

ASSESSMENT OF THE INDIVIDUAL PERFORMANCE OF CIVIL SERVANTS UNDER THE ADMINISTRATIVE CODE

Eugenia IOVĂNAȘ*

ABSTRACT : *Performance indicators are established to assess the degree to which civil servants have achieved their individual objectives. The setting of individual objectives and performance indicators must be linked to the tasks and objectives of the institution in which the civil servant works. In the framework of the individual performance assessment process for civil servants, the training requirements for civil servants are established. The objectives set out in paragraph (1) shall be determined in accordance with the duties set out in the job description, by reference to the public position held, its professional grade, the theoretical and practical knowledge and skills required to perform the public position held by the civil servant, and shall correspond to the objectives of the department in which the civil servant works. The performance indicators referred to in paragraph 1 shall be set out in paragraph (1) shall be established for each individual objective, in accordance with the level of the public office holder's duties, by reference to the requirements relating to the quantity and quality of the work performed. In all cases, the individual objectives and performance indicators shall be made known to the public servant at the beginning of the period evaluated. In this article, we propose to discuss relevant issues concerning the analysis of the annual individual performance assessment report of civil servants, by analysing the two methodologies for assessing the annual performance of civil servants, as described above, with reference to the judicial practice in this field.*

KEYWORDS: *public position; civil servant; professional performance; objectives of the public authority or institution; evaluation report.*

JELCODE: K20, K23

DOI: 10.62838/CJJC.97.2.15

ACTUALITY

The approach to this issue is generated by the existence of several cases being brought before the administrative court, the object of which is the annulment of the annual individual performance assessment report of the civil servants appointed within the Agricultural Directorate of Arad County, the order of the employer to re-assess the individual performance of the civil servants assessed and the accessory claims, aiming either at the granting of a certain grade in the re-assessment, or at the calculation and

* „Aurel Vlaicu” University, Arad, Romania corresponding author's, ROMANIA.

reimbursement of the salary rights, unlawfully withheld on the basis of the grade granted and the payment of the related legal interest.

Subject matter: With regard to the analysis of the annual performance assessment report of civil servants appointed to the Arad County Agricultural Directorate, it can be noted that the provisions of Article 485 of the Administrative Code, approved by O.U.G. no.57/2019, regulate the general assessment procedure.

Thus, the individual performance assessment of civil servants is carried out annually and the process of evaluating the individual performance of executive civil servants and senior civil servants is the objective assessment of the individual performance of civil servants by comparing the degree and manner of achievement of individual objectives and established performance criteria with the results actually achieved by the civil servant.

The assessment of the individual performance of civil servants includes the following elements:

a) *assessment of the extent to which and how well individual objectives have been achieved;*

b) *assessment of the degree to which the performance criteria have been met.*

Performance indicators are established to assess the degree to which individual civil servants have achieved their objectives. *The setting of individual objectives and performance indicators must be linked to the tasks and objectives of the institution in which the civil servant works.*

Individual performance assessments shall be carried out for all civil servants who have actually worked for at least 6 months in the calendar year for which the assessment is made.

The ratings obtained in the individual performance assessment process of civil servants are taken into account in:

a) *promotion to a higher public office;*

b) *the granting of bonuses, in accordance with the law.*

c) *a 10% reduction in salary rights until the next annual individual performance assessment for civil servants who have obtained a "satisfactory" rating;*

d) *dismissal from public service.*

The evaluation of individual job performance is also mandatory when civil servants' employment is modified, suspended or terminated.

The individual performance assessment process for civil servants establishes the training requirements for civil servants.

As far as the concrete evaluation procedure is concerned, a distinction is to be made according to the period under evaluation.

Thus, with regard to the work carried out by civil servants from 1 January 2020, as well as the work of junior civil servants appointed to public office after 1 January 2020, the evaluation procedure is governed by Annex 6 to O.U.G. no.57/2019, on the Administrative Code, on the methodology for carrying out the evaluation process of the individual professional performance of civil servants applicable to the work carried out from 1 January 2020, as well as for carrying out the evaluation process of the work of junior civil servants appointed to public office after 1 January 2020.

