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Discretionary Powers in the Field of Public Administration and Principles of Their Implementation in the Activities of the Penal System

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Abstract

Introduction: the article is devoted to topical problems of the use of discretionary powers by public authorities in modern conditions of the development of the state and society, as well as the study of basic principles of the application of administrative discretion in the activities of the penal system. *Purpose*: to highlight theoretical and applied problems in the field of administrative discretion in the activities of public administration bodies and officials in general and the penal system in particular. *The methodological basis* of the work is formed by general scientific and private scientific (historical-legal, comparative-legal, descriptive, content analysis) methods of cognition of legal reality. The *conclusions* are substantiated that at present the problem of administrative discretion in the activities of public administration is gaining new importance. In the context of the constant expansion of the sphere of public administration, its complexity, multitasking and situational uncertainty, making even an outwardly legitimate decision in the future may entail adverse consequences that are not obvious or difficult to forecast at the time of making a management decision. In this regard, the question arises of establishing legal boundaries (guidelines) for the actions of public administration bodies in the exercise of powers within the framework of administrative discretion. Such guidelines should be administrative and legal principles of the activities of public administration bodies fixed in legislation in the field of implementation of various areas of subordinate administrative activities, including in the field of subordinate rulemaking, adoption of general administrative acts, individual law enforcement acts, administrative contracts, etc. One of the main advantages of using discretionary powers in activities of the penal system is their ability to provide flexibility and adaptability in the development and adoption of managerial decisions, the search and testing of new advanced management forms and methods. Scientific and practical significance of the work consists in substantiating the provisions that discretionary powers play an important role in improving activities of the Federal Penitentiary Service of Russia, allow it to adapt to changing conditions, and ensure legality and fairness in making managerial decisions. At the same time, in order to exclude abuses and unfair decisions, discretionary powers should be limited and controlled, that is, applied in compliance with the principles of transparency, liability and control.

Keywords: administrative law; discretionary powers; administrative discretion; administrative procedures; penal system.

5.1.2. Public law (state law) sciences.

5.1.1. Theoretical and historical legal sciences.

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Introduction

Development of the public administration system in Russia has actualized a large layer of theoretical and applied problems in the field of administrative discretion in the activities of public administration bodies and officials [1, p. 61; 2, p. 51]. As noted in the special literature, "with regard to administrative discretion, neither domestic legal science nor legislative activity has a unified approach nowadays" [3, p. 197]. In this regard, the question arises acutely about what should be understood by administrative discretion today, what is its content and essence, on what principles it should be applied in public administration, etc.

The dialectical nature of administrative discretion and its internal inconsistency make it possible to consider it in diametrically opposite meanings. On the one hand, the exercise of public administration's powers is always discretionary and is associated with the need to choose the optimal solution from a large number of possible alternatives in conditions of situational uncertainty, multitasking and multilevel management processes, the necessity to simultaneously achieve goals of economic and social efficiency, eliminate contradictions and fill gaps in regulatory regulation, etc. On the other hand, when choosing one or another variant of a management decision, there are always risks of violating current law and harming the interests of various participants in public administration. Moreover, sometimes there are situations when harming the interests of individual subjects of public legal relations is simply inevitable due to the urgent need to make a management decision.

Administrative discretion in activities of public administration in new conditions

Today, the problem of administrative discretion in activities of public administration is gaining new importance. In the context of constant expansion of the sphere of public administration, its complexity, multitasking and situational uncertainty, making even an outwardly legitimate decision in the future may entail adverse consequences that are not obvious or difficult to predict at the time of making a management decision.

In this regard, the question arises of establishing legal boundaries (guidelines) for the actions of public administration bodies in the exercise of powers within the framework of administrative discretion. Such guidelines should be the administrative and legal principles of activities of public administration bodies fixed in legislation in the field of implementation of various areas of subordinate administrative activities, including in the field of subordinate rulemaking, adoption of general administrative acts, individual law enforcement acts, administrative contracts, etc.

