Universal Decimal
Classification 342.9

Kalina E. S.

ADMINISTRATIVE OFFENCES COMMITTED UNDER EMERGENCY CONDITIONS [1]

Kalina Elena Semenovna,
c.j.s. (PhD in law), Associate professor of the Chair of constitutional and administrative law, South Ural State University.

Here are considered the conditions of an emergency situation in the context of circumstances that strengthen and mitigate responsibility for an administrative offense. The author proves that the conditions of an emergency situation can be a source of extreme necessity. The article proposes the author's classification of administrative offenses regarding compositions of administrative offenses that "generate" an emergency situation and "are generated" by an emergency situation.

Keywords: administrative offences, emergency situation, state of emergency, administrative responsibility, mitigating and aggravating circumstances.

Under paragraph 1 article 1 of the Federal Law No. 68 -FL from 21.12.1994 "On Protection of Population and Territories from Emergency Situations of Natural and Man-made Nature" [1] , the legislator considers emergency situation as a situation in a particular territory that has developed as a result of an accident, natural hazard , disaster, natural or other disasters that may cause or have caused human losses, damage to human health or the environment, significant financial loss and breach of conditions of people life.

[1]Published on materials of VII All-Russian scientific-practical conference with international participation «Theory and practice of administrative law and process» (Rostov-on-Don — Krasnodar — Nebug — 2012)

This definition allows us to represent state of emergency as an objectively existing phenomenon, a state of affairs, which can serve as a basis for the introduction of a special order of legal regulation. At that, it should be noted that neither in the Federal Law No. 68-FL nor in the Constitution of the Russian Federation the legislator uses the term "emergency mode", and therefore the question of the legitimacy and feasibility of this concept use in administrative-legal science is debatable. So, D. N. Bakhrakh mentions emergency mode among examples of legal regimes [4, 479]. The opposite position is that when making a state body decision to establish the fact of existence of an emergency situation and taking measures to ensure the safety of the population (e.g. evacuation) more correct wording is not "introduction of emergency mode", but "establishing the fact of the existence of an emergency situation" of this or that type and adoption in this connection of the relevant measures to save lives and property [5].

The objections, on which is based the second position, are more terminological than reflecting the crux of the matter. Because emergency mode in the theory and practice of law enforcement is understood as just such a legal situation where the authorities of an appropriate level on the basis of fixed objective evidence of emergency situation of a certain scale adopt non-normative legal acts that change the nature of action of some legislative norms, what cannot help but influence on the volume rights and responsibilities, as well as the limits of responsibility of the subjects of law. This is evidenced by the existing judicial practice on challenging such non-normative legal acts under the procedure of article 197 of the Arbitration Procedural Code of the Russian Federation [3].

In contrast to emergency mode, which is introduced only by a decree of the RF President and allows specific restrictions on rights and freedoms of citizens, in an emergency situation such restrictions are not introduced. However, there is a range of specific duties of citizens and organizations in the field of regulation of issues related to the prevention of emergency situations and liquidation of its consequences. The range of these duties is defined in article 19 of the Federal Law No. 68-FL.

Thus, an emergency situation is not only a particular actual state of affairs that is just stated by a non-normative legal act of a state body, but also a particular legal situation. This particular legal situation affects, including the conditions for occurrence of administrative responsibility, the limits of this responsibility and the measure of imposed administrative punishment – both towards of tightening and in towards of mitigating.

One of the general rules of imposition administrative punishment is the requirement of accounting, including, both circumstances mitigating administrative

responsibility and circumstances aggravating administrative responsibility, and this rule applies to both physical and legal persons (part 2, 3 article 4.1 of the Code on Administrative offences of the RF, hereinafter CAO RF).

At that committing of an administrative offense in conditions of a natural disaster or other emergency circumstances is expressly stated by the legislator in paragraph 5 part article 4.3 CAO RF as a circumstance aggravating administrative responsibility. This norm, by virtue of part 2 article 4.3 CAO RF, does not apply only to the offense under part 2 article 20.6 CAO RF (failure to take measures in order to ensure the readiness of the forces and means intended for liquidation of emergency situations, as well as untimely sending to the area, where there is an emergency situation, of the forces and means stipulated by a plan of liquidating emergency situations, endorsed in the established procedure) because it is the only norm of CAO RF, which expressly provides for the commission of these punishable actions (inaction) in an emergency situation as a qualifying attribute of an administrative offense.