According to the provisions of Art.14-16 of the Methodology:

Art. 14 - "(1) *The annual assessment of the individual professional performance of civil servants shall be carried out for one calendar year, during the period from 1 January to*

31 March of the year following the period assessed, for all civil servants who have actually worked for at least 6 months in the calendar year for which the assessment is carried out.

(2) By exemption from the provisions of Art. (1), the annual assessment of the individual performance of civil servants may also be carried out after the period from 1 January to 31 March of the year following the period assessed, if the official's service relationship is suspended for the entire assessment period. In this case, the assessment shall be carried out within 5 working days of resuming work, in accordance with the conditions of this methodology.

(3) By way of exception to Art. (1), the annual assessment of the individual performance of civil servants may also be carried out after the period from 1 January to 31 March of the year following the period assessed, if the service relationship or, as the case may be, the employment relationship of the assessor is suspended for the entire assessment period. In this case, the assessment shall be carried out within 5 working days of the end of the assessment period, with the appropriate application of Article 15(2). (1)(b) of this Annex.

Art. 15 - (1) By exception to the provisions of Art. 14 paragraph. (1) of this Annex, the evaluation of civil servants shall be carried out for another period in any of the following situations:

(a) when the civil servants' employment relationship is modified, suspended or terminated in accordance with the law, if the period actually worked is at least 30 consecutive days;

b) upon modification, suspension or termination of the employment relationship or, as the case may be, of the employment relationship of the assessor, under the terms of the law, if the period actually coordinated is at least 30 consecutive days. If the assessor is legally or factually prevented by an administrative act from actually carrying out the assessment, the status of assessor shall revert to the person who is the countersignatory of the assessment report on the date of termination, suspension or amendment, under the conditions laid down by law, of the employment relationship or, where applicable, of the assessor's employment relationship, with appropriate application of the legal provisions regarding the appointment of another countersignatory, where possible, in accordance with the organisational structure;

c) when during the period under review the civil servant is promoted in grade or professional rank.

(2) The assessment carried out in the situations referred to in paragraph 1 shall be based on the following criteria (1) shall be called a partial evaluation and shall cover the evaluation of the individual objectives referred to in Article 485 (1). (3) of this Code.

(3) The partial assessment shall be carried out on or within 10 working days after the occurrence of the situations referred to in paragraph (1). (1) and shall be taken into account in the annual evaluation.

(4) The partial evaluation of civil servants shall not be required if the civil servant's employment relationship is changed by delegation, suspended in accordance with Article 513 para. (1) (e), (h), (i) and (j) of this Code or, where applicable, terminated under Article 517 para. (1) (a) and (b) of this Code.

Art. 16 - (1) In order to carry out the individual performance assessment of executive and managerial civil servants referred to in Article 485 para. (3) lit. a) of this Code, at the beginning of the evaluated period the person who is the evaluator shall establish individual

objectives for the civil servants whose work he/she coordinates and the performance indicators used in the evaluation of the degree and manner of their achievement.

(2) The objectives referred to in paragraph (1) shall be determined in accordance with the duties set out in the job description, by reference to the public office held, its professional grade, the theoretical and practical knowledge and skills required to perform the public office held by the public servant and shall correspond to the objectives of the department in which the public servant works.

(3) The performance indicators referred to in paragraph (1) shall be established for each individual objective, in accordance with the level of duties of the public office holder, by reference to the requirements of the quantity and quality of the work performed.

(4) In all cases the individual objectives and performance indicators shall be made known to the civil servant at the beginning of the assessment period.

(5) Individual targets and performance indicators may be reviewed quarterly or whenever there are changes in the work or organisational structure of the public authority or institution. The provisions of paragraph (4) shall apply accordingly.

(6) The performance criteria for carrying out the individual performance assessment component of the performance assessment of civil servants under Article 485 para. (3) (b) of this Code are set out in Article 29 (b) of this Annex".

With regard to the work carried out by civil servants until 31 December 2019, the evaluation procedure is governed by the provisions of Articles 621 - 6213 of Law No.188/1999, on the status of civil servants, as resulting from the provisions of Article 597 paragraph 2 letter b of O.U.G. No.57/2019, on the Administrative Code, according to which:

"(2) On the date of enforcement of this Code, is abrogated:

(b) Law No. 188/1999 on the Status of Civil Servants, republished in the Official Monitor of Romania, Part I, No. 365 of 29 May 2007, with subsequent amendments and additions, with the exception of the provisions of Articles 20, 201 - 2010, 60 para. (3), articles 601 - 604, 621 - 6213 and annex no. 2, which apply to the evaluation of the individual professional performance of civil servants for the activity carried out in 2019".

