

THE ILLEGALITY OF CERTAIN PROVISIONS OF NOTE NO. 575/2009 OF THE NATIONAL HOUSE OF PENSIONS

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ABSTRACT: Note no. 575/2009 of the National House of Pensions contains illegal provisions, in the sense that for updating magistrates service pension in 2006-2007 it is not justified to modify the base salary by including salary rights won on the basis of court orders.

Abusive interpretations of the law had existed even before the advent of this note, but some decisions were changed by administrative procedures, the processes in which those decisions were contested remaining redundant.

KEYWORDS: service pension; update; Note no. 575/2009 of the National House of Pensions.

JEL CLASSIFICATION: K 23, K 31

As a result of issues arising during the implementation of Law no. 303/2004¹ the National House of Pensions issued for the territorial subunits note no. 575 of March 5, 2009, which includes more instructions for different situations.

Paragraph 2 refers to settling claims for recalculation of service pensions for magistrates who have received remuneration on the basis of court orders, stating that "To upgrade service pension in 2006-2007 it is not justified to modify the base salary by including salary rights gained on the basis of court orders". This issue is covered in other directions addressed by CNP to some county houses of pensions².

Therefore, most county houses of pensions have asked income certificates from judges and prosecutors who were in these situations, stating explicitly that the amounts earned on the basis of court orders should not be included in the calculation. For magistrates who have been previously granted those rights, decisions of imputation have been issued in the amount of recalculated sums, the aspects which represented the basis of such decision were succinctly presented, or the differences were recovered from the subsequent updates of the

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¹ Law no. 303/2004 on the status of judges and prosecutors.

² Note no. 128/824/30.04.2009 addressed by C.N.P. to C.J.P Brașov states that "To upgrade service pension in 2006-2007 it is not justified to modify the base salary (by including salary rights gained on the basis of court orders)".

pension. For these reasons some magistrates did not realize these aspects, and others have been hesitant to challenge in court the illegal decisions, due to various reasons. Applications for administrative resolution of these issues have been protracted, often rejected on the ground that judicial decisions are not binding on the National House of Pensions and pension payment can be increased only in the month following the one when the requirement is made, under Art. 169, Paragraph 3 of Law no. 19/2000³.

1. It is conclusive in this regard a case in which Brasov County House of Pensions and Brasov Court⁴ ignored legal requirements and some principles of law, conceding that rights gained in other court orders cannot be taken into account.

Thus, P.I. retired on September 1, 2005 while three litigations regarding the recognition of salary increases were pending. These were subject to joint action with other work colleagues, remaining irrevocable after retirement⁵. Court orders referred to income growth in the period before retirement and had to determine the retroactive calculation of pension starting from September 1, 2005, because the average income for determining service pension was modified.

The aforesaid did not act consistently to achieve all these rights, and some requests have been treated illegally by the House of Pensions.

Thus, after the first irrevocable court order, he obtained from the Prosecutor's Office attached to Brasov Court of Appeal, a certificate⁶ showing that at the retirement date he had a gross income average of 6320 lei, which included those obtained by sentence no. 494/2006.

On December 14, 2006 he has presented this certificate to Brasov County House of Pensions⁷, with court orders attached, on which the pension should have been recalculated retroactively to the amount of 5562 lei, starting with September 1, 2005, taking as a basis the income average resulting from the addition of prescribed gain in the sentence.

Since he received no response, after several months he formulated a new application in the same scope⁸, sending the new certificate and copies of court orders. Brasov County House of Pension told him that "*Civil Sentence 494 / M/ of 22.06.2006, which was filed in December 14, 2006, is not binding on the House of Pensions*" and that "*the recalculated pension shall be paid starting from the month following the one that the application of recalculation was filed according to art. 169 (3) of Law no. 19/2000⁹*".

Both communicated issues are illegal because such court orders are binding on the House of Pensions, even if it was not part of the process, since the litigations regarded wages, referring to the period in which he was an employee, not a pensioner, determining another rate of wages which should be used retroactively, only after sentences have become final. Article 169 (3) of Law no. 19/2000 refers to other issues, not applicable to

³ Law no. 19/2000 on pensions.

⁴ Brasov Court, civil sentence no.1723/M/2009.

