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The Legal Guarantees for the Public Employee in the Disciplinary case A comparative

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Abstract

In order for public employees to preserve their constitutional and legal rights from being abused by the administration in disciplinary actions, law granted them a set of substantive and formal guarantees before and after imposing the penalty on them. These guarantees are available at all stages of the administrative lawsuit, from the occurrence of the violation to the stage of imposing the penalty on the employee, through which he/she is able to face the abuse of the administration if it abuses its authority.

Introduction

Disciplinary systems aim to protect the administration's interest in preserving the public position from mistakes committed by employees in order to ensure the regular and steady functioning of public utilities by holding the public employee accountable if he/she violates the job duties entrusted to him/her, but this does not deprive the public employee from legal guarantees through which he/she can confront the administration if it abuses its disciplinary authority against him/her. By law, the employee possesses a set of formal and objective guarantees that enable him/her to confront the administration before or after imposing a disciplinary punishment on him/her. The following sections and subsections present a comprehensive discussion of the topic in its various aspects.

The Significance of the Present Study

The present study gains its significance from its attempt to explore the legal

means through which the public employee can confront the administration if it abuses his/her rights by imposing penalties on him/her. The administration must preserve all the legal means granted by the legislator to the public employee in the field of disciplinary actions.

The Hypothesis

The research hypothesis is based on identifying whether the means granted by law to the public employee in the field of disciplinary action are sufficient to confront the deviation of the administration in the use of its disciplinary authority, and whether these means are sufficient for the disciplinary action to be fair and preserve both the right of the public employee and the right of the state to discipline him/her when job duties are violated.

The Research Plan

The present study is divided into three sections. In section one, the definition of public employee is discussed. Section two is devoted to identifying the formal guarantees in the disciplinary action. Substantive guarantees in the disciplinary action are also tackled.

Section One

Defining Public Employee

Public employees are there to perform jobs entrusted to them through the employee's assumption of the public job under the conditions determined by law. The concept of public employee varies according to the different governing legal and job systems.

First The Concept of Public Employee

Paragraph (3) of Article (1) of State and Public Sector Employees Discipline Law No. (14) of (1991) defines public employee as every person entrusted with a job within the staff of the ministry or an entity that may not be associated with a ministry.

Article (2) of the amended Civil Service Law No. (24) of (1960) refers to the concept of public employee as every person entrusted with a job within the working staff (Civil Service Law No. (103), Article (8), 1931).

Article (1) of Charitable Institutions Law No. (67) of (1971) also refers to the definition of public employee as every person entrusted with a job in religious and charitable institutions (Lebanese Public Employees Law, Article (1), 1959).

Based upon, it is possible to say that public employee requires three basic elements, which are:

1. Being a normal person and not a legal entity.

2. Working in a permanent job due to the possibility of having the capacity of a public employee. Most legislations require the quality of permanence in a public job, which is what the Supreme Administrative Court in Egypt ruled that who performs a temporary work in the service of a public facility is not considered a public employee (Egyptian Supreme Administrative Court, 1969).
3. The work of public employee is in the service of a public facility run by the state, which means that who works in an entity that does not meet the description of a public facility is not considered an employee (Egyptian Supreme Administrative Court, 1969).

By examining a set of judicial rulings in Iraq, it is found that the Iraqi judiciary has adopted the same conditions required by the Civil Service Law of public employee. The General Discipline Council (currently the Employees Judiciary Court) indicated in one of its rulings in its decision No. (40/65) that if the employee is not appointed in accordance with the provisions of the Civil Service Law and does not receive a salary from the public service, he/she has no right to appeal to the General Disciplinary Council.

Second Duties of Public Employees

Disciplinary laws relating to workers in the public office impose a set of duties on the employee, the breach of which leads to the employee being subjected to disciplinary accountability. Not complying to them leads to positive or negative disciplinary offenses.