Therefore, according to the provisions of Articles 626-6213 of Law 188/1999:

"Art. 626*) - (1) The annual evaluation of the individual professional performance of civil servants shall be carried out for one calendar year, in the period from 1 to 31 January of the year following the evaluated period, for all civil servants who have actually worked for at least 6 months in the calendar year for which the evaluation is carried out.

(2) By way of exemption from paragraph. (1), the partial assessment of the individual performance of civil servants shall be carried out for a period other than that provided for in paragraph (1) in any of the following circumstances:

(a) when the civil servants' employment relationship is modified, suspended or terminated in accordance with the law, if the period actually worked is at least 30 consecutive days;

b) on modification, suspension or termination of the employment relationship or, as the case may be, the employment relationship of the assessor under the law, if the period actually coordinated is at least 30 consecutive days. If the assessor is legally or factually prevented by an administrative act from actually carrying out the assessment, the status of assessor shall revert to the person who is the countersignatory of the assessment report on the date of termination, suspension or amendment, under the conditions laid down by law,

of the employment relationship or, where applicable, of the assessor's employment relationship, with the appropriate application of the legal provisions regarding the appointment of another countersignatory, where this is possible according to the organisational structure;

(c) when, during the period under review, the civil servant is promoted in grade or professional rank.

(3) The partial assessment shall be carried out within 10 working days of the date of the occurrence of the situations referred to in paragraph (2) and shall be taken into account in the annual assessment, in accordance with the law.

(4) The partial evaluation of civil servants is not required in the case where the civil servant's service report:

a) is changed by delegation;

b) is suspended in cases where the civil servant has been remanded in custody, is under house arrest, or has been placed under the terms of Law No. 135/2010 on the Code of Criminal Procedure, as subsequently amended and supplemented, under the measure of preliminary investigation under judicial supervision or under judicial supervision on bail, if obligations have been established against him/her that prevent the exercise of the employment relationship, is on leave for temporary incapacity for work under the terms of the law, is missing, and the disappearance has been established by a final court decision or in case of force majeure;

(c) shall cease on death or on the final judgment declaring the death of the civil servant.

(5) By way of exception to paragraph. (1), the annual assessment of the individual performance of civil servants may also be carried out after the period from 1 to 31 January of the year following the period assessed, if the service relationship of the civil servant is suspended during the whole assessment period. In this case, the evaluation shall be carried out within 5 working days after the resumption of work, under the conditions of this Law.

(6) By exception to the provisions of para. (1), the annual evaluation of the individual professional performance of civil servants may also be carried out after the period from 1 to 31 January of the year following the evaluated period, if the service relationship or, as the case may be, the employment relationship of the evaluator is suspended during the entire evaluation period. In this case, the appraisal shall be carried out within 5 working days of the end of the appraisal period, with the appropriate application of the provisions of paragraph (2)(b).

Art. 627*) - (1) In order to carry out the individual performance assessment of civil servants referred to in Article 622 para. (1) letter a), at the beginning of the evaluated period, the person acting as evaluator shall establish individual objectives for the civil servants whose work he/she coordinates and the performance indicators used in the evaluation of the degree and the way of achieving them.

(2) The objectives referred to in paragraph 1 shall be set by the (1) shall be established in accordance with the duties in the job description, by reference to the public office held, its professional grade, the theoretical and practical knowledge and skills necessary for the performance of the public office held by the public official, and shall correspond to the objectives of the department in which the public official works.

(3) *The performance indicators referred to in paragraph (1) shall be established for each individual objective, in accordance with the level of the duties of the public office holder, by reference to the requirements of the quantity and quality of the work performed.*

(4) *In all cases, the individual objectives and performance indicators shall be made known to the civil servant at the beginning of the period under review.*

(5) *Individual targets and performance indicators may be reviewed quarterly or whenever there are changes in the work or organisational structure of the public authority or institution. The provisions of paragraph(4) shall apply accordingly".*

Art. 628) - The performance criteria used to carry out the individual performance appraisal component of the performance appraisal of civil servants under Art. 622 para. (1) letter b) are set out in item. III of Annex 2".*

.Important aspects regarding the analysis of the annual performance assessment report of the civil servants appointed to the Agricultural Directorate of Arad County.