⁵ Brasov Court, sentence 494/2006, final by decree 344/18 X 2006, resulted in an increase of 40% of revenue in the last 12 months of activity, which were the basis for calculating pension; sentence no. 810/M/06.09.2007 referred to seniority increment for the period 2003 -2005; sentence no. 67/F/19.09.2008 established a 50% increase in monthly gross salary for the period 01/07/2005 to 01/09/2005.

⁶ Request registered under no. 9677/22 V 2007.

⁷ Application registered no. 9677/22 V 2007.

⁸ Application registered no. 9677/22 V 2007.

⁹ Address no. 17.934/9.677 of June 4, 2007.

court orders, even if the retirement had been made under this law. The limitation of this right could not be invoked, because the limitation period for claiming the right begins on the date when the court order is final and irrevocable and not from the period date set therein.

The pension increased only in 2007¹⁰, when they had to recalculate it anyway on the basis of another certificate¹¹, which showed that the average gross income at retirement date was 6756 lei, due to gains from another sentence. In that decision too was stated that it is applicable only from 1 January 2007.

Seeing that the original illegal decisions were not challenged in court, Brasov Territorial House of Pensions continued abusive actions in 2009, imputing him a part of the money received during the years 2006-2007. To this end Brasov County House of Pensions requested another certificate from the Prosecutor's Office attached to Brasov Court of Appeal, referring to pension recalculation starting from 1.I.2006 and 1.I.2007, referring to C.N.P.A.S. note no. 575 / 5 III/2009 and wrongly stating that it is necessary to communicate the gross revenue of the last 12 months by magistrates who are in business, and not reported to their own income¹².

As a result of the incorrect application, the Prosecutor's Office attached to the Brasov Court of Appeal, communicated strictly what was asked¹³, ignoring the holder's rights gained by court orders. On this basis the difference which was paid in 2006 and 2007¹⁴ was imputed and also on the basis of another certificate, which showed that the 12 months average gross income from the date of retirement included amounts earned by court orders.

The last decision was challenged in court, but Brasov Court committed the same error, stating that the certificates on file are contradictory, and requested a new certificate, but erroneously stated that it must include "*the average gross income of the last 12 months made by a prosecutor in service*"¹⁵. Based on this wrong question, the answer was wrong, with reference only to "*the gross income for the last 12 months made by a prosecutor in service*".

Thus the court rejected the appeal against decisions which decreased retroactively the pension and imputed the amount of 11,379 lei for the period 1 January 2006-31 March 2008¹⁶. As grounds of the sentence it was shown that there are many certificates referring to income, so that for the pension updates in 2006 and 2007 only the certificates which refer to the gross average income over the past 12 months by a prosecutor in activity have been properly taken into account.

This sentence is illegal and unjustified, because court orders should be taken into consideration by the House of Pensions, by the acceptance of certificates which referred to the existence of a medium income increased in the previous months before retirement, in relation to the one communicated at the time of granting the pension, when those

¹⁰Brasov County House of Pensions, Decision 248.917 of 26 March 2007.

¹¹ Prosecutor's Office attached to Brasov Court of Appeal, certificate no.901/ February 27, 2007.

¹² Brasov County House of Pensions, address no.16945/ April 9, 2009.

¹³ By certificate no. 1314/IX/1/ April 17, 2009 the Prosecutor's Office announced that the average net income of a prosecutor with similar rank was 6.756 lei.

¹⁴ Brasov County House of Pensions, decision no. 396/ May 14, 2009.

¹⁵ Brasov Court, the sentence of November 5, 2009.

¹⁶ Brasov Court, civil section, civil sentence no.1723/M/2009.

decisions did not exist. Furthermore, reference is made to that effect in one of the items of note no. 575/05.03.2009 of the National House of Pensions, which provides that "*If the magistrates, based on court rulings won remuneration (salary increases in general), service pension rights will be reviewed, following that the remuneration earned be included in the calculation used to determine initial service pension. They are entitled to the new rights from the date of the initial establishment, if the court did not dispose otherwise (to the first update, respecting the general term of limitation and on condition of presenting new certificates issued under the provisions of GD no. 1275/2005*"¹⁷.

These rights remain valid for the period of subsequent recalculation, since upgrading magistrates pension provisions seeks to maintain them at a reasonable level and not reduce them, even if the wages of active magistrates were apparently diminished over a period of time because of some magistrates not introducing actions regarding wage increases, or suspension of payment of such rights for a period of time.