Legislative consolidation of the principles of exercising discretionary powers should be the starting point in regulating the exercise of administrative power by public administration bodies and officials. The practical significance of this issue cannot be overestimated, since it directly affects the creation of effective guarantees for the observance of the rights, freedoms and legitimate interests of citizens and organizations, protection from crime by public authorities, and exceeding permissible limits of the exercise of administrative powers.

Legal regulation of public relations in any sphere is constrained by objective limits, which implies the need for public management activities, including those aimed at eliminating gaps in the current legal regulation, adapting the norms of law to real living conditions of people, which, as a rule, is discretionary. In other words, a number of powers of state bodies, despite legislative declaration, do not have strictly regulated administrative procedures for implementation. At the same time, it is necessary to take into account that legal regulation in the field of public administration has objective limits, which necessitates the provision of discre-

tionary powers to public administration bodies. In this regard, the problem arises of setting the limits of administrative discretion and limiting the discretionary powers of public administration bodies and officials.

The European experience in solving this problem is primarily related to the normative definition of administrative discretion principles. Thus, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (80) 2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities (hereinafter referred to as Recommendations) [4, p. 1, 2], in which discretionary powers are defined as the powers of public authorities to choose one of the most appropriate solutions among several legally acceptable. At the same time, attention is drawn to the fact that "the possibility of such a choice requires representatives of public authorities to exercise their (administrative) discretion" [5, p. 73].

Of particular interest is the fact that the main scope of application of the principles of limitation of discretionary powers in accordance with these Recommendations is the protection of the rights, freedoms and interests of persons when adopting administrative acts. In turn, an administrative act refers to administrative measures or decisions taken in the exercise of public authority and directly affecting the rights, freedoms or interests of individuals or legal entities.

The recommendations also define basic principles of the activities of administrative bodies in the exercise of discretionary powers, which include the following requirements:

1. The obligation not to pursue a purpose other than the one for which the authority was granted.

2. The obligation to observe objectivity and impartiality, taking into account only the factors relevant to the particular case.

3. The obligation to respect the principle of equality before the law and to avoid unfair discrimination.

4. The obligation to maintain an appropriate balance between any adverse consequences that its decision may have for the rights, freedoms or interests of persons and the goals that are pursued when adopting an administrative act.

5. The obligation to make a decision within a reasonable time, taking into account the issue under consideration.

6. The obligation to consistently apply general administrative rules and taking into account specific circumstances of each case.

At the same time, there are no acts in domestic legislation that would enshrine a system of principles for the exercise of discretionary powers by the public administration. Currently, there are only separate, fragmentary provisions contained in normative legal acts of various legal force and subject matter, which in one way or another express such principles or at least contain a mention of them [6, p. 44]. At the same time, the presence of disparate provisions contained in normative legal acts of various levels only exacerbates the situation, since it reduces the level of importance of these principles and discretion as a category.

At the same time, a number of these principles are reflected in the acts of the Constitutional Court of the Russian Federation, which indicates certain positive dynamics in resolving the issue of regulating discretion in Russian legal reality. In particular, the Constitutional Court of the Russian Federation repeatedly mentioned the categories of discretionary powers and discretion in its Resolution No. 42-P of October 16. 2020 and rulings No. 2386-O and No. 2492-O of October 29, 2020, which indicates recognition of the existence of these institutions of administrative law at the highest level.

Theoretically, the discretionary powers of public administration bodies are usually attributed to the powers that are granted to public administration bodies and their officials to make decisions within their competence at their discretion within the framework of laws and regulations.

As noted in the specialized literature, administrative discretion is an important element of state (public) management, which allows making managerial decisions aimed at protecting public interests promptly, taking into account the current situation and on the basis of current legislation [3, p. 199]. Discretionary powers are provided to ensure flexibility and efficiency of public administration. They allow public administration bodies and officials to independently determine the ways and methods of performing their tasks, choose the most optimal and appropriate measures and areas of activity.

The main features of discretionary powers are the following:

– freedom of choice of managerial decisions, which allows public administration bodies and officials to choose the most appropriate solutions and methods of work in terms of their effectiveness and expediency;

– restriction by law, which determines the establishment of regulatory limits for making managerial decisions and the obligations of bodies and officials of public administration to strictly comply with the requirements of legality;

– judicial control, which provides the possibility of judicial appeal against decisions of bodies and officials of public administration;

– transparency of the activities and mandatory reporting of bodies and officials of public administration.