Analysing the two methodologies for evaluating the annual professional performance of civil servants, as set out above, by reference to judicial practice in the matter, it is noted that there are three aspects relevant to the issue of analysing the evaluation reports of civil servants:

a)The deadline for the evaluation;

b)The individual objectives and performance indicators are made known to the civil servant at the beginning of the appraisal period.

c)Consequences of the annulment of the assessment report/application for the award of a specific appraisal grade in the reassessment or for the calculation and reimbursement of the salary rights unlawfully withheld on the basis of the appraisal grade awarded and the payment of the related legal interest.

a) The deadline for carrying out the assessment.

With regard to the term for carrying out the evaluation, it can be noted that in the old legislation, concerning the activity carried out by civil servants until 31 December 2019, the evaluation term is between 1 and 31 January of the year following the period evaluated, for all civil servants who have actually carried out activity for at least 6 months in the calendar year for which the evaluation is carried out, as it results from the provisions of Article 626 paragraph 1 of Law No. 188. /1999 on the status of civil servants, whereas in the new legislation, concerning the activity of civil servants from 1 January 2020 and the activity of junior civil servants appointed to public office after 1 January 2020, the evaluation period is between 1 January and 31 March of the year following the period evaluated, for all civil servants who have actually worked for at least 6 months in the calendar year for which the evaluation is carried out, as stated in Article 14, paragraph 1 of Annex 6 to O.U.G. no.57/2019, on the Administrative Code, regarding the evaluation methodology.

b) The individual objectives and performance indicators are made known to the civil servant at the beginning of the appraisal period.

With regard to this requirement of legality of the evaluation report, we note that both in the old legislation, concerning the work carried out by civil servants until 31 December 2019, namely the provisions of Article 627, paragraph 4 of Law No. 188/1999 on the status of civil servants, and in the new legislation, concerning the work carried out by civil servants from 1 January 2020, as well as the work of junior civil servants appointed to public office after 1 January 2020, namely Article 16 paragraph 4 of Annex 6 of the O.U.G.

no.57/2019, on the Administrative Code, regarding the evaluation methodology, *in all cases, it is stipulated the requirement that the individual objectives and performance indicators are made known to the civil servant at the beginning of the evaluated period.*

In this regard, the judicial practice of the Timisoara Court of Appeal has consistently held that, *since it has not been proven that these individual objectives were brought to the attention of the civil servant at the beginning of the period assessed, the assessment of the applicant's annual professional performance was carried out formally, without analysing the assessment criteria in concrete terms and without complying with the legal requirements*, and thus without setting out in concrete terms the aspects on which the contested assessment was based, namely the concrete method of awarding marks during the assessment, which leads to the unlawfulness of the assessment report and, by implication, its annulment.

However, there is a non-uniform practice at the Timisoara Court of Appeal level in the concrete way of analysing and applying this requirement of legality of the civil servant's evaluation report.

Thus, in one case it was decided that individual objectives are established in accordance with the duties in the job description and *there is no impediment for them to be identified with the duties in the job description*, as long as the conditions set out in Article 16 of Annex 6 to O.U.G. No. 57 /2019 are met, on the Administrative Code, concerning the evaluation methodology, which require that these objectives be established by reference to the public office held, the professional grade of the same, the theoretical and practical knowledge and skills required to perform the public office and which correspond to the objectives of the department in which the civil servant works.

However, *the Court of Appeal held that the assessment report was null as there was no evidence that the individual objectives had been brought to the attention of the civil servant at the beginning of the period assessed.* Thus, although the defendant argued that the individual objectives were contained in the job description, namely in a decision issued by the management of the DAJ Arad by which the applicant was appointed to a committee for the implementation of decision no. 716 /2020 on the approval of the 'The minimis aid scheme to compensate for the effects of the adverse hydro-meteorological phenomena which occurred between March and May 2020 in the beekeeping sector', the applicant did not prove those claims either before the court of first instance or before the court of appeal, nor did he prove that the job description and the decision referred to above had been notified prior to the period assessed, in order for it to be held that that notification represented notification of the individual objectives for 2020, thus complying with Article 16 paragraph (4) of the Methodology.