It is worth noting that there are other duties outside the scope of the Disciplinary Law in Iraq. Instructions regarding rules of conduct for state employees, the public sector, and employees of the mixed sector in Iraq No. (1) of (2006) referred to a set of negative or positive job duties for a public employee. They also indicated that breaching them leads to the employee being subjected to a disciplinary action.

Among the most important job duties are:

1. The public employee is required to perform the job by him/herself. This requires the achievement of public interest. The employee should devote all his/her efforts and time to achieving public interests.
2. Adhering to the work rules and not being absent without a legitimate excuse. Public employees must attend to the work place on time. They must also devote the hours specified by law to work in order to complete the work and not to use the official working hours to do personal work.
3. Respecting superiors; The employee must respect his/her superiors at work and implement orders and instructions, especially if they are not in violation of

law. Employees are bound by it in accordance with the law.

4. Non-disclosure of job secrets; The employee must keep job secrets and not disclose or declare them to any party without approval, and also not to keep any document related to job work after the end of the job for any reason.
5. Preserving honour and dignity of the job and not combining it with any other job unless law excludes that.

Third; Formal guarantees for a public employee in a disciplinary action

The authority that imposes a disciplinary penalty on a public employee varies according to the legislation that regulates the issue of the public employee. The Egyptian legislator, for example, indicated that the disciplinary courts have the authority of imposing disciplinary punishment on the employee when he/she breaches his/her job duties, while the majority of legislation, including Iraq, Lebanon, and Qatar, referred The task of imposing disciplinary punishment to the legally competent authorities.

The Iraqi legislation did not define the disciplinary action in the law on the discipline of state employees and the public sector, but it rather referred to the procedures taken by the administrative authorities to impose disciplinary punishment on the grounds that the Iraqi legislator did not adopt the system of disciplinary actions instituted by the administrative authority against its employees. However, the Egyptian jurisprudence addressed the definition of disciplinary action on the basis that the disciplinary system in Egypt according to the Personnel Law of 1978 applies to the disciplinary action system. It is defined by some specialists as the claim submitted by the administrative authority before the disciplinary judge against one of the employees for disciplinary accountability in accordance with the law (Omar, 2021). Based upon, it can be said that the disciplinary action is the same as the procedures that are necessary to hold the public employee accountable, whether that is through the disciplinary courts or through the competent department. The following subsections will elaborate on two types of disciplinary actions.

First Formal guarantees prior to the imposition of the penalty

There are a set of formal guarantees required by law to be available before starting the procedures for imposing disciplinary punishment as follows:

First Formation of an investigative committee or a disciplinary board in accordance with law

In Iraq, Article (10) of State Employees and Public Sector Discipline Law in force states that the minister or the head of the department may form an investigative committee consisting of a head and two members with experience, provided that one of them holds an initial certificate in law. The article clarifies that the first guarantees that the employee has in against the administrative authority is the necessity of forming investigative committees in accordance with the law.

The General Disciplinary Council (currently the Employees Judiciary Court) indicated in one of its rulings that the formation of the investigative committee

must be in accordance with the law. Hence, if the committee consists of a head and four members, it is considered illegal as it must consist of a head and two members. Thus, its decisions are invalid (Youssuf, 1976).

Second; Writing

One of the general guarantees of the public employee is the recording of the investigation, as writing and recording the investigation is one of the important procedures in various types of investigations, including the administrative investigation. The importance of this procedure comes from the fact that it is a valid basis for the results.

The Egyptian legislator indicated in the State Civil Workers Law No. 48 of 1978 in Article (79) that it is not permissible to impose a penalty on the employee except after being investigated in writing and hearing his/her statements. The Lebanese legislator also referred to the importance of writing the investigation, whether the investigation is conducted by the competent administrative authority or by the Central Inspection Commission.

It is worth noting that the Iraqi legislator in the effective disciplinary law has granted the minister and the head of the department the power to impose disciplinary punishment, including drawing attention, warning, and cutting salary, after verbally questioning him/her (Muhammad, 2018). This matter is an exception to the original which requires that the investigation be in writing. What justifies this type of investigation is the speed in completing the investigation, but the interrogation should also be editorial in order to preserve the employee's guarantees of referring to what is found in the investigations to present his/her defence.

