

## **Contraindications of the disciplinary responsibility of a public servant according to the provisions of the Libyan law and judiciary**

**By**

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### **Abstract**

It is known that as a result of the increase in the requirements of working life, it had an impact on the nature of the work of the operating institutions, which led to the change of the general system of the state from the custodian state to the maid that is based on facilities that provide public services to individuals and groups, provided that those facilities work only through The path of the public employee assigned to perform his work, which is entrusted with a number of obligations that he should follow and respect, and in the event of violation of them, the employee will be in front of a functional responsibility if the basic pillars that lead to discipline are established, knowing that most of them do not fall on the employee's shoulders, the rules of justice do not require That, and it was necessary to establish barriers to deviate from functional responsibility, and distanced when approving the penalty because of administrative guilt if it occurs, including what may be barriers due to the employee's psychological and mental nature such as alcohol, taking narcotic substances, absence of the mind, and loss of awareness that is not responsible for it, and some of them are due to external factors Such as emergency circumstances, and cases of extreme necessity beyond his control, in addition to cases within the scope of the job, and in times of the employee's practice in his work that lead to committing a mistake whose burden and responsibility does not fall on the employee, such as Or and fulfill the orders of his superiors within the limits of the law and according to criteria set by the legislator.

### **Introduction**

A public employee is every person who works for the management authority on a permanent and continuous basis, and in return enjoys a set of rights, such as the right to promotion, the right to salary and others according to a regulatory or contractual relationship linking the employee to the public facility in which he works, and in return for rights there are a number of obligations that he must undertake. He is subject to it, otherwise he will be faced with an error that the administration must punish in case of violation, according to a mechanism approved by the legislator with guarantees for the employee through a ruler represented by the disciplinary system that begins with summoning and interrogation, then investigation and approving a punishment commensurate with the administrative guilt committed, if the employee's mistake is proven by violating his duties and job obligations, However, there may be exceptions in which it is not possible to question the employee and question him, which prevent the imposition of penalties on him, such as force majeure circumstances or loss of legal capacity, which, if achieved, prevent the employee from being disciplinary responsibility.

Accordingly, we will address this topic according to two main topics: the first is in the conceptual framework of disciplinary responsibility, and the second is in the establishment of barriers to functional responsibility.

## Research Importance

The importance of the research is highlighted as it sheds light on a basic human rights issue, which is the employee's general rights and how to protect them from the abuse of the administration on the one hand, and to provide means of protection for the employee so that he can start his work comfortably on the other hand, so that he has guarantees that exempt him from disciplinary responsibility in the event of errors that are the cause in which the job or accidental events outside his control without the direct intervention of the employee.

## The Problem of the Research

We will address the problem of the research with a set of queries as follows:

1. What is the standard for measuring and adapting a disciplinary offense?
2. What are the main legal reasons on which the employee is relieved of responsibility?
3. What are the limits of the reasons for exempting the employee from liability?
4. Which is the authorized direction to adapt and estimate the employee's exemption from liability?

## The Methodology of the Research:

The study in this research relied on the descriptive analytical approach in accordance with the provisions of the Libyan Labor Law No. (12) for the year 2010, the pleadings law and the provisions and principles of the Libyan Supreme Court.

## THE FIRST TOPIC

### *The Conceptual Framework of Disciplinary Responsibility*

To clarify the nature of disciplinary responsibility, we will address it in two demands: the first regarding the concept of disciplinary crime, and then its causes in a second demand.

#### *The First Demand: The nature of the disciplinary offense.*

Disciplinary crime in its general sense does not differ with the criminal crime in terms of elements, as it is based on major pillars that make up its strength, although it is decided that criminal crime is based on three pillars according to the predominant criminal jurisprudence, which are the legal, material, and moral pillars.

However, there is a disagreement about the elements of crime in administrative jurisprudence, where some consider the disciplinary crime based on the material element only, which is the violating employee to be disciplined and the administrative guilt, and another trend sees the presence of the material and moral pillars, and the legal pillar is not considered as it is outside of it, and it does not enter into its composition <sup>(1)</sup>, by analogy with the rule that there is

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<sup>(1)</sup>Dr. Khalifa Salem Al-Jahmi. Judicial oversight on the proportionality between punishment and punishment in the field of discipline (a comparative study), Al-Fadil House and Library for Publishing and Distribution, Benghazi, 2013 AD, pg. (29-31).

no crime or punishment except with a text that does not apply to the administrative law, considering that it is a structural law based on jurisprudence and not codified.

