Universal Decimal
Classification 342.9

Kizilov V. V.

BASES FOR PRESUMPTION OF GUILT OF PUBLIC OFFICIALS, WHEN COMMITTING ADMINISTRATIVE OFFENCES

Kizilov Viacheslav Vladimirovich,

c.j.s. (PhD of jurisprudence), Associate Professor, Department of Administrative and financial law of the Non-State educational institution of Higher vocational education «Omsk Institute of Law», Omsk.

On the basis of analyses of legislation governing the various types of public service, as well as procedural legislation of the Russian Federation, proves the possibility and need for introduction to the administrative and tort legislation presumption of guilt of public officials for committed by them administrative offenses.

Keywords: presumption of guilt, public officials, administrative offences, administrative responsibility of officials.

In accordance with the terms given in the United Nations Convention against Corruption (adopted by the UN General Assembly on October 31, 2003) [6], by public officials in the context of this article, we will understand:

- any appointed or elected person holding a post in legislative, executive, administrative or judicial body of the Russian Federation and the subject of the Russian Federation on a permanent or temporary basis, with salary or without one, regardless of the level of posts of this person;

- any other person who performs a public function, including for a public department or public enterprise, or provides a public service as defined in the legislation of the Russian Federation and the subjects of the Russian Federation, and as applied in the pertinent area of legal regulation of the mentioned public formations;

- any other person defined as a «public official» in the legislation of the Russian Federation and the subjects of the Russian Federation;

- any other person who performs public functions at the level of municipal formations.

The issue of establishing the principles of guilt determination of public officials of committed service (official in the context of the CAO RF) administrative offenses is significant not only for the law-enforcer, but also for the legislator, who

resolves the task of modernization of the administrative and tort legislation. Application of presumption of innocence and subjective imputing while consideration of public officials' administrative offenses, in our view, is unreasonable in respect of the mentioned special subject of administrative responsibility.

As correctly pointed Semenov A. V.: "modern constitutional system is based on a presumption of responsibility (responsible conduct) of public authorities to citizens" [15, 22]. Indeed, the adoption of decisions by public officials, committing of legally significant actions "always somehow affects legally protected rights and freedoms of a man and citizen, interests and values expressed in them" [14, 143]. Commenting on the provisions of article 53 of the Constitution of the Russian Federation, Semenov A. V. repeats statements of other authors on the presence in them of the objective nature of the state responsibility, emerging regardless of its officials' guilt [14, 145]. So why, allowing the responsibility of the state and its bodies to the citizens, we are surprised of objective imputing of public officials? As we see it, upholding the institute of subjective imputing in respect of public officials is being implemented only with one purpose – to provide an opportunity for this delinquent to move away from legal responsibility (in our case from the administrative responsibility for service (official) administrative offenses).

This situation is not conducive for effective security and protection of constitutionally recognized rights and freedoms of a man and citizen, as it generates impunity of offenders – public officials. Occurs a paradoxical situation where there is a fact of violation the rights of a man and citizen, as well as of collective private subjects of law, at the presence of the subject of administrative responsibility and his tort deed, the offender avoids administrative responsibility due to failure of evidence of guilt.

In considering the issue, whether subjective imputation at all is possible in its pure form and how to deal with situations involving deviations from this principle, it should be noted that in the evolving legal practice, there are many cases of going beyond subjective imputation and necessity to implement administrative responsibility based on objective principles.

With the increasing number of administrative and legal torts of the representatives of authorities [9] refusal of bringing of public officials who commit administrative offences to administrative responsibility, even for the sake of the rule of law principles (the principle of subjective guilt imputing) will not contribute to strengthening of the rule of law. Appropriateness of administrative responsibility in such cases is doubtless, as it is socially conditioned. Objections of lawyers may cause only explanation of this responsibility, which under the current

administrative and tort legislation, can occur only in accordance with the principle of subjective imputing. Meanwhile, it seems to us that in such cases we need different principle of guilt determination based on objective imputing.

Objective imputing in the administrative and tort legislation, of course, should be limited to these specific subjects of administrative responsibility – public officials.

As pointed out by Bytko S. Yu. "objective imputation actually remains in the criminal law and performs the function of restoring social justice when bringing to criminal responsibility for crimes of negligence that caused significant damage, and itself is not the cause of violation human rights and freedoms of citizens; the prohibition of objective imputation is a legal fiction that allows to reconcile the formalism of criminal law and the diversity of real life"[10, 101]. Appeal of a lawyer to the issue of applying objective imputation in criminal law demonstrates the relevance of its application in tort legislation of Russia.

