

Guarantees prior to the issuance of the decision to transfer an employee in Algeria

الضمانات السابقة لصدور قرار نقل الموظفين بالجزائر

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Abstract :

During disciplinary proceedings, informing the employee of the various details of the case and providing him/her with information regarding the charges against him/her is a basic legitimate guarantee in accordance with the law, and this step is necessary in cases of disciplinary proceedings in general, including transfer decisions , We aim to enlighten employees on the most important guarantees they are guaranteed when they are transferred ..

Key words : Transfer Movement ; Employee ; Transfer Guarantees ; Equal Member Committee.

ملخص المقال :

يعد إطلاع الموظف على الملف في الإجراءات التأديبية المتعلقة بقرارات النقل من المبادئ التي تقوم عليها دولة القانون، ونهدف من خلا هذا إلى تبصير الموظفين بأهم الضمانات السابقة المكفولة لهم عند نقلهم ، لكي يكونوا على دراية كافية على الحقوق المضمونة لهم ، بما يمكنهم من مواجهة الإدارة ، فلا يكفي مجرد إخطار الموظف بقرار النقل ، دون احترام الإجراءات والشكليات المنصوص عليها قانونا ، لذلك تعد ضمانات النقل جزءا أساسيا من الحقوق الشخصية للموظف، وخلصت الدراسة إلى أن الضمانات السابقة لقرار نقل الموظف تعتبر أداة مهمة تساهم في استقرار مساره المهني واستمرارية المرافق العامة .

كلمات مفتاحية: حركة النقل ; الموظف ; ضمانات النقل ; اللجنة المتساوية الأعضاء .

Introduction

The transfer process is one of the career path of public servants. It serves as a vital administrative tool that enhances the efficiency of public institutions and promotes functional justice by ensuring equal distribution of opportunities and challenges among employees. In this regard, the transfer of public servants is considered a strategic mechanism to achieve administrative balance and improve government performance effectively and equitably. One of the most prominent processes related to the career path of a public servant is the transfer process as a vital administrative tool that contributes to improving the efficiency of public bodies and contributes to achieving functional justice by distributing opportunities and challenges equally among employees, thus the transfer of public servants is a strategic tool to achieve administrative balance and develop government performance effectively and equitably.

In this context, the Algerian legislator, through various laws related to the public employees, has developed and clarified the aspects related to employee transfers including the methods of management. Conditions. Application mechanisms. And the essential guarantees that precede the transfer decision. These measures aim to safeguard the right of all parties involved and ensure the fulfillment of their duties.

Accordingly, this study stands out as one of the few attempts to thoroughly analyze the pre-transfer guarantees for public servants in Algeria. It seeks to explore the frameworks governing this process by addressing the following question:

How effective are the pre-transfer guarantees for public servants in Algeria?

to answer this question. The study employs the descriptive method to define the key concepts related to the research and the historical method to examine the evolution of successive legislations. following this plan:

First Research: The principle of initial confrontation.

Second Research: Additional guarantees for employee transfers.

1- First Research: The principle of *prima facie*

Informing the accused employee during his disciplinary accountability of what is attributed to him is an important guarantee established by law, and this is a necessary matter required by the disciplinary procedures, and should be guaranteed to the accused employee, whether at the stage of investigation or trial, so that he is aware of the seriousness of his position and is active in defending himself. The mere statement that the violation is proven material and unquestionable is not sufficient for confrontation, as the judgment on the proof or absence of the violation depends on the outcome of the investigation, which is considered the filing of the charge, asking the offender about it, and achieving his defence thereof, one of its essential elements (Bouadi Mustapha, -, 2013-2014).

On this basis, the definition of the principle of confrontation (the first requirement), its foundations (the second requirement), and finally, its various elements (the third requirement) will be explained.

1.1 FIRST REQUIREMENT: Definition of the principle of confrontation:

Confrontation between litigants within the framework of procedural law generally means that each party should be informed of the action taken by the other party (El-Gohary, 2015), and that this should be done in an appropriate time to enable him to object to it if he has the right to do so, that is, the necessity for each party to know the allegations, requests, defences, evidence and proofs presented in the litigation, as well as the procedures taken in the litigation, all at an appropriate time, enabling him to object, respond and discuss them (Al-Kafarneh, 2019).