However, *given that no such evidence was provided and that the appraisal report for the period 2019 does not record any objectives under the heading 'objectives for the next appraisal period', the Court held that the Court of First Instance was right to hold that it had not been proved that the objectives for the appraisal period had been brought to the attention of the civil servant at the beginning of the appraisal period.* The Court held that it was irrelevant that the 2019 appraisal report had not been contested by the applicant, as the applicant was not dissatisfied with the grade awarded in that report and the defendant had the burden of proving that the individual objectives for 2020 had been communicated to the civil servant.

The Court also found that the first court correctly held that the assessment of the applicant's professional performance for the period from 1 January 2020 to 31 December 2020 was carried out formally, without analysing the assessment criteria in detail and without complying with the legal requirements, and that the aspects on which the contested assessment was based, namely the specific method of awarding marks during the assessment, were not set out in detail. Thus, in the assessment report challenged in the present case, the assessor did not give reasons for the marks awarded and the court is thus unable to verify the lawfulness of the procedure, since the content of the assessment report does not clearly show the considerations which led to the award of those marks, the evaluation report does not contain any reasoning as regards the assessor's assessments for each of the performance criteria used in the evaluation, the 'Comments' section of each of the 11 performance criteria is not completed, and the percentages indicated in the first part of the evaluation report as to the weighting of the achievement of the performance indicators relating to the six objectives are not justified (see Civil Decision No. 261 /18.03.2022 pronounced by the Timisoara Court of Appeal - Administrative and Fiscal Litigation Section in case no.2607/108/2021).

In another case it was decided that the appraisal report was unlawful because it was *not proven that the objectives for the period under appraisal, which are not confused with the duties in the job description, as the appellant wrongly tries to claim, were brought to the attention of the civil servant at the beginning of the period under appraisal, and the performance indicators were not properly set out, with no relevant explanations/comments being recorded for any of the performance criteria.*

However, the contested appraisal report, in the section 'objectives during the period under review', reproduces almost in full the duties mentioned in the job description. In those circumstances, the Court held that the assessment of the applicant's professional performance in the period from 1 January 2019 to 31 December 2019 was carried out formally, without setting out and analysing the assessment criteria in concrete terms and without complying with the legal requirements in terms of both the legality and the thoroughness of such a procedure. In those circumstances, the Court held that the result of the assessment, the mark awarded, is uncertain, without any guarantee that it accurately reflects the work carried out, which is such as to show that an objective assessment of the applicant's work was not carried out in practice, and that the aspects on which the contested assessment was based, namely the specific method of awarding marks during the assessment, were not set out in detail (see Civil Decision No 374 /25.03.2021 delivered by the Timisoara Court of Appeal - Administrative and Fiscal Litigation Section in case no. 1072/108/2020)

c) The consequences of the annulment of the appraisal report/the ancillary claims concerning either the award of a specific appraisal grade in the reassessment or the calculation and reimbursement of the salary rights, unlawfully withheld on the basis of the evaluation grade awarded and the payment of the related legal interest.

In the cases, the main subject-matter of which is the annulment of the annual individual performance appraisal report of the civil servants appointed to the Agricultural Directorate of Arad County and an order that the employer should re-evaluate the individual performance of the civil servants evaluated, the applicant also brought ancillary proceedings, The applicants claim that the Court should, following the upholding of the main head of claim and the annulment of the appraisal report, either order the defendant to

award a specific mark in the reassessment or order the defendant to calculate and repay the salary rights unlawfully withheld on the basis of the mark awarded and to pay the related statutory interest.

In one case, the Court of First Instance dismissed the applicant's secondary head of claim, seeking an order that the defendant alter the final mark and award the mark 'very good', on the ground that it is *not the court's function to substitute itself for the assessor*, especially since, on the basis of the information in the file, no such assessment can be made, and the court cannot therefore impose the mark to be awarded following the reassessment (see civil judgment No 877 /09.11.2020, pronounced by the Court of Arad - Section III - Administrative and Fiscal Litigation, Labour and Social Security Disputes in case no.1072/108/2020). This decision of the first instance was not challenged by appeal, only the decision given to the main claim, which was to annul the evaluation report, was challenged and upheld by the appeal court.