As for circumstances mitigating administrative responsibility for the administrative offense, their list contained in part 1 article 4.2 CAO RF does not contain such circumstance as commission of an offense in the context of an an emergency situation. In accordance with paragraph 3 part 1 article 4.2 CAO RF legislator refers to commission of an administrative offense in the state of intense emotional excitement (temporary insanity) or at the concatenation of difficult personal or family circumstances. Logically, these circumstances can be caused by an emergency situation, but they are possible only for a physical person.

Frankly, part 2 article 4.2 CAO RF authorizes law enforcement officials considering a case concerning an administrative offence to deem mitigating some circumstances that are not indicated in this Code or in the laws on administrative offences of the subjects of the Russian Federation. Together with the requirement of parts 2, 3 article 4.1 and paragraph 4 article 26.1, according to which in the case of an administrative offense the circumstances mitigating administrative responsibility and circumstance aggravating administrative responsibility are subject to clarification, this norm means that a law enforcer at the moment of imposition of an administrative penalty not only can, but must consider as mitigating circumstances any circumstances, including those arising out of the special conditions of an emergency situation, which make lawful activity of an individual or organization difficult or objectively impossible.

In addition, in administrative law of Russia exists institute of extreme necessity. Article 2.7 CAO RF determines extreme necessity as such conditions, under

which a person inflict harm to legally protected interests for the prevention of a direct danger to a person, or to the rights of the given person, or of other persons, as well as to the protected by the law interests of the state or society, if this danger could not be prevented by other means and if the inflicted harm is less than the one that has been prevented. Such actions (inactions) do not constitute an administrative offense, under paragraph 1 article 24.5 CAO RF in the presence of such circumstances as the actions of a person in a state of extreme necessity, case proceedings concerning an administrative offense cannot be initiated, and initiated proceedings shall be terminated. And, again, following the logic of common sense, it cannot be denied that conditions of emergency situation may be a source of extreme necessity.

If extreme necessity exempts a person from responsibility for forced infliction of damage during fulfillment of actions aimed at the prevention of infliction of worse harm or elimination of a threat, then force majeure exempting the person from responsibility for inaction, at the same time obliges it to commit certain alternative actions. This concept is expressed in article 16.6. CAO RF that enshrines carrier's responsibility for failure to preserve goods and (or) vehicles (part 1 article 16.6 CAO RF) and failure to report to the nearest customs office about the accident or force majeure, or the occurrence of other circumstances preventing delivery of goods and (or) means of transport to the place of arrival, stopping of sea (river) vessel or planting aircraft in specified locations or transportation of goods in accordance with the internal customs transit or international customs transit, about the location of goods and (or) means of transport or failure to transport goods and (or) means of transport to the nearest customs office or to another location specified by the customs body. At that, part 1 of this article provides for an exception in case of perishing or loss of goods and (or) means of transport due to circumstances, which the carrier could not avoid and the elimination of which did not depend on it.

It seems that the provisions of this article deserve generalization, since the circumstances of force majeure can occur not only in the activities of a carrier, but also in any other activity.

This general overview gives us reasons to review compositions of administrative offenses at a particular angle of view, paying most attention to the fact of how conditions of emergency situation may affect the imputation in the commission of the actions or inaction. Consideration the connection of a specific composition of an administrative offense with an emergency situation can be beneficial for better ensuring of legality in bringing a natural or legal person to administrative responsibility, as well as for delimitation of administrative offenses, on the one hand, from

crime, on the other hand, from disciplinary misconducts, in case of similarity in the content of committed actions or inaction.

First of all, we can emphasize the specific administrative offences directly related to emergency situations. These, on the one hand, are such actions or omissions that result in increased risk of emergency situations of natural or man-made nature (relatively speaking, actions "generating" emergency situations), on the other hand, these are actions or omissions, the public harm of which occurs only in an emergency situation, that are expressed in making obstruction to organized activities on liquidation of consequences of an emergency (compositions "arising" from emergency situations).

This group of administrative offences, in turn, consists of three sub-groups. Detaching of the first of these three sub-groups is related to the codification of substantive and procedural norms that establish responsibility for administrative offenses: as is well known, since the 1st of July 2002 at the federal level, the main source of those norms in federal legislation is CAO RF [4, 540]. In turn, the delimitation of the second and third subgroups is due to the absence in the current legislation of formal criteria for applying the concept of "threat of an emergency situation", which, in contrast to the concept of emergency situation, has a fuzzy sense.