Third Formal impartiality of the investigation body

The formal aspect of impartiality in the investigation body is manifested by the separation between authorities to refer to the investigation and the investigation authority itself, and between the latter and the authority to impose the penalty, and then the separation between the authority to impose the penalty and the authority before which the appeal is being appealed. This means that the investigation authorities are limited to the investigation of the violation of the public employee who was referred for investigation. Other authorities shall impose the penalty on the employee and accept his/her appeal from the administrative decision regarding the penalty. Likewise, the investigative authority must be committed to adopting legitimate means of collecting evidence and concern for public interests. Based upon, it is clear that impartiality requires the separation of powers so that each authority is competent to do a specific work, which was not taken into account by the Iraqi legislator. Paragraph (4) of Article (10) of the applicable disciplinary law for the minister or the head of the department to interrogate the accused and impose specific penalties on him/her. Some specialists believe that although there

is no indication of impartiality in the effective Iraqi disciplinary law, guarantee can be achieved by referring to the Civil Procedure Code with regard to the dismissal and removal of judges. This applies to investigative committees (Abdulaal, 2016).

Fourth Notifying the employee of the accusation against him/her

Notifying the employee is the first step of the administrative investigation. This step is sometimes called notification or summons. It is a stage that includes informing the employee of the need to appear before the investigative committee and inform him/her of the violation he/she committed while specifying the place and time of the administrative investigation in order for the employee to submit his/her defences before the investigative committee. Failure to report or understand the violation leads to rendering the investigation void. The Administrative Court of Egypt cancelled the penalty of dismissal of one of the employees due to the employee's failure to understand the accusation against him, which led to a breach of the rights of the defence.

Referring to the effective Iraqi disciplinary law, the legislator did not specify a specific form of notification, but it is possible to refer to the general rules in legal notifications, which include that the notification should be in writing and through the administrative official, including the details of all the violation. It should be noted that there must be a sufficient period between notification and conducting the investigation in order for the employee to present his/her defences correctly.

Fifth Causation

One of the important formal guarantees for the public employee is causation, which means reporting the realistic and legal arguments on which the decision or judgment is based and produced, such as stating the circumstances of the case, refuting the defences made by the opponent, stating the reasons for rejection and acceptance, and the legal article applicable to the incident (Allam, 1977). Causing differs from reason. Reason for the disciplinary decision is the employee's breach of the job duties entrusted to him/her, while causation is to inform the employee of the fact of the violation attributed to him/her that led to his/her punishment. The importance of causation for the employee is manifested in his/her awareness of the truth of the accusation against him/her for which he/she was punished, as well as the knowledge that the penalty imposed on him/her is a penalty that is commensurate with the violation he/she committed.

Legislation's view causation differently. In Lebanon, according to Article (56) of the public system, which states that disciplinary authorities are not obligated to justify their disciplinary decisions, while disciplinary decisions issued by disciplinary councils, the High Disciplinary Commission, or the Central Inspection Commission must always be justified as they are issued by bodies that are of a judicial nature.

In Iraq, Article (10/Second) indicated that the recommendations of the investigative committee must be reasoned, which means that the legislator obliged the

committee to make its recommendations reasoned, so it is a fortiori that the final decision to impose the penalty be justified. The absence of causation in the decision to impose the penalty leads to the invalidity of the decision to impose the penalty for omitting an important guarantee of the guarantees required by law for the public employee.

Second; Post-punishment guarantees

Even after imposing the penalty on the employee because it was proven that he/she committed the act in violation of law, law gives the employee a set of guarantees that enable him/her to make the administration review its decision, which may be incorrect.