Although the prevailing opinion goes to embrace the trend of the tripartite division of the elements of disciplinary crime, as is the case for criminal crime, which is the most likely opinion, as the crime depends on two pillars of the material and moral act, but the third pillar (the legal)<sup>(2)</sup> is considered a base for adapting the nature of the criminal act or if it depends on the discretion of the disciplinary authority, but it depends on the general rules to establish the idea of an abstract act or not.

This is because the legislator, as approved by the Libyan Supreme Court (that he did not enumerate disciplinary crimes exclusively as he did in criminal crimes, where the latter is subject to the principle (no crime or punishment except by text), but left to the disciplinary authority wide freedom in its estimation, and this freedom must be matched Extensive effective judicial oversight, to ensure the seriousness of the reason

In the administrative decision, and when the court is satisfied with the material existence of the incident, its attribution to the accused, its conformity with reason and its consistency with the investigations, it will move to adapting the incident to verify whether it is an administrative fault or not ( ).

Accordingly, whoever has the disciplinary authority may consider any positive or negative action committed by the employee when exercising his job duties as a disciplinary offense if it does not conform to the duties of the public office, and it is considered a departure from the requirements of the job or a breach of the dignity of the public office and therefore the disciplinary offense cannot be limited ( ).

In general, the impediments to responsibility do not arise except in the event that the crime has actually occurred, and that the perpetrator has a reason that makes him ineligible for punishment, and it follows that the failure of the material element or the moral element is no more than an impediment to responsibility, even if the absence of one or both prevents the crime from taking place.

#### The Second Requirement: The Reasons For The Disciplinary Offense

Disciplinary violation does not occur except when the employee breaches his job duties, or deviates from its requirements by performing a negligent or negligent behavior in performing his duties positively or negatively, or performing a prohibited act, and what this involves a breach of good conduct ( ).

(<sup>1</sup>) Judgment of the Libyan Supreme Court issued on 11/29/1973 in Appeal No. (1/2 s) (10/2) pg. (14)

(<sup>1</sup>) Dr. Muhammad Abdullah Al-Falah, Administrative Law Provisions (Comparative Study) Dar Al-Fikr University Alexandria, year 2016 AD, page 226

(<sup>1</sup>) Ibid., p. 221.

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(<sup>2</sup>) The legal pillar means the legal base on which it is based to describe an act or conduct as constituting a disciplinary burden, whatever its source, whether constitutional, law, custom, or regulation.

look at that dr. Khalifa Salem Al-Jahmi, previous reference, p. 32.

with the investigations, it will move to adapting the incident to verify whether it is an administrative fault or not<sup>(3)</sup>.

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### ***The Second Requirement: The Reasons For The Disciplinary Offense***

Disciplinary violation does not occur except when the employee breaches his job duties, or deviates from its requirements by performing a negligent or negligent behavior in performing his duties positively or negatively, or performing a prohibited act, and what this involves a breach of good conduct<sup>(5)</sup>.

It should be noted that the legislator had drew a path for the employee in return for rights, in which he recognized many duties, and the most important:

#### ***First: The Functional Duties***

The public employee has obligations approved by the legislator to regulate his function relationship with the facility in accordance with the principle of respecting the job to serve the citizen, and to achieve the public interest - whether inside or outside it, by preserving the dignity of the function in accordance with the rules of religion, custom and morals.

In this regard, Article 122 of the Libyan Labor Relations Law<sup>(6)</sup> stated that (a public function is a mandate for those who hold it, and it is their duty to perform their work with diligence and perfection, and to act in their behavior in a manner consistent with religion, morals and dignity, and that their pioneer in carrying out its work is a service citizens and the public interest).

As well as emphasizing the good behavior of the employee in his private life outside the functional framework by making good conduct, behavior and good reputation among the conditions for assuming the public position in the administrative units according to the text of the third paragraph of Article (128) of the aforementioned law, which stipulates that (he shall be of good conduct and good reputation).

Therefore, the job according to the previous legal text is a mandate and not an honor, and the public employee should perform his work at the time and place allotted for that,

This duty of public order is not permissible for the employee to waive it, or to perform it at the place of his job unless the nature of his work requires him to do so<sup>(7)</sup>.