The first of the three subgroups include deeds, administrative responsibility for the commission of which is provided for by the norms of CAO RF that contain a direct indication of material relationship of an appropriate deed with an emergency situation. An example of such an administrative offense is failure to comply with rules and regulations on the prevention and elimination of emergency situations (article 20.6 CAO RF). As you can see, this norm combines in one offence actions and inaction both "generating" an emergency situation (part 1 article 20.6 CAO RF) and "generated by" an emergency situation (part 2 article 20.6 CAO RF).

In the second subgroup is expedient to combine the compositions of administrative offenses, which are punishable under norms of CAO RF that do not contain in the norm itself direct indication of the substantive relationship of an appropriate deed with an emergency situation, but directing to a law that contains such direct indication. An example of such a composition is a denial to provide information (article 5.39 CAO RF), which the legislator defines as a wrongful refusal to provide citizen and (or) organization information, the provision of which is provided for by federal laws, its late providing or providing of knowingly false information. This norm refers to part 4 article 6 of the Federal Law No. 68-FL from 21.12.1994 (as amended on 01.04.2012) "On Protection of Population and Territories from Emergency Situations of Natural and Man-made Nature" [1], according to which the

cover-up, late submission of information or submission by officials of knowingly false information in the field of protection of the population and territories from emergency situations shall entail responsibility in accordance with the legislation of the Russian Federation. Another example is article 6.3. CAO RF (Violation of the Legislation in the Area of Securing the Sanitary-and Epidemiological Well-Being of the Population and the Legislation on Technical Regulation).

The third subgroup is supposed to include compositions of administrative offenses "generating" and "generated by" an emergency situation, which are punishable under norms of CAO RF that do not contain in the norm itself direct indication of the relationship of an appropriate deed with an emergency situation and do not refer to a law that contains such a direct indication. The relationship between an appropriate action or omission is detected through the analysis of the objective aspect of administrative offences of this group.

As an example of composition of an administrative offense of this group can be given a failure to provide information on the acts of unlawful interference in the facilities of transport infrastructure and on vehicles. Article 19.7.5 CAO RF, which establishes administrative responsibility for failure to submit or late submission by a subject of transport infrastructure or carrier of information about threats of commission or about commission of acts of unlawful interference in the facilities of transport infrastructure and on vehicles to the competent authorities in the field of ensuring transport security, corresponds to paragraph 1 part 2 and part 3 article 12 of the Federal Law No. 16-FL from 09.02.2007 "On Transport Safety" [2]. Part 2 article 12 of the Law establishes the obligation of the subjects of transport infrastructure and carriers to immediately inform about the threats and commission of the acts of unlawful interference in the facilities of transport infrastructure and on vehicles in the procedure established by the federal executive body responsible for elaboration of public policy and normative legal regulation in the sphere of transport. According to part 3 article 12 of the Federal Law No. 16-FL from 09.02.2007, subjects of transport infrastructure and the carriers are responsible for the failure to perform the requirements on ensuring transport safety in accordance with the legislation of the Russian Federation. Analysis of the composition of administrative offense provided for by article 19.7.5 CAO RF indicates that a social harm emerging as a result of it may consist, inter alia, in the occurrence of the threat of emergency situation.

The same group includes compositions of offences described in article 9.1 CAO RF (Failure to Meet the Requirements Concerning Industrial Safety, or the Terms and Conditions of a License for Operating in the Area of Industrial Safety of

Dangerous Production Objects) and 9.2 CAO RF (Violating the Safety Norms and Rules Concerning Hydraulic Engineering Structures).

Common to all these types of administrative offences is that their relationship with emergency situations is detected through the analysis of the objective aspect of deed: there is a causal link between a committed action (inaction) and occurrence of a threat of an emergency situation or obstruction to organized activities on liquidation of emergency situation consequences.

In addition, the analysis of a specific composition of administrative offense in the context of an emergency situation can detect the influence of the conditions of the emergency situation on the determination of the subjective aspect of deed, and, respectively, its qualification as an administrative offense. According to part 1 article 2.1 CAO RF, administrative offense is a wrongful, guilty action (inaction) of a natural person or legal entity, which is administratively punishable under this Code or the laws on administrative offences of the subjects of the Russian Federation. At that, according to part 2 article 2.1 CAO RF, a legal entity shall be found guilty of an administrative offence, if it is established that it had an opportunity to observe rules and norms whose violation is administratively punishable under this Code or under the laws of a subject of the Russian Federation, but it did not take all the measures that were in its power in order to comply with them.