Keeping in mind our concept, the responsibility for an administrative offense of a public official should occur regardless of the state of that person at the time of its commission (we mean volitional and psychological aspect) [11]. There is no need to figure out what exactly was conscious and willing delinquent at the time of the offense and it is not required for his conviction. The fact of committing a punishable under administrative and tort legislation deed is of essential importance.

We believe that the principle of the presumption of guilt of a public official (enshrined in objective imputation) who committed a wrongful act, means that the burden of proving absence of guilt when a particular consideration of a case on an administrative offense in the court should be assigned to this public official, but not to an administrative jurisdiction body. To avoid administrative penalties a public official charged with an administrative offense must refute the arguments of an administrative jurisdiction body about his involvement in tort, prove his innocence or existence of the circumstances precluding administrative responsibility [13].

It is well known, if legislation presumes the guilt of an illegal deed and imposes to a delinquent the obligation to prove his innocence, it is already the fact of presence of subjective prerequisites of bringing to responsibility. In legal literature, this is considered as the application of framework of strict liability, which strengthens the presumption of guilt. Applying the presumption of guilt to a public official, the legislator thus imposes on the person the obligation to exercise the highest degree of diligence in the performance of ministerial acts. Presumption of guilt will actually include all subjectively possible measures of conduct of a public official, including in the event of accidental circumstances.

As we see it, there will be not so much opponents of the idea of introducing the presumption of guilt of a public official in the administrative and tort legislation of Russia. The more that de facto this presumption already exists in procedural legislation and is applied by the courts when considering administrative and legal disputes and resolving cases arising from other public-law relations. Under part 1 of article 249 of the Code of Civil Procedure of the RF [2], part 3, article 189 and part 5 of article 200 of the Arbitration Procedural Code of the RF [1] the obligation of proving the circumstances that led to the adoption of normative (non-normative) legal act, its legitimacy and the legitimacy of contested decisions, actions (or inactions) of public authorities, local self-government bodies, officials, state and municipal employees is assigned to the body that adopted the normative (non-normative) legal act, bodies and individuals who adopted the contested decisions or committed contested actions (inactions).

The reasons for imposing a presumption of guilt in administrative and tort legislation, in our opinion, are in the legislation governing the various types of public service, as well as in subordinate legal acts, regulating the procedure of service, establishing of official regulations, etc. As we see it, the normatively vested rights, obligations and prohibitions of employment activity of a public official, form good-faith conduct (delineate the boundaries of lawful conduct) of that person, going beyond of which or deviation from which should be regarded as an intentional or negligent (i.e. guilty) offense.

For example, article 12 of the Federal law No. 25-FL from March 02, 2007 "On Municipal Service in the Russian Federation" [7] (hereinafter referred to as the Law on Municipal Service) established the following obligations of a municipal employee, non-compliance of which may result in administrative and legal tort:

- compliance with and ensuring the enforcement of the Constitution of the Russian Federation, federal constitutional laws, federal laws and other normative legal acts of the Russian Federation, constitutions (charters), laws and other normative legal acts of the subjects of the Russian Federation, charters of a municipal formation and other municipal legal acts;

- execution of duties in accordance with the job description;

- compliance with the rights and legitimate interests of citizens and organizations in the performance of official duties;

- compliance with the rules of internal labor regulations, job description, procedure of work with official information established in the body of local self-government, office of the municipal election Commission;

- no disclosure of information constituting state or other secrets protected by

federal laws, as well as the information which he has got to know in connection with the performance of official duties, including information relating to private life and health of citizens, or affecting their honor and dignity;

- careful attitude to state and municipal property, including the provided to an employee for execution of his official duties;

- providing in accordance with the procedure stipulated by the legislation of the Russian Federation, information about himself and members of his family;

- informing the representative of employer about renunciation of the citizenship of the Russian Federation on the day of exit from the citizenship of the Russian Federation or about the acquisition of nationality of a foreign State on the day of acquisition of nationality of a foreign State;

- compliance with restrictions, obligations, not a violation of the prohibitions established by federal laws [8];

- notice in writing to his immediate superior about the personal interest during the performance of official duties, which can lead to a conflict of interests, and adoption of measures to prevent such a conflict;

- do not perform given to him illegal order.