In the context of a public official, the confrontation is 'face-to-face', i.e. the accused employee is face-to-face with the charges against him (Moufida, , 2008/2009), so he is informed of the charges against him, so that he can prepare his defence and refute the charges against him. In order for the defence to be effective, the defendant must be notified of the offences against him and must be given sufficient time to submit his

comments, and the defendant must be fully informed of all the papers in the file, not just the charges against him (Ahsan, 2015-2016).

In another definition, 'the principle of confrontation is generally intended to enable an accused employee whose rights and interests are exposed to an act that may affect his legal status, to be informed of it so that he can prepare his defence, and the confrontation must take place in such a way that the employee feels that the administration is on its way to take him if it is likely to have evidence to convict him so that he is aware of the seriousness of his position and is active in defending himself. The principle of confrontation acquires its importance from the fact that its essence, which is knowledge, is necessary for the exercise of all aspects of the right of defence (Mustafa), as the opponent cannot exercise his right to be present or to delay or exercise his right to refute the evidence presented by his opponent unless he is aware of it, nor can he exercise his right to present defences unless he is aware of the procedures taken by his opponent or by the court, and cannot exercise his right to oral or written pleading unless he is aware of the factual or legal means, arguments, papers and documents presented by his opponent (Al-Jawhari).

Accordingly, the guarantee of confrontation supervised by the administration is one of the essential and important guarantees, so that the employee can present his defences and prepare for the investigation before the Disciplinary Board after being informed of his administrative file that will be presented to the latter, so the guarantee of confrontation is closely linked to the rest of the guarantees. The direct summons by the administration for the employee to appear before the Disciplinary Council without confrontation has no effectiveness or benefit unless the administration confronts the employee beforehand and determines the type of act attributed to him (Ade, 2016).

Accordingly, Article 14(3) of the United Nations Convention on Civil and Political Rights of 1966 emphasises that "the accused has the right to be informed as soon as possible, in a language he understands and in a detailed manner, of the nature and cause of the charge against him". Hence, confronting an employee with the charge against him is essential, even in the absence of a legal provision, especially in the public service) Mustafa).

In fact, the issue of confronting the employee with the charges against him has become a well-established trend in the field of discipline, and based on this, the administrative judiciary in France and Algeria has settled on the nullity of any. A penalty imposed on the accused public servant if he is not confronted with the charges against him so that he can prepare his defense) Ibid. (.

The notification may be by telegram addressed to the administrative head to be delivered to the employee subject to discipline, or by a judicial report, or by a letter with acknowledgement of receipt.

The role of the administrative authority in informing the accused employee of his right to be informed of the charges against him does not stop for serious offences, for which the penalty is more severe, but even for minor penalties such as warnings or reprimands, which do not require notification to the Disciplinary Board. It is also necessary to confront the employee with the charges against him, whether at the stage of investigation or at the stage of imposing a disciplinary sanction (Ibid).

Hence, confronting the accused employee is one of the general principles established in the scope of criminal trials as well as disciplinary accountability, given that most of the provisions applied in the scope of discipline find their basis in criminal legislation) Adel.

Accordingly, the Supreme Administrative Court in Egypt has defined the controls of confronting the offending employee with the charge under investigation, where it ruled that 'one of the guarantees of the investigation is to inform the worker of what is attributed to him ... and it is not enough to ask the worker questions about certain facts, but he must be confronted with the charges attributed to him to be aware of them and to prepare his defence on the basis of them (Bawadi Mustafa)

1.2 The Basis of the Confrontation Principle:

Two trends have been adopted in the development of confrontation, the first of which considers that the basis of confrontation and defence rights is the idea of punishment, and the second of which considers that this basis is the principle of hearing the other party.

The first trend linked this idea to the idea of punishment, considering the confrontation procedure as one of the general principles that apply in the absence of texts, only for the procedure that has the nature of punishment, while in other cases, confrontation is not required in the procedure, except by text, based on the fact that the administration does not commit in principle to confrontation except in cases that require a real defence. Although the power of the administration to punish is exceptional, this power of the administration is increasingly being recognised, so it is necessary to apply safeguards that are in fact a component of judicial systems (Ibid.) .

As for the other trend, it expanded the basis of the idea of confrontation and attributed it to the principle of (hearing the other party), thus not limiting the scope of confrontation to disciplinary measures, but rather to any measure that involves serious effects affecting a material or moral interest (Moufida Q.) . ISSAC adds that the procedures in which confrontation is obligatory even in the absence of a stipulation are procedures that affect the individual to avoid any danger that leads to control and error. In the same sense, WALINE, who considers that any measure that poses a risk to the interests of a specific person must be preceded by summoning this person to make his comments, even in the absence of a provision to that effect (of, 2006.) .