All compositions of administrative offenses for which CAO RF provides for responsibility can be divided into two groups. These are, on the one hand, the compositions, the subjective aspect of which may depend on the presence or absence of an emergency situation, on the other hand, actions and inactions, the guiltiness of which does not depend on the conditions of emergency situation.

Compositions, the subjective aspect of which does not depend on the conditions of emergency situation, include such compositions as, for example, failure to follow in due time a lawful direction (order, citation, decision) of a body (official) exercising state supervision (control) (article 19.5 CAO RF), failure to submit information to the federal executive body in the field of financial markets (article 19.7.3 CAO RF), failure to submit information or failure to submit information in due time about conclusion a contract or its change, execution or termination to the federal executive body of the Russian Federation, local self-government body authorized to run registers of contracts concluded after the placement of orders in accordance with the legislation of the Russian Federation on placing orders for delivery of goods, execution of works and rendering services for state and municipal needs (article 19.7.4 CAO RF) and etc. In an emergency, there may be no objective opportunity to commit actions required by law, this eliminates the guiltiness of an

appropriate inaction, and, hence, the presence of a composition of administrative offense.

Compositions, the subjective aspect of which does not depend on the conditions of emergency situation, include, in particular, failure to follow a rightful order of a policeman, military serviceman, officer to monitor traffic in narcotic drugs and psychotropic substances, employee of the Federal Security Service, employee of a body authorized to exercise the functions of control and supervision in the field of migration, or an employee of body or institution of the correctional system (article 19.3 CAO RF); failure to follow a lawful order of an official of a body exercising state supervision (control) (article 19.4 CAO RF); unlawful denial of access of a tax authority official to inspect territories and premises of a taxpayer, in respect of which tax audit is being conducted (article 19.7.6 CAO RF) and etc. According to the content of these actions, conditions of an emergency situation cannot make them involuntary, therefore, emergency situation cannot exclude their guilt nature.

A detailed analysis of compositions of administrative offences in terms of their possible commission in conditions of emergency situation is intended to promote the rule of law in bringing a natural or legal person to administrative responsibility, including, will help to avoid formal application of paragraph 5 part 1 article 4.3 CAO RF in isolation from the requirements of part 2 article 4.2 CAO RF, Part 2, part2, 3 article 4.1 and paragraph 4 article 26.1, during determining the degree of guilt and imposing of punishment for an administrative offence.

References:

1. Federal Law No. 68-FL from 21.12.1994 (as amended on 19.05.2010) “On Protection of Population and Territories from Emergency Situations of Natural and Man-made Nature” [Federal’nyi zakon ot 21.12.1994 № 68-FZ (red. ot 19.05.2010) «O zashchite naseleniya i territorii ot chrezvychainykh situatsii prirodnogo i tekhnogennogo kharaktera»]. *Konsul’tant Plus. Professional version* [Electronic resource], Moscow: 2012.

2. Federal Law No. 16-FL from 09.02.2007 “On Transport Safety” [Federal’nyi zakon ot 09.02.2007 № 16-FZ «O transportnoi bezopasnosti»]. *Konsul’tant Plus. Professional version* [Electronic resource], Moscow: 2012.

3. Resolution of the Federal Arbitration Court of the North-West district from 14.09.2007 on the case No. A52-4426/2006 [Postanovlenie FAS Severo-Zapadnogo okruga ot 14.09.2007 po delu № A52-4426/2006]. *Konsul’tant Plus. Professional version* [Electronic resource], Moscow: 2012.

4. Bakhrakh D. N., Rossinskii B. V., Starilov Yu. N. *Administrative Law: Textbook for Higher Schools. 3rd ed., revised and enlarged* [Administrativnoe pravo: Uchebnik dlya vuzov. 3-e izd., peresmotr, i dop.]. Moscow: Norma, 2007.

5. Kozlov S. S. Commentary to the Federal Constitutional Law No. 3-FCL from May 30, 2001 "On the State of Emergency" (article by article) [Kommentarii k Federal'nomu konstitutsionnomu zakonu ot 30 maya 2001 g. № 3-FKZ «O chrezvychainom polozhenii» (postateinyi)]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2012.