Article 14 of the Law on Municipal Service established for municipal servants the following prohibitions the breach of which may give rise to administrative and legal tort:

"1. in connection with the passage of municipal service the municipal servant is prohibited to:

1) be a member of the management body of the commercial organization, except if otherwise is provided by federal law, or if in procedure stipulated by a municipal legal act in accordance with federal laws and the laws of the subject of the Russian Federation, he was not ordered to participate in the management of this organization;

...

3) engage in entrepreneurial activities;

...

5) receive in connection with the official position or in connection with the performance of official duties remuneration from physical persons and legal entities (gifts, money reward, loans, services, payment for entertainment, recreation, transportation costs and other remunerations) ...;

6) go on a business trip at the expense of physical persons and legal entities, except for trips undertaken on a mutual basis by the agreement of the local self-government body and the election commission of municipal formation with local

self-government bodies, electoral commissions of other municipal formations, as well as with public authorities and local self-government bodies of foreign states, international and foreign non-profit organizations;

7) use for purposes not related to the performance of official duties means of logistical, financial and other supporting , other municipal property;

8) disclose or use information, which is classified in accordance with the federal laws as confidential information or information, which became known in connection with the performance of official duties for purposes not related to the municipal service;

9) allow public statements, judgments and assessments, including in the media, regarding the activities of the local self-government body, Election Commission of municipal formation and its leaders, if it is not a part of his official duties;

10) take without the written permission of the head of a municipal formation awards, honorary and special ranks (except scientific) of foreign States, international organizations, as well as political parties, other public associations and religious associations, if his job duties include interaction with these organizations and associations;

11) use advantages of official position for waging an election campaign or a referendum campaign;

12) use official position in favor of political parties, religious and other public associations, as well as to publicly express attitude to these associations as a municipal civil servant;

13) form in the bodies of local self-government, in other municipal bodies political parties, religious and other public associations (with the exception of labor unions, as well as veterans' and other local community bodies) or contribute to the creation of these structures;

...

15) be part of the administration of guardianship or supervisory boards, other bodies of foreign non-commercial non-governmental organizations and their structural divisions acting in the territory of the Russian Federation, unless otherwise is stipulated by an international treaty of the Russian Federation or the legislation of the Russian Federation;

16) be involved in paid work, which is funded entirely by foreign states, international and foreign organizations, foreign citizens and stateless persons without the written permission of the representative of the employer, unless otherwise is stipulated by an international treaty of the Russian Federation or the legislation of the Russian Federation".

In addition to these duties and prohibitions of the Law on Municipal Service the norms of part 1 of article 75 of the Federal Law "On General Principles of Local Self-Government in the Russian Federation", [4] determine the cases of incurrence of responsibility (as a matter of fact here are being presumed guiltiness):

- of a municipal formation head and head of local administration (see part 1) - "because of the adoption by a local self-government official a legal act contrary to the Constitution of the Russian Federation, federal constitutional laws, federal laws, the constitution (charter), the laws of the subject of the Russian Federation, the charter of a municipal formation if such contradictions are revealed by the appropriate court, and this official has not adopted within its competence measures for enforcement of a court's judgment within two months from the date of entry into force of the court's judgment or within another period prescribed by a court decision".

- of an official of a local self-government (see part 2) - "In the case of committing by an official of a local self-government actions, including adoption by him a legal act, not of a normative nature, entailing violation of the rights and freedoms of a man and citizen, threat to the unity and territorial integrity of Russia, national security and defense, the unity of the legal and economic space of Russia, spending subventions from the federal budget or budget of the Federation subject for the wrong purposes".

Norms of the Law on Municipal Service governing the admission to the municipal service, its passage and termination, give reason to believe that in respect of the person who proceeded to municipal service, there is no such circumstance precluding administrative responsibility as insanity (Article 2.8 of the CAO RF).

All what we have said about the presumption of guilt of municipal employees, in full measure applies to public civil servants, the service of which is carried out in accordance with the Federal Law No. 79-FL of July 27, 2004 «On the Public Civil Service of the Russian Federation» (hereinafter The Law on Public Civil Service) [5].