2. Second Research: Additional guarantees for employee transfers

In addition to the aforementioned guarantees, there are other guarantees that precede the decision to transfer an employee in Algeria, which we will review as follows:

2.1 The first requirement: Guaranteeing the right of defence:

Most civil service laws and regulations stipulate that no punishment may be imposed on an employee, except after hearing his statements and investigating his defence, because the accusation may be baseless; because the crime did not occur at all, or was committed by someone else, and the employee may have reasons or excuses that exempt him from responsibility or reduce the punishment, and the best person who can clarify these matters is the accused (Yasser Ammar Jabbar, 2019,) Although this principle is taken for granted in disciplinary systems, it is of recent origin compared to the criminal system in that it crystallised from the development that was aimed at bringing disciplinary procedures closer to criminal procedures in all aspects related to guarantees under the influence of the principle of hearing the other party (Ibid).

The right of defence is one of the guarantees established for the employee, which consists of the need to notify the employee of the acts attributed to him and allow him to present his defences and objections, either orally or in writing, in order to refute what is attributed to him and present evidence of his innocence (Mustapha).

The origin of this concept is derived linguistically as 'the judged order and the opposite of falsehood, justice, money, ownership, honesty and other vocabulary and the right to prevail in the dispute, and the word (right) is mentioned in the Holy Qur'an in several places such as Almighty God in Surah Al-Nisa verse 122: (God's promise is true) (Ayash, 2007).

As for the word defence in language, it means a lot of defence and protection, he defended him from bad and harm and protected him from it, as the Almighty says: (Allah defends those who believe) [Al-Hajj: 38], i.e. he stops them from the evil of their enemies and protects them.

In the terminology (Al-Shteiwi, 2008), the right of defence is to enable the accused to prove his innocence and avoid the charge against himself during all disciplinary procedures. As such, defence rights include a wide range of disciplinary safeguards accompanying all the procedures taken against the accused employee from the stage of referral to investigation until the stage of imposing the disciplinary sanction (Al-Akidi, 2019) .

Jurisprudential opinions have differed in defining the content of the right of defence and its relationship to the guarantee of confrontation, and several trends have emerged in this regard, including:

- The first trend: Dr Eltamawy believes that defence rights are only a component of the principle of confrontation: For example, Dr Eltamawy believes that confrontation is based on two elements, namely: Declaring the accused and enabling him to defend himself.
- The second trend: He argues for the denial of defence rights in judicial matters, where the principle of face-to-face confrontation prevails, considering that defence rights exist in non-judicial administrative procedures, where the judge is obliged to respect them as a counterpart to the face-to-face confrontation in the judicial procedure.
- The third trend: The proponents of this trend took the functional interpretation of the right of defence and the principle of adversarial confrontation, so that each of them is taken into account in the case, as each of them has a different field, as the principle of confrontation ensures respect for some formalities, while the principle of the right of defence ensures respect for what the parties show in the case.
- The fourth trend: It considers that the right of defence is the purpose of all procedures in the case, and that the procedures are established to protect the parties under the guidance of the judge, and that defence rights guarantee this protection supported by the confrontation, as the principle of confrontation, according to the proponents of this trend, is an element of defence rights (**Mustapha, op. cit.**).

The importance of ensuring the right of defence in pre-trial disciplinary proceedings is due to the fact that these proceedings are predominantly administrative in nature and the dominance of the administration over these proceedings, which opens the door wide to the possibilities of arbitrariness and abuse of power, and as such the need to ensure defence rights in these proceedings seems urgent considering that these proceedings are important in determining the course of the disciplinary case and leaving the employee without defence cover at that stage on the pretext of enabling him to defend in the final stages may cause harm to the employee considering that the trial stage may be far and the continuation of disciplinary procedures and the psychological burden they represent on the employee (**Mustapha, , op. cit.**).

The French legislature has guaranteed this right, as Article 08 of the Decree of 28 November 1983 stipulates that 'except in cases of urgency or exceptional circumstances, decisions that must be legitimately reasoned cannot be taken unless the person concerned is able to present his defence'.