Mistakes committed by the employee when performing his function, and in implementation of the applicable laws, regulations and systems, are considered attached mistakes as long as they occurred by an employee during the performance of his job or because of it, and then these mistakes result in harm to others, the administration bears the

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<sup>(3)</sup> Judgment of the Libyan Supreme Court issued on 11/29/1973 in Appeal No. (1/2 s) (10/2) pg. (14)

<sup>(4)</sup> Dr. Muhammad Abdullah Al-Falah, Administrative Law Provisions (Comparative Study) Dar Al-Fikr University Alexandria, year 2016 AD, page 226

<sup>(5)</sup> Ibid., p. 221.

<sup>(6)</sup> Libyan Labor Relations Law No. (12) of 2010.

<sup>(7)</sup> Dr. Muhammad Abdullah Al-Falah, Provisions of Disciplinary Authority and Control over it (a comparative study), New University Publishing House, Alexandria, 2016 AD, p. 41.

responsibility alone according to the responsibility of the subordinate and the subordinate for the action of his subordinate, and that In contrast to the mistakes committed by the employee outside his job, or committed during the performance of his job but with bad faith, or for personal motives, and the employee is responsible for them civilly or criminally, if they cause harm to others, or to the administration, the employee is obligated to compensate in his personal capacity, and from his own financial liability according to what Referred to by the Civil Service Law <sup>(8)</sup>.

Therefore, if the employee's mistake is based on the performance of a legitimate act due to the implementation of his job duties, disciplinary responsibility is precluded. But this matter is not taken for granted, and it must be in accordance with criteria and conditions that can be summarized as follows:

***A. Conditions that fall on the management Authority:***

1. The management should have discretionary authority.
2. There is a reason to use this power
3. Approval of the administration's procedure for what it has done when using its discretion in accordance with the law in terms of form and substance
4. That the administration, if it uses the discretionary power, seek the public interest.

***B. Conditions that are burdened by the public servant:***

- 1 - Having good faith when performing a legal act.
- 2 - That the violating act is based on carrying out work in the service of citizens and in order to achieve the public interest.

***Second: Obedience to Functional orders:***

The superiors' Obedience is one of the most important duties of the employee, and from these duties his foundation is derived from the principle of presidential authority; This is because the presidential authority in its various manifestations is exercised by superiors who have seniority in the service, which makes them more aware of the work and its needs, and therefore more knowledgeable and able to confront and solve its problems, in addition to the fact that the president is primarily responsible for the progress of work in the unit he heads <sup>(9)</sup>.

Most of the legislations have approved the principle of obedience to superiors, including the Libyan legislation, where Article (151) of the aforementioned Labor Law stipulates that each boss is responsible for his actions and the actions of his subordinates, and managers, heads of departments and those in their position have the power to approve, amend, dissolve, withdraw and cancel all their subordinates. According to the law, and stated in Article (152) that the presidential competencies always include, even if not provided for by law, the development of work methods, simplification of procedures, the development and development of human resources and the application of regulations and laws.

For this duty the jurists give great importance, and they consider that one of the most prominent duties of the employee is the duty to obey his superiors and perform their work according to their directives. Obedience is the backbone of every administrative system <sup>(10)</sup>.

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<sup>(8)</sup> Ibid., pp. (43-44).

<sup>(9)</sup> Dr . Maged Ragheb Al-Helweh, Administrative Law, Mansha'at Al-Maaref, Alexandria, in 1992, pg. 275.

**1.** <sup>(10)</sup> Dr.. Muhammad Suleiman Al-Tamawi, Disciplinary Judiciary, a comparative study, fourth edition, Dar Al-Nahda Al-Arabiya, Cairo, 1987, p. 176.



Therefore, obedience to superiors in public utilities is obligatory, for the sake of respecting the hierarchy and working collectively for the sake of the common good, so that obedience is not blindly; But within the limits of law and regulations.

In this, what was approved by the principles of the Libyan Supreme Court in its ruling issued on 10/29/2000 (what was settled by the judiciary of this court is that the employee's relationship with the state is an organizational relationship governed by laws and regulations, and it arranges a general legal position to which these laws and regulations apply and is not subject in any way to the will of employee or management body)<sup>(11)</sup>.

It is worth mentioning that reverence and respect for superiors does not restrict the employee in exercising his rights and freedom, and does not prevent him from objecting and complaining, and it is only in the form of a grievance, and in return, the superior does not exceed the legal limits, and in the event that the employee is exempted from any responsibility resulting from these actions; But within the limits drawn by the law, we will address them in the second topic.