In another case, the Court of First Instance dismissed the applicant's additional claims for an order that the defendant calculate and repay the unlawfully withheld salary entitlements and pay the statutory interest thereon. In its reasoning, the first instance held that those heads of claim related to the repayment of salary rights and the related interest, rights which had been reduced for the applicant following the award of a 'satisfactory' grade. However, even if the plaintiff is to be reassessed, *the court cannot substitute itself for the assessment committee in order to know, with certainty, whether or not, at the new assessment, the plaintiff will exceed the "satisfactory" qualification in order to be entitled to the undiminished salary rights* (see civil judgment no.1312/03.11.2021 pronounced by the Court of Arad - Section III - Administrative and fiscal litigation, labour and social security disputes in case no.2607/108/2021).

This decision was modified on appeal, with the Timișoara Court of Appeal ordering the defendant Arad County Directorate for Agriculture to reimburse the applicant the sums withheld following the award of the "satisfactory" rating in the annulled individual performance appraisal report and the related statutory interest, calculated from the date on which those sums were withheld until the date of actual payment. In its reasoning, the Court of Appeal found that, following the award of the "satisfactory" rating by the individual performance appraisal report drawn up on 29.03.2021, pursuant to Article 485(7) of the O.U.G. no.57/2019 and Article 21(1)(c) of the Methodology, the applicant's salary rights were reduced by 10% until the next annual individual performance appraisal. *Given that the individual performance appraisal report drawn up on 29.03.2021 was found to be unlawful and was annulled, and that the reason for reducing the applicant's salary rights by 10% was the "satisfactory" rating obtained in the individual performance appraisal for 2020, the Court held that it was therefore necessary, in view of the ancillary nature of those small amounts, to allow the application for reimbursement of the amounts withheld following the award of the "satisfactory" rating and the award of the related legal interest calculated from the date of deduction of these amounts until the date of actual payment, the qualification to be awarded to the plaintiff following the reassessment being irrelevant, as long as the reason for the reduction in salary rights no longer exists at that time (see civil decision no.261/18.03.2022 handed down by the Timișoara Court of Appeal - Administrative and Fiscal Litigation Section in case no.2607/108/2021).*

We cannot agree with this solution, because the reason for the reduction of the applicant's salary rights by 10% is the "satisfactory" rating obtained by the applicant in the

evaluation of individual professional performance, as provided for in Article 485(7) of the O.U.G. No. 57/2019 and as provided for in Article 21(1) letter c of the Methodology, and the reinstatement of the applicant's assets implies the awarding of a rating higher than 'satisfactory' in the new assessment, which cannot be done by the court, since the assessment of civil servants and the determination of the ratings to which they are entitled is beyond the jurisdiction of the court, which is the exclusive responsibility of the assessment committee of the institution, appointed in accordance with the law. In other words, even if the appraisal report is annulled by the court, the court may not reassess the applicant, and there is no certainty that the appraisal carried out by the appraisal committee will award the civil servant a higher mark than 'satisfactory' in order to allow his claim for repayment of the reduced salary entitlement, since the committee may again award the mark 'satisfactory' and is not bound by the court's assessment of the civil servant's professional performance, but only of the legality of the appraisal report.

In addition, it is undeniable that the appraiser has an obligation to listen to the appraisee, otherwise, by not doing so, he will cause the appraisee an injury which, under the circumstances, no longer needs to be proven by the appraisee, but must be presumed in the case.

On the other hand, in the context of the fact that, contrary to the legal provisions already set out, and the theoretical considerations set out, the appeal was not resolved in the presence of the parties, the civil servant in question was not heard, and the decision adopted by the committee deciding the appeal was in no way reasoned, it must be held that the decision to maintain the score relating to the assessment of the civil servant is null and void, since the court does not have the legal prerogative to invalidate the decision of the assessment committee and, moreover, to proceed to a new assessment by awarding a higher score than that originally awarded by the assessment committee.

However, through such a case law ruling we consider that the court has exceeded its general jurisdiction, exceeding the powers of the judiciary, having no legal basis to re-evaluate itself the evaluation sheet in educational management, awarding marks based on its own assessment of the grades given by the evaluator.