Article 58 of Law No. 210 of 1951 stipulates that it is forbidden for the competent administrative head to impose a sanction on an employee except after hearing the employee's statements and investigating his defence. Article 60 of Law No. 46 of 1964 stipulates the same provision, as does Article 59 of Civil Service Law No. 81 of 2016, which states that no sanction may be imposed on an employee except after investigating him in writing, hearing his statements and investigating his defence (**The, 2015-2016**).

In Algeria, all texts relating to the public service have stressed the importance of the employee's right to defend himself once disciplinary proceedings are initiated, from Ordinance 66-133 to Law 82-06, Decree 82-302, Decree 85-59, as well as the current legislation 06-03 (**Article 130 of Order 06-03, op. cit.**).

Accordingly, the employee is entitled to present all written or oral statements before the equal-member administrative committee or the appeal committee, or to request the presence of witnesses, and he is entitled to see all the accusation papers as soon as he is informed of the error attributed to him, as well as all the documents filed in his file so that he can fully understand the charge against him, prepare his defence, and present everything that may prove his innocence or reduce his responsibility; he may entrust his defence to any person he chooses (**Mustafa, op. cit.**).

In addition to legislative texts, the right of defence has been enshrined in the provisions of the administrative judiciary. In this regard, the French administrative judiciary has played a creative role in guaranteeing the right of defence, affirming the principle of freedom of defence and granting the employee adequate time to prepare his defence, as the administrative judiciary has determined that the rights of defence consist in notifying the concerned person of the action taken against him, and This notification is intended to enable him to mount a meaningful defence, and must take place within a reasonable period of time before the sanction is imposed. The concerned party may also have access to a lawyer and must have access to his personal file, but this access must be complete in order to be able to prepare his defence, as the French Administrative Court of Appeal in Versailles has stated in one of its principles that : The reading by the

disciplinary board of the written remarks made by the employee in the disciplinary proceedings is an essential formality, so the Court of Appeal annulled the decision for an error in form, considering that the reason given by the appellant's administrative consultant in written remarks was not approved in the disciplinary board session, which is contrary to the text of Article 3 and 5 of the Decree of 25 October 1984 containing the disciplinary procedures for employees, which stipulates that :An employee subject to disciplinary proceedings may make written remarks. These written remarks are finally read at the hearing, and are therefore as important as the decision issued by the disciplinary authority (**Ziad Adel**).

The Algerian administrative judiciary has also been keen to guarantee and respect this guarantee as one of the important safeguards that the administration must observe when holding the employee accountable in disciplinary matters, otherwise the administration violates this principle established in jurisprudence and jurisprudence, as ignoring the principle is a violation of the most important safeguards established in the disciplinary sphere (**Bouadi Mustafa**).

2.2 The second requirement: Suspending a public servant except in the interest of the investigation:

Suspension is a preventive measure taken by the administration to serve the public interest, and due to its seriousness, the legislator has surrounded it with a number of conditions, which can be summarised as follows:

1-In this case, the employee is immediately suspended from work by the authority that has the power of appointment, and during the period of suspension, he receives half of his main salary and all family-related grants, and in the event that the committee takes a lesser penalty against him or he is acquitted or the committee does not decide on his case within 45 days, the employee regains his full rights and the part of his salary that was deducted from his salary, and in case the committee takes a lesser penalty against him or he is acquitted or the committee does not decide on his case within a period of 45 days, the employee regains his full rights (**Article 130 of Order 06-03, op. cit**).

2- According to Decree No. 59-85, if an employee is subjected to a criminal prosecution for committing an offence that does not allow him to keep his job, he is immediately suspended, and this suspension continues until a final judgement is issued by the competent judicial authorities, and the administration is not restricted to certain deadlines, but it is obliged to pay him for six months an amount not exceeding $\frac{3}{4}$ of his salary (**Decree No. 85/59 of 23 March 1985, 24 March 1985**).

3-However, this amount was amended by Ordinance No. 06-03 and the salary that the employee benefits from does not exceed half of the salary he was receiving at the time of his suspension. of which the employee will receive no more than half within a period not exceeding six months from the date of suspension, and will continue to receive all family allowances (**Article 131 of Ordinance 06-03**).