First Grievance

Grievance is a request submitted by the stakeholder to the administrative authority from which the administrative decision was issued, or to the presidential authority, requesting a reconsideration of its decision by withdrawing, cancelling, or amending it (Mankoni, 1972). In the field of disciplinary action, grievance is the request submitted by the employee against whom a penalty was imposed according to a specific administrative decision, in which he/she requests the party that imposed the penalty or the presidential body to review its decision to impose the penalty. Grievance is one of the important legal means that ensures the proportionality of the penalty with the disciplinary offense and that the administration's decision to impose the penalty is a sound and correct administrative decision. Grievance represents an opportunity for the administration to review its decision and correct its mistakes by itself if the error is marred by it. It also removes the burden from the judiciary in that the employee did not resort to it to challenge the decision of imposing the penalty. Grievance is either optional or obligatory.

In Iraq, the legislator obligated the enforceable State and Public Sector Discipline Law to file a grievance against the employee against whom a decision was issued and a disciplinary penalty was imposed on before resorting to appealing the decision to the General Disciplinary Council. This is confirmed by State Consultative Council Law No. 65 of 1979. It is also adopted by the Egyptian legislator in Article (12/7) of the Egyptian State Council Law of 1972.

Grievance shall be submitted against a final administrative decision and by a stakeholder whose position has affected the administrative decision to impose the penalty, namely the sanctioned employee, submitted to the administrative authority that is competent to consider it, and be submitted within the legal period stipulated by the legislator.

After submitting the grievance by the employee, the administration must decide on it within the period specified by the law, either by reconsidering its decision issued against the employee, whether by withdrawing, cancelling, amending, or by rejecting the employee's grievance, whether real or legal, so that

the employee can later appeal before the competent court of the decision of administrative penalty.

In Lebanon, Article (16) of the Staff Regulations issued by the amended Decree No. (112) of 1959 referred to the employee's right to oppose the decision to impose the penalty by submitting an administrative review, either to the disciplinary authority from which the decision was issued, or to the administrative chief For the authority that issued the decision, which means that grievance is one of the important guarantees for the employee during the disciplinary action, which was approved by the majority of legislations concerned with disciplinary sanctions.

Second; Appealing the decision to impose a penalty before the court

The guarantee of appealing the decision to impose punishment before the judiciary comes from a constitutional rule that the judiciary is a right that is guaranteed to everyone. It is permissible for anyone against whom a judgment or decision has been issued to resort to the judiciary and challenge it in accordance with law.

In Iraq, the appeal against the decision to impose a disciplinary penalty is before the Employees Judiciary Court, formerly the General Disciplinary Council. This court practices the jurisdiction of the General Disciplinary Council. The employee whose grievance has been rejected, in fact or by judgment, has the right to resort to the Employees Judiciary Court to challenge the administration's decision to impose the penalty. The penalty shall be imposed on the employee within 30 days from the date of the rejection of the appeal, in fact or judgment.

Paragraph (4) of Article (11) of the applicable Disciplinary Law stipulates that the penalty for drawing attention - warning - cutting salary is final and not subject to appeal, but with the issuance of Law No. (5) of 2008, no penalty is final, but it became possible to appeal all penalties stipulated by the law (Abdulsalam, 2014). Upon the expiry of the legal period for appeal, which is 30 days from the date on which the employee was notified of the rejection of the grievance in fact or judgment, the administrative decision shall be considered final ().

Article (64) of the Lebanese State Council Law issued by Decree No. (10434/on 6/14/1975) indicated that the employee has the right to resort to the State Consultative Council to challenge the disciplinary decision issued against him/her, as the control of the administrative judiciary over disciplinary decisions is achieved through judicial review. The law has set a period of (30) days during which the employee is entitled to judicial review to appeal the disciplinary decision. This period starts from the date the employee is notified of the decision.

It should be noted that the appeal against the decision to impose a penalty is based on the existence of one of the defects of the administrative decision to impose the penalty. The most prominent of these defects are those that focus on one of its pillars (specialty - location - reason - form - purpose) and the decision is considered by the judiciary court of employees. The court has several decisions that are either approving the decision, reducing the penalty, or cancelling it.