The fact that no pension may be reduced by ignoring the increases won by court orders results from several methods of analysis of the judicial text, including analyzing the evolution of law. According to Art. 85 Paragraph 2 of Law No. 303/2004 modified, "*If after updating the service pension the resulting pension is lower, the judge or prosecutor can maintain the pensions under payment*". Paradoxically this legal provision was stated in the criticized sentence, without taking it into account.

The constitutional principle of preserving economic rights won acts in this case, because a higher pension than the one retroactively recalculated in 2009 was previously legally obtained.

The illegality of the erroneous interpretations of the National House of Pensions and the Brasov County House of Pensions results from the fact that they gave and respectively applied other interpretations only in 2009 for a 2004 law, referring to the period of 2006-2007, even though another perception existed at that time.

2. Abusive interpretation of legal provisions existed even before the emergence of note no. 575 of March 5, 2009 of the National House of Pensions, but on some decisions they got back on administratively, leaving redundant processes in which these decisions were challenged.

Thus Hunedoara County House of Pensions issued a decision¹⁸ which annulled the decision issued several months ago in which a magistrate's pension was increased due to the increment of the average income in the last 12 months of work, because of wage rights gained through judicial action. The final part of that decision was not grounded by right and in fact, in accordance with Art. 86 Paragraph 2 of Law 19/2000, mentioning only that "*the civil sentence no.1258/2006 of Hunedoara Court is not enforceable to Hunedoara County House of Pensions*".

During the process Hunedoara County House of Pensions issued another decision which annulled the contested decision and wage increases obtained by court orders after retirement date were taken into account. The correction of the service pension was operated with the initial registration date for pension and the reimbursement of the

¹⁷ National House of Pensions, note no. 575/March 5, 2009, point 2 paragraph 2.

¹⁸ Hunedoara County House of Pensions, decision no.195.414/April 7, 2007.

imputed sum was ordered. As a result, the opposing party indicated that he waives trial, as devoid of object and the court took note of this¹⁹.

3. Another decision of updating the pension²⁰ was appealed on the grounds that the long service allowance obtained after retirement was not taken into account, although Art. 4¹ paragraph 2 Law no.45/2007²¹ provides that: "*long service allowance shall be paid (...) and it shall be taken into consideration for the granting, recalculation and updating of magistrates pensions*". It was also disputed the fact that the pension was updated only starting from April 1, 2008, and not from March 9, 2007, as required by Law. 45/2007.

During the process another decision was issued by the County Pension House granting the claimed rights, so that the process remained devoid of object²².

4. In another case the annulment of a decision to recalculate retirement pension²³ was requested on the grounds that service pension was only updated from January 1, 2006, the year 2005 being omitted. The court granted the appeal, annulled the contested decision and ordered Arad County House of Pensions to pay the differences due for 2005 and issue a new decision to update the rights of the challenger appropriate to salary increases for 2005²⁴. The appeal of Arad County House of Pensions was dismissed as unfounded²⁵.

In conclusion, it appears that there were numerous instances of circumvention of legal provisions during the recalculation of service pensions for judges and prosecutors, some of which have not been charged or contested by beneficiaries. Some cases were resolved through administrative channels, whereas those who have issued decisions realized that they are illegal, and others have been invalidated by the courts.

Despite this, the National House of Pensions issued note no. 575/2009, which tends to generalize the issue of illegal decisions to recalculate service pensions for judges and prosecutors, counting on the many regulations in this area. It is tragic the fact that some court decisions have ignored the legal provisions and principles of law, creating dangerous precedents in relation to current policy on restoring the magistrates pensions.

¹⁹ Hunedoara Court, labor disputes department, sentence no. 919/2007.

²⁰ Hunedoara County House of Pensions, decision no.195.414/July 31, 2008.

²¹ Law no.45/2007 published in Official M. no. 169 from March 9, 2007 for the approval of Government Emergency Ordinance no.27/2006 on salaries of judges and prosecutors in the justice system.

²² Hunedoara Court, employment litigation section, conclusion no. 888/LM/2009.

²³ Arad County House of Pensions, decision no.234.887/May 24, 2006

²⁴ Arad Court, civil division, sentence no. 1129/2006.

²⁵ Timisoara Court of Appeal, labor disputes department, decision no. 30/2007.