## The Second Topic

### *Contraindications Disciplinary responsibility of the employee*

Contraindications to the employee's disciplinary responsibility stem from punishment in many forms and cases, the most important of which are:

Loss of discernment and awareness, and lack of freedom of choice, which we will address in two matters .

### *The first demand : loss of discernment and perception.*

The impediments to responsibility arise due to awareness, or lack of discrimination, or awareness, due to the absence of awareness and lack of focus, which may be due to the absence of the mind due to insanity, mental illness<sup>(12)</sup>, or due to unintentionally ingesting substances that gild the mind such as alcohol, or ingesting them by necessity or compulsion.

The Libyan legislator did not define insanity and mental illness a comprehensive and precluding definition, but left it to the competent authorities to define insanity and identify its symptoms, based on medical reports from the competent authorities, and this is what the Libyan Supreme Court approved in its ruling issued on 01/27/1955:

(Assessing whether the accused suffers from a mental disability that has made him lose his sense and choice is a matter related to the facts of the case, and the trial court decides on it finally, and it has the right, if the matter is accurate, to seek the assistance of experts)<sup>(13)</sup>.

And if criminal jurisprudence has a role in defining insanity, where Dr. Awad Mohammad went on to say that insanity is (every affliction that afflicts a person and affects his equipment or powers that dominate his perception and choice, thus corrupting one or both of them, whether the affliction is original or accidental, and whether it is represented by a disease Mental, nervous, psychological or organic)<sup>(14)</sup>.

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2. <sup>(11)</sup> The ruling of the Libyan Supreme Court in the appeal No. S 22/44 year and the number of the magazine is unknown.

<sup>(12)</sup> Although psychologists tend to give the name psychological disorders to include psychological and mental illnesses, but some specialists distinguish between psychological and mental illnesses, on the basis that mental illnesses originate from disorder and seriousness related to feelings, mood and outlook on life." As for neurological diseases, their origin is a defect in the nervous system central.

Excerpts from an article published in Al Jazeera Net by the writer Farida Ahmed on 9/7/14 201 AD

<https://www.aljazeera.net/news/lifestyle/2019/5/17/>

<sup>(13)</sup> Judgment of the Libyan Supreme Court in the appeal No. (Sq. 5/2), year and number p1 / C / page 9.

<sup>(14)</sup> Dr. Awad Mohammed, Penal Code, General Section, New University House, Cairo, year 2000 AD, pg. 471.

Articles 62, 79, 83, 84, and 85 (penalties), and Article 312 (procedures) for the case of an accused person with a mental handicap, stipulating that a crime is not punished unless it is committed voluntarily and willingly.

Accordingly, we conclude that the conditions for abstaining from responsibility for insanity or mental impairment are as follows:

1. It is proven that the employee in question suffers from insanity or mental illness of the mind that leads to lack of will, awareness of actions and freedom of choice.
2. The absence of oriented and awareness coincided with the employee's committing an act that violates his functional duties
3. The loss of feeling or choice shall be in the event of a violation of functional duties in whole and not in part.
4. The competent authorities are entrusted with proving the state of loss of awareness and lack of awareness and assessing this according to the facts of the case.

In the consumption of mind-gum substances, such as alcohol and anesthesia, as a barrier to disciplinary responsibility, the consumption must be not voluntary, in the sense of losing the feeling to take alcohol or drugs without the knowledge of the employee and for compelling reasons, whether with the intention of treatment or in preparation for a surgical operation, or if he is forced to take them. Any responsibility on the employee in the event of committing a disciplinary violation while he is under the influence of these mind-bending substances that he dealt with by choice or compulsion.

This is what the Libyan Supreme Court approved in its ruling issued on 3/7/1956 that (voluntary drunkenness does not exempt from responsibility for committing intentional or unintentional crimes, and does not diminish them, because if the offender commits alcohol consumption, he must expect that the loss of feeling may Therefore, the Libyan law legislated in Article 88p to increase the penalty in the case of voluntary drinking of alcohol by an amount not exceeding one third, unlike if the offender used alcohol by compulsion or as a result of an emergency accident or force majeure, then the offender is exempted from punishment if the drunk was completely (m) 87 p) The punishment is reduced for him if he reduces the power of feeling and will without removing it<sup>(15)</sup>.