Article 15 of this law establishes the following obligations of a public civil servant, failure to comply with which may result in an administrative-legal tort:

- compliance with and enforcement the Constitution of the Russian Federation, federal constitutional laws, federal laws and other normative legal acts of the Russian Federation, constitutions (charters), laws and other normative legal acts of the subjects of the Russian Federation;

- execution of official duties in accordance with the official regulations;

- execution of orders of appropriate leaders, which are given within the limits of their powers, established by the legislation of the Russian Federation;
- compliance with the rights and legitimate interests of citizens and organizations in performing official duties;
- no disclosure of information constituting state or other secrets protected by federal laws, as well as the information which became known in connection with the performance of official duties, including information relating to private life and health of citizens, or affecting their honor and dignity;
- careful attitude to state property, including the provided to an employee for execution of his official duties;
- providing in accordance with the procedure stipulated by the legislation of the Russian Federation, information about himself and members of his family;
- informing the representative of employer about renunciation of the citizenship of the Russian Federation on the day of exit from the citizenship of the Russian Federation or about the acquisition of nationality of a foreign State on the day of acquisition of nationality of a foreign State;
- compliance with restrictions, performing obligations and requirements to service conduct, not violation of the prohibitions established by federal laws [8];
- informing the representative of an employer about the personal interest during the performance of official duties, which can lead to a conflict of interests, and adoption of measures to prevent such a conflict;
- not performing given to him illegal order.

Part 1 of article 16 of the Law on Public Civil Service, which establishes the limitations of civil service, prescribes norms that give reason to believe that when committing of an administrative offense by a public civil servant there will be absent circumstances precluding administrative liability on account of his insanity (article 2.8. CAO RF).

For a public civil servant is also set a number of prohibitions, the failure to comply with which may result in an administrative offense. Such bans are, in our opinion, paragraphs 1), 3)-9), 11)-17) of part 1 of article 17 of the Law on Public Civil Service.

In respect of forming the institute of administrative responsibility of public civil servants was dedicated a monograph containing the concept of administrative responsibility of the mentioned category of delinquents [12], so there is no need to repeat the earlier arguments on the principles of bringing public civil servants to administrative responsibility.

Considered by us public officials are only the part of the representatives of public persons, in respect of which when the commission of an administrative offense should be applied a presumption of guilt.

We believe that for persons performing military service, the severity of disciplinary responsibility for committed official torts is comparable to the administrative liability of civilians. Official torts of judges unless they are a criminal offence may be a subject matter of regulation by administrative and tort legislation. However, the presumption of guilt cannot be applied against judges. It would be absurd to believe that justice is administered by the person who is a potential delinquent.

Jurists, we believe, do not wonder about application of administrative punishment to persons who serve in law enforcement agencies. However, application of the presumption of guilt in respect of employees of law enforcement agencies and procuratorate is unacceptable, as this could undermine the authority of law enforcement agencies themselves.

The seeming multiplicity of offenses committed by law enforcement officers, which is covered in the media, is a result of increased attention of civil society to the work of law enforcement agencies. In contrast to the bodies of public civil and municipal service, in law enforcement agencies traditionally take place units that carry out the fight against tortious manifestations of their employees. Cases of revealing torts in law enforcement bodies are generally made public. It seems to us, that if all torts at civil and municipal service are fixed, the number of such would be incomparably greater.

Due to the fact that public officials of the state civil and municipal service routinely make many decisions, implement managing impact on citizens and legal entities, the question of the implementation of the administrative responsibility for committed by them official administrative-law torts is of paramount importance. In our opinion, without accepting by the legal science and the legislator the presumption of guilt of a public official for committed administrative offences, suffers the principle of inevitability of punishment for torts.

References:

1. The Arbitration and Procedural Code of the Russian Federation, No. 95-FL of July 24, 2002 [Arbitrazhnyj protsessual'nyj kodeks Rossijskoj Federatsii ot 24 ijulja 2002 g. № 95-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.
2. The Civil Procedural Code of the Russian Federation, No. 138-FL of November 14, 2002 [Arbitrazhnyj protsessual'nyj kodeks Rossijskoj Federatsii ot 24 ijulja 2002 g. № 95-FZ]. *System GARANT* [Electronic resource], Moscow: 2012.
3. The Code on Administrative Offences of the Russian Federation, No 195-FL of December 30, 2001 (as at October 29, 2011) [Kodeks Rossijskoj Federatsii ob administrativnyh pravonarushenijah ot 30 dekabrja 2001 g. № 195-FZ (po sostojaniju na 29 oktjabrja 2011 g.)]. *System GARANT* [Electronic resource], Moscow: 2012.
4. Federal Law № 131-FL of October 6, 2003 On the General Principles of Organization of Local Self-Government in the Russian Federation [Federal'nyj zakon ot 6 oktjabrja 2003 g. № 131-FZ «Ob obshhih printsipah organizatsii mestnogo samoupravlenija v Rossijskoj Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2012.
5. Federal Law No. 79-FL of July 27, 2004 On the Public Civil Service of the Russian Federation [Federal'nyj zakon ot 27 ijulja 2004 g. № 79-FZ «O gosudarstvennoj grazhdanskoj sluzhbe Rossijskoj Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2012.
6. Federal Law No. 40-FL of March 08, 2006 On Ratification of the United Nations Convention against Corruption [Federal'nyj zakon ot 8 marta 2006 g. № 40-FZ «O ratifikatsii Konventsii Organizatsii Ob"edinennyh Natsij protiv korruptsii»]. *System GARANT* [Electronic resource], Moscow: 2012.
7. Federal Law No. 25-FL of March 02, 2007 On Municipal Service in the Russian Federation [Federal'nyj zakon ot 2 marta 2007 g. № 25-FZ «O munitsipal'noj sluzhbe v Rossijskoj Federatsii»]. *System GARANT* [Electronic resource], Moscow: 2012.
8. Model Code of ethics and official conduct of public servants of the Russian Federation and municipal employees approved by the decision of the Presidium of the Presidential Council of the RF on combating corruption of December 23, 2010 (protocol No. 21) [Tipovoj kodeks etiki i sluzhebnogo povedenija gosudarstvennyh sluzhawih Rossijskoj Federatsii i munitsipal'nyh sluzhawih, odobrennyj resheniem prezidiuma Soveta pri Prezidente RF po protivodejstviju korruptsii ot 23 dekabrja 2010 g. (protokol № 21)]. *System GARANT* [Electronic resource], Moscow: 2012.
9. Alaev I. V., Kizilov V. V. Service Delinquency of the Public Civil Servants of the Russian Federation [Sluzhebnaja deliktnost' gosudarstvennyh grazhdanskih

sluzhawih Rossijskoj Federacii]. *Aktual'nye voprosy publichnogo prava – The Topical Issues of Public Law*, 2012, no. 1.

10. Bytko S. Ju. On the Admissibility and Limits of the Objective Imputation in Criminal Law [O dopustimosti i predelah ob"ektivnogo vmenenija v ugolovnom prave]. *Sovremennoe pravo – Modern Law*, 2009, no. 7.

11. Kizilov V. V. Administrative Responsibility without Establishment of the Form of a Guilty Deed [Administrativnaja otvetstvennost' bez ustanovlenija formy vinovnogo dejanija]. *Aktual'nye voprosy publichnogo prava – The Topical Issues of Public Law*, 2012, no. 4, .

12. Kizilov V. V. *Institute of Administrative Responsibility of Russian Public Civil Servants* [Institut administrativnoj otvetstvennosti gosudarstvennyh grazhdanskih sluzhawih Rossii]. Saratov: publishing house of Saratov State University, 2012.

13. Kizilov V. V. Circumstances Affecting Application of Administrative Penalty to a Public Civil Servant [Obstojatel'stva, vlijajuwie na primenenie administrativnogo nakazanija k gosudarstvennomu grazhdanskomu sluzhawemu]. *Ekonomika. Upravlenie. Pravo. – Economics. Management. Law.*, 2011, no. 11, part 2.

14. Semenov A. V. Nonlegal Conduct of Public Authorities (public officials) as a Basis of Responsibility (qualification peculiarities) [Nepravovoe povedenie publichnyh vlastej (publichnyh dolzhnostnyh lits) kak osnovanie otvetstvennosti (osobennosti kvalifikatsii)]. *Vestnik Moskovskogo universiteta MVD Rossii Messenger of Moscow University of MIA of Russia*, 2010, no. 7.

15. Semenov A. V. Public Authorities and Public Officials as Subject of Responsibility in Modern State-legal Systems [Publichnye vlasti i publichnye dolzhnostnye lica kak sub"ekt otvetstvennosti v sovremennyh gosudarstvenno-pravovyh sistemah]. *Zakon i pravo – Law and Order*, 2010, no. 10.