3.2 The third requirement: Reasoning the disciplinary decision to compulsory transfer .

Reasoning is one of the guarantees that emerged from the legal civilisation, especially in the field of sanctions, since the guarantee of reasoning as a human right avoids human justice (**Suleiman Eltamawy, 1973**) from the control of opinion and the prevalence of emotion and stands as an impenetrable wall against any imbalance that may affect the human psyche or any emotion that affects human justice, accordingly, reasoning means:"The administration discloses the legal and factual reasons that justify the administrative decision (**Mubaraka, 2010**), and thus the decision is reasoned if it itself discloses the reasons on which the source of the decision was based, as reasoning is the formal expression of the reasons for the decision and therefore belongs to the external legitimacy of the decision (**Al-Salimat, 2013**).

As long as the reasoning falls under the umbrella of the right of defence, it is considered a constitutional right; hence, reasoning is obligatory for all disciplinary decisions and decisions of disciplinary councils, as reasoning is one of the basic principles of the judicial system, and it requires specifying the description of the facts The reasons differ from the reason, as every decision is supposed to have a reason, as the disciplinary decision is generally based on the judge's breach of the duties of his/her job or following the

constitutional rights of the defence. Any judge who violates the legally prescribed duties or orders of superiors within the limits of the law - as will be mentioned below - or deviates from the requirements of duty in the work of his office commits a disciplinary offence, which is the cause of The decision that justifies his discipline as a result of the will of the disciplinary authority to establish a legal effect on him, namely the imposition of a penalty on him in accordance with the form and conditions prescribed by law (Yassin, 2016).

The French legislator has enshrined the principle of justification of the decision, as Article 19 of the Law on the Rights and Duties of Public Officials stipulates that the decision taken, whether by the disciplinary authority or the disciplinary council, must be justified, thus, if the secret deliberations of the disciplinary council are held, the acts that justify the disciplinary punishment of the employee must be adequately justified in order to ensure the principle of impartiality, and this is also confirmed by Article 67 of Law No. 16-84 containing the State Public Service Act in France, which states that: 'The disciplinary authority can decide on the penalty and its justification after taking into account the conditions stipulated in Article 19 of the Law on the Rights and Duties of Public Officials, and after taking the opinion of the equal-member administrative committee, which expresses its opinion publicly: Thus, the penalty or procedure is not legitimate if the administration does not justify its decision, even if the disciplinary council is approved (Adel, op. cit.).

In the same vein, the Algerian legislator followed the same direction by explicitly stipulating it in Article 125 of 85-59 and stipulating it in Article 126, stating in the former that 'the authority decides the first degree penalty by a decision of reasons, and in the latter the second degree penalty by a decision of reasons, and also addressed it in Ordinance 06- 03 on the public service in Article 165: The authority with the power of appointment shall take a justified decision on disciplinary penalties of the first and second degree, after obtaining written explanations from the applicant, and the authority with the power of appointment shall take a justified decision on disciplinary penalties of the third and fourth degree, after taking the opinion (Article 165 of Order 06-03) .

Conclusion:

In the end, we concluded that the topic of pre-transfer guarantees is one of the topics that still needs more research and attention, especially by the Algerian legislator and specialists:

- Employee transfer guarantees are an important tool that contributes to the stability and continuity of public organisations.
- The transfer requires a guarantee of the existence of a vacant position that is compatible with the employee to be transferred.
- We note that the Algerian legislature amended the Public Service Act No. 06-03 by Law No. 22-22 without amending the guarantees that precede the transfer.
- The judiciary's oversight of transfer decisions is an effective safeguard to minimise the illegality of the reasoning behind administrative decisions relating to transfers.
- The procedural texts governing pre-transfer guarantees are ambiguous, as they refer to procedures without clearly defining how to implement them.

In light of these findings, we have decided to make the following suggestions:

- The legislator must define the limits of the public administration's powers to transfer a public employee, as relying on the concept of public interest, which is a broad term, may be used to achieve other objectives under the cover of public interest.
- The establishment of a website by the General Administration of the Public Service in coordination with the Council of State to publish disputed administrative decisions and jurisprudence without naming names.
- The direct transfer in the public service sector may lead to unrealistic decisions and a clear violation of the transfer guarantees recognised by the legislator, as the specificities of the public service sector must be

respected and the experiences of other sectors should not be copied without taking into account the differences.

- In order to preserve the principle of impartiality and enhance the legitimacy of decisions, we propose that the process of reviewing transfer decisions be entrusted to a fully independent body to ensure greater credibility and reassurance for the employee concerned .

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