanity of an accused officer<sup>33</sup>.

Discussing the right to defense in the disciplinary proceedings it is worth pointing out that the substantive and formal aspects remain in coincidence. It applies not only on the intentional plane but also on the normative one. Its expression is the accused officer's possibility to be active in the proceedings despite of having a legal counsel who acts in the proceedings simultaneously. It means that the accused may take all actions, to which he is legally entitled, during the course of the proceedings by himself. This kind of dualism might sometimes causes some dysfunctions during the proceedings but is axiologically justified<sup>34</sup>.

<sup>29</sup> See Z. Sobolewski, *Samooskarżenie w świetle prawa karnego (nemo se ipsum accusare tenetur)*, Warszawa 1982, *passim*.

<sup>30</sup> See B. Baran, *Postępowanie dyscyplinarne w sprawach...*, p. 117.

<sup>31</sup> See R.S. Summers, *Evaluating and Improving Legal Process – a Plea for “Process Value”*, “Cornell Law Review”, Nov. 1947, No. 1, p. 20-29.

<sup>32</sup> See B. Baran, *Postępowanie dyscyplinarne w sprawach...*, p. 117.

<sup>33</sup> *Ibidem*, p. 117.

<sup>34</sup> *Ibidem*, p. 118.

## CONCLUSION

To conclude, it is worth underlying once again that in the disciplinary proceedings of the Prison Service officers one of the sources of law are international human rights treaties. Their provisions are binding in the scrutinized proceedings, even if not directly. In the Polish legal system the Act on Prison Service realizes most of the international fairness standards, among which are the presumption of innocence and the right to defense. The presumption of innocence in the discussed proceedings has a primary consequence – the burden of proof is on the disciplinary proceedings' authority. The right to defense in the proceedings has two aspects – the substantive and formal ones. There is also the perspective of the right to remain silent during the course of actions for the accused officer.

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**Summary:** The article discusses selected international human rights standards applied in the disciplinary proceedings of the Prison Service officers. There are scrutinized the issue of presumption of innocence, as well as the right to defense also with the right to remain silent.

**Keywords:** Prison Service, officer, disciplinary proceedings, human rights, presumption of innocence, right to defense

### **POSTĘPOWANIE DYSCYPLINARNE W SPRAWACH FUNKCJONARIUSZY SŁUŻBY WIĘZIENNEJ W ŚWIELE MIĘDZYNARODOWYCH STANDARDÓW PRAW CZŁOWIEKA**

**Streszczenie:** Tematyką artykułu jest analiza wybranych międzynarodowych standardów praw człowieka przestrzeganych w postępowaniu dyscyplinarnym w sprawach funkcjonariuszy Służby Więziennej. Szczegółowo opracowane zostały zagadnienia domniemania niewinności oraz prawa do obrony.

**Słowa kluczowe:** Służba Więzienna, funkcjonariusz, postępowanie dyscyplinarne, prawa człowieka, domniemanie niewinności, prawo do obrony