Section Two

Substantive guarantees for the employee in the disciplinary action

The employee's right in the disciplinary action is not limited to formal or procedural guarantees only, but most of the legislations have guaranteed him/her a lot of objective guarantees through which he/she can confront the abuse of the administration and the abuse of its authority in some cases. Such guarantees are approved by human right documents, international treaties, and states constitutions, whether on the level of public office or on the level of personal life. In this section, these guarantees are summarized as follows:

First The right of defines in the field of disciplining a public employee

This right is one of the most important objective guarantees granted to the public employee before imposing the penalty on him/her. This right is the basis on which other guarantees are based and is an integral part of it. The employee is able to defend him/herself and redress the injustice if it is committed against him/her by responding to the charges against him/her. It is considered one of the established and safeguarded rights (Al-Tamawi, 1979).

The 2005 Constitution of Iraq affirmed this right by stating that the right of defence is sacred and guaranteed at all stages of investigation and trial. The constitution guarantees this right in all stages of the case, whether it is a criminal case, an administrative case, or a disciplinary action. However, by referring to the State Employees Discipline Law of 1991, the legislator did not explicitly provide for this right, which is something that the legislator must deal with given the extreme importance of this right. While the Lebanese legislator stipulated this right in Article 59 of the Lebanese Public Officials Law in its fourth paragraph by stating that the employee has the right to review all papers related to the case and to reproduce what he/she deems necessary to defend him/herself.

The defence has several manifestations that can be summarized as follows:

1. Notifying the employee of the start of the investigation; It is one of the most prominent manifestations of the right of defence by informing the employee of the accusation against him/her and summoning him/her to start the investigation before the disciplinary authority.
2. The right to confront and review the accusation file; This guarantee is achieved by informing the employee referred for investigation of the knowledge of the accusation against him/her and its circumstances so that he/she can defend him/herself, present his/her defences, and inform him/her of all the documents that incriminate him/her. Before imposing the penalty on the employee, the administration should inform him/her of the accusation against him/her and show him/her all the documents that condemn him/her in order to present his/her defences.

There are many judicial rulings that emphasized the importance of this guarantee, including the ruling of the Supreme Administrative Court in Egypt, which states that one of the guarantees of the investigation is to inform the public employee of what is attributed to him/her and to enable him/her to defend him/herself before imposing a penalty on him/her. It is not sufficient to ask questions about certain facts. Rather, he/she should be confronted with the accusations attributed to him/her to be aware of them.

3. The accused employee's right to have a lawyer

One of the basic manifestations of the right of defence is the ability of the accused to seek the assistance of a lawyer to defend him/her in the field of discipline since the goal of the right of defence is to nullify the security charges against him/her, which means that there is nothing to prevent him/her from seeking the assistance of a lawyer since the lawyer has sufficient experience and knowledge in the field of discipline that allows him/her to avoid the charge on behalf of the accused employee.

Legislations have differed in stipulating this right. In Iraq, the Iraqi Disciplinary Law is devoid of a provision for this, but this does not prevent its implementation based on the Constitution, which guarantees the right of defence for all. In Lebanon, the legislator explicitly stipulated the right of defence and the assistance of a lawyer in Article (59) of Decree No. 112 of 1959, which stated that the employee has the right to review all papers related to him/her and to seek the assistance of one lawyer or employee during the appearance before the Disciplinary Council.

4. It is not permissible for the accused to be sworn in

One of the well-established legal principles is that it is not permissible for the accused to swear an oath unless he/she is in the position of testimony against others because this act leads to the deprivation of the freedom of the accused. Swearing an oath makes the accused a witness against him/herself, which is not permissible.

5. The principle of presumption of innocence

The principle of the presumption of innocence is one of the constitutional principles that most of the legislations have adopted. This principle requires that the employee be treated as innocent throughout the period of the administrative investigation until proven guilty in full.

6. The right of silence

The accused employee has the right not to answer the questions directed to him/her. The will of the accused employee may not be pressured, which follows the statement of his/her right of silence, and that using his/her right is not considered a

violation for which the employee is held accountable because his/her failure to defend him/herself by remaining silent means that the employee has waived the right. One of his/her rights is the right of defence. Although the State Employees Discipline Law in Iraq is devoid of a provision for this right, it is possible to refer to the general rules in the investigation referred to in the Iraqi Code of Criminal Procedure No. 23 of 1971 and not to force the accused to answer the questions addressed to him/her.