The High Court of Cassation and Justice has also pronounced in the same sense in Decision no. 1580 of 11 April 2008 of the Administrative and Fiscal Contentious Section, published, showing that the discretionary power conferred on an authority cannot be considered, in a state governed by the rule of law, as an absolute and unlimited power, since the exercise of the right of appreciation by violating the fundamental rights and freedoms of citizens provided for by the Constitution or by law constitutes an excess of power, in the context in which the Romanian Constitution provides in Article 31 para. 2 of the Constitution requires the public authorities to ensure that citizens are properly informed about public affairs and matters of personal interest. The High Court therefore held that any decision likely to have an effect on fundamental rights and freedoms must be reasoned not only from the point of view of the power to issue that act, but also from the point of view of the possibility for the individual and society to assess the legality of the measure, that is to say, whether the boundaries between discretionary power and arbitrariness are respected, since to accept the view that the employer does not have to give reasons for its decisions is tantamount to emptying the essence of democracy and the rule of law based on the principle of legality.

Moreover, it has also been held in Community case-law that the statement of reasons

must be appropriate to the measure issued and must set out in a clear and unequivocal manner the algorithm followed by the institution which adopted the contested measure, so as to enable the persons concerned to establish the reasons for the measures and also to enable the Community courts to review the measure (Case C-367/1995).

As the European Court of Justice has ruled, the extent and detail of the statement of reasons depends on the nature of the act adopted, and the requirements which the statement of reasons must meet depend on the circumstances of each case, an insufficient, or incorrect, statement of reasons is deemed to be equivalent to a failure to state reasons for acts, as in the present case. Moreover, failure to state adequate reasons or failure to state reasons renders Community acts null and void or invalid (Case C-41/1969). A detailed statement of reasons is also necessary where the issuing institution has a wide discretion, since the statement of reasons makes the act transparent, allowing individuals to verify whether the act is properly reasoned and, at the same time, enabling the Court to exercise judicial review (Case C-509/1993).

In a different perspective, however, but in full agreement with the same decision of the High Court mentioned above, in our opinion, it is the employer's prerogative to award grades in the annual performance appraisal procedure, and the court hearing the action for annulment of the annual performance appraisal form has the power only to review the legality of the appraisal procedure, without carrying out the appraisal itself and awarding another grade.

Last but not least, but for the purposes of the considerations set out above, it is clear that in exercising the legality review, the court cannot proceed to only partially annul the file in question, precisely because it is not entitled to make judgments of expediency, i.e. to assess the work, in accordance with the legal provisions and cannot "issue" another assessment of service "with a higher value". In addition, based on the relevant legal provisions and the relevant case law, we consider that the court may not rule on the granting of a particular type of rating, it has the power to exercise exclusively the control of legality of the evaluation procedure of the individual performance of the civil servant in activity, and it may order the re-evaluation procedure with the observance of the legal rigours, but without subrogating itself to the rights and obligations of the evaluator.

The awarding of the rating in the annual individual performance appraisal procedure is the prerogative of the employer and the modification of the score is the exclusive responsibility of the appraisal committee.

In conclusion, we express the opinion that only when the right of assessment of an authority turns into an abuse of law, the court has the possibility under Article 18 of Law No. 554 of 2004 on administrative litigation, to censor the act in order to annul it and possibly in order to oblige the authority to re-evaluate, without replacing the powers of the committees and without itself changing the relevance of certain certificates concerning the qualifications and skills of candidates.

REFERENCES

- O.U.G. nr.57/2019 PRIVIND Codul Administrativ al României publicat în Monitorul Oficial nr28 din 10 ianuarie 2023
- Sentința civilă nr.877/09.11.2020, pronunțată de Tribunalul Arad – Secția a III-a Contencios administrativ și fiscal, litigii de muncă și asigurări sociale în dosarul nr.1072/108/2020).
- Decizia civilă nr.261/18.03.2022 pronunțată de Curtea de Apel Timișoara - Secția de Contencios Administrativ și Fiscal în dosarul nr.2607/108/2021).
- Decizia civilă, nr 262 din 19 .02. 2010, pronunțată de Curtea de Apel Timișoara în dosar nr 1050/108/ 2010