The introduction of these principles into activities of public administration will allow to properly limit administrative discretion, provide necessary legal guidelines for administrative management and control over the activities of public administration bodies on the application of discretionary acts and other actions of public administration, that is, provide effective guarantees for the protection of the rights, freedoms and legitimate interests of the individual and society from administrative arbitrariness.

Discretionary powers in activities of the penal system

Discretionary powers are applied in various spheres and areas of public administration, including in law enforcement in general and in the activities of the penal enforcement system in particular [7, p. 509].

The penal system is a complex organizational management system in which various bodies and institutions perform tasks in the field of the execution of criminal penalties. One of its important features of activity is the presence of extensive discretionary powers of bodies and institutions executing criminal penalties in the field of making managerial decisions on resolving specific cases, responding to individual cases or situations. Discretionary powers play an important role in the effective functioning of the penal system [8, p. 18], allowing its bodies and institutions to adapt to changing conditions and ensure legality and efficiency in their work.

Discretionary powers or administrative discretion in activities of the penal system are the powers of bodies and institutions executing criminal penalties and their officials to carry out official tasks on the basis of independent discretion in choosing possible alternatives. These powers enable authorities and institutions to respond to different situations and solve emerging problems in accordance with specific circumstances.

Discretionary powers play an important role in the effective functioning of bodies and institutions executing punishments, in the mechanism of countering corruption and other types of penitentiary crime [9, p. 195], allow them to adapt to changing conditions and ensure the fairness and effectiveness of penitentiary activities [10, p. 80].

One of the main advantages of using discretionary powers in activities of the penal system is their ability to provide flexibility and adaptability in the development and adoption of managerial decisions, the search and testing of advanced forms and methods of management. In an ever-changing political, economic and social situation, bodies and institutions executing criminal penalties should be able to make decisions based on a constant analysis of their practical activities, an expert assessment of their effectiveness and expediency in order to respond in a timely manner to changes and adapt to new tasks, challenges and threats.

An important aspect of discretionary powers in activities of the penal system is their role in ensuring fairness and maintaining a balance of interests of different parties [11, p. 84; 12, p. 82]. Unlike general rules and regulations, discretionary powers help penal system employees to take into account the specific situation and characteristics of each individual case. This allows officials to take into account the individual needs and interests of various categories of persons [13, pp. 792–794], guaranteeing the adoption of a fair and equitable decision.

An important issue in the exercise of discretionary powers in activities of the penal system is the control over their application and their limitation in cases of unfair decisions and abuses.

In this regard, various types of external (state and public) and intra-organizational control are important means of ensuring legality, transparency and openness of decision-making, which imply checking the legality and validity of the decision, the possibility of its cancellation in administrative or judicial proceedings.

Discretionary powers play an important role in the development and improvement of the functioning of the penal system. They allow the implementation of innovative solutions and technologies, for example, in the field of:

digitalization of the sphere of the execution of criminal penalties;

– using telecommunication technologies in conducting procedural actions against persons held in institutions;

– preparing convicts for release;

– carrying out social and psychological adaptation activities;

– development of the manufacturing sector;

– organization of training and education of employees;

– resource support for activities, etc.

Conclusions

The use of discretionary powers should imply the liability of officials for the decisions taken. Voluntarism in the use of discretionary powers is extremely possible and this circumstance implies the need to develop effective criteria for evaluating managerial activities both in the penal system as a whole and in certain areas of its functioning (execution of punishments, resocialization and social adaptation, personnel and other resources, the production sector, etc.).

In general, it should be concluded that discretionary powers play an important role in improving activities of the penal system, allowing it to adapt to changing conditions, ensure legality and fairness in making managerial decisions. At the same time, in order to exclude abuses and unfair decisions, discretionary powers should be limited and controlled, that is, applied on the basis of compliance with the principles of transparency, responsibility and control.

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