7. The right of the accused employee to seek the assistance of witnesses

Most of the penal legislation stipulated this right as by means of which, the accused can seek the assistance of some people who witnessed the incident or realized it with their senses in order to inform about the details of the incident. It is a guaranteed right and not less important than the right of the accused to seek the assistance of a lawyer. The testimony is among the statements that are sought from persons outside the framework of the case. Witnesses in the criminal case may be to defend the accusation on behalf of the accused, i.e. defence witnesses. The investigative committee may use witnesses to prove the accusation, i.e. prosecution witnesses. Defence is important and guaranteed by constitution. The Iraqi legislator took a commendable course when this right was stipulated in the core of the law.

Second Objective Neutrality

Impartiality is represented by the functional and personal principles that affect the personality of the investigator and that may affect his/her impartiality. The authorities who are in charge of the investigation must stay away from acts that violate their functional integrity. The person in charge of conducting the investigation must get rid of any prior information about the incident under investigation in order to reach the truth, and to move away from personal interest in the field of administrative investigation, and seek public interest. That person can ask for being replaced by someone else when he/she feels that there is any sort of impartiality (Al-Gwairi, 1992).

In Iraq, the Iraqi Disciplinary Law of 1991 did not refer to this right, but it is possible to refer to the general rules found in the Civil Procedure Code. The first article of the amended Iraqi Code of Procedure No. 83 of 1969 referred to this by stating that this law shall be the reference for all pleading and procedures laws if there was no text in it that explicitly contradicts.

In Lebanon, Article (4) of Decree No. 7236 related to the system of the Supreme Disciplinary Commission stipulates this right, as it refers to the possibility of rejecting or removing the president, member, or commissioner of the government from the disciplinary trial by submitting a request before the start of the disciplinary proceedings. If the application is not submitted, the case will continue and the judgment will be valid.

Conclusion

First Conclusions

1. The majority of legislations have granted the violating public employee a set of

guarantees to confront the administration and ward off the accusation from him/her in a manner that is not less important than the guarantees granted to the accused in the criminal case.

2. Most of the legislations, including the Iraqi legislation, emphasized the necessity of writing the administrative investigation since writing is one of the general guarantees for both the employee and the administration alike.
3. Disciplinary legislations vary with regard to the guarantee of causation. The Lebanese legislator did not require, for example, the reasoning of the decision to impose the penalty, the Iraqi legislator obliged the investigation committee to cause the decision to impose the penalty, while the Egyptian legislator in the Personnel Law of 1978 obliged the authorities to cause the decision to impose administrative penalties without specialization. This is confirmed by the judiciary.
4. Many important guarantees, such as the use of a lawyer or access to the accusation file are not provided by the Iraqi legislation. This made the investigative authorities refer to the general rules in the Code of Procedure and the Code of Criminal Procedure and adopt them.

Second Recommendations

1. It is better for the Iraqi legislator to stipulate in the applicable discipline law the guarantees neglected to be mentioned and not to give the administration the authority to refer to the general rules and interpret them in a way that leads to harming the violating employee by amending the law and making it the main course of the administration in conducting administrative investigations such as stipulating the right to defend in all its manifestations, as well as the possibility of disqualification or response of the members of the investigative committee.
2. Amending Clause Four of Article (10) of the applicable Disciplinary Law and emphasizing that the employee's interrogation by the head of the department should be in writing since writing is one of the important safeguards for the public employee.
3. The Iraqi legislator must pay attention to the causation guarantees and make them binding on the administration in all disciplinary penalties because the penalties, even if they are gradual in severity and the impact that they entail, have a great impact on the employee and his/her legal and job status, regardless of their severity, which requires the administration to cause the decision to impose the penalty. And the lack of economic reasoning on the recommendations of the investigative committee.

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