In general, drunkenness is considered a criminal act against the employee, whether inside or outside the job, and it contradicts the job behavior. On the one hand, the private life of the public employee is not his private property, so he must take into account in his actions that he does not perform a behavior or action that affects his job, himself or the view of individuals He has, as his actions may result in a shake of the confidence of individuals in the public office and those who act in its affairs<sup>(16)</sup>.

***The second demand: Abstaining from disciplinary responsibility for the employee due to the loss of freedom of choice.***

***First: Obedience to the Supreme Leader:***

This is what was approved by the Libyan Labor Relations Law No. (12) for the year 2010 and referred to in Article (155), whereby the employee is exempted from disciplinary responsibility if three basic conditions are met:

1. If the act ascribed to him was committed based on an order from his superior.
2. The order should be in writing.
3. That the matter is directed to the employee.

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<sup>(15)</sup> Judgment of the Libyan Supreme Court in Appeal No. (C 68/2) Yearand number of Journal P1/C p. 321.

<sup>(16)</sup> Dr. Abd al-Hafiz Ali al-Shimy, Impediments to the Disciplinary Responsibility of the Public Employee at the Supreme Administrative Court, first edition, Dar al-Nahda al-Arabiya, Cairo, 2006, p. 113.

In this case, the person who issued the orders is responsible for this act, and he is also exempted from civil liability, except in the case of personal error.

***Second: abstention of the functional responsibility due obsolescence***

Also, Article (164) of the Libyan Labor Relations Act referred to, dropped disciplinary responsibility due obsolescence for perpetrators in two cases:

1. In the event that three years have elapsed from the day the violation occurred.
2. Five years for violations that result in the loss of a right to the public treasury.

Provided that this period is interrupted in the previous two cases by any procedure of investigation, accusation, or trial if taken against the accused, and the period shall run again starting from the last procedure. And in the case of multiple accused, the interruption of the period for one of them entails the interruption of the period for the rest

***Third: Abstaining from disciplinary responsibility in cases beyond the employee's control.***

One of the factors that make a person lose freedom of choice is his being under physical or moral compulsion, force majeure, or an emergency accident.

And by force majeure is meant the occurrence of an exceptional circumstance resulting from the act of man or nature that is not expected and cannot be repelled. If an employee commits a violation in the shadow of these force majeure, it is not permissible to impose a penalty on him because of that, provided that the burden of proof of this force majeure rests with the plaintiff, and he is Employee <sup>(17)</sup>.

When such cases arise and the administration is certain of their occurrence, it is not responsible for holding the employee accountable for the violating act, for example, the occurrence of wars or revolutions and rebellions in the employee's place of residence, for example the Libyan case during the February 2011 events, which resulted in the suspension of work in most facilities operating in the state administration.

Therefore, in these cases, the employee is exempted from direct responsibility for his work tasks inside the facility, and it is arbitrary and abuse of authority to apply the text of the third paragraph of Article (174) of Labor Law No. (12) for the year 2010 referred to, which considered those who cut off from their work fifteen A day in the judgment of the resigned.

The same thing involves cases of necessity, and necessarily means a danger that can only be repelled by committing the contrary act, and the necessity is often the result of nature, and the following conditions are required for the occurrence of the state of necessity <sup>(18)</sup>:

- 1 - The existence of a danger to oneself, and it is required that it be serious in a way that takes away the freedom of choice for the employee.
- 2 - The danger is immediate.
- 3- The employee should not have a voluntary will to cause this danger.
- 4 - That the violation is necessary to ward off this danger.
- 5- That the violation is the only means of defending himself and keeping the danger away.

With the availability of these conditions, the necessity that permits the violating act will prevent the employee's disciplinary responsibility for this act, and the subject judge shall

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<sup>(17)</sup> Dr. Abdel Aziz Abdelmoneim Khalifa, for the responsibility of performing him in the public office, Maarif Foundation, Alexandria, year 2007 AD.150

<sup>(18)</sup> <https://www.alanba.com.kw/kottab/mahmoud-abdulhadi>.



consider the conditions for the necessity in each case separately when the dispute is presented to him.

## Conclusion

After we had discussed the research and its highlights, it becomes clear to us that the reasons for establishing the disciplinary responsibility of the public employee are in case of his violation of his functional duties, or his refusal to implement the orders of his superiors, but the legislator put a number of guarantees to protect the employee in the absence of direct responsibility when the error is not occurred from him according to the text of the law as it is The order when performing a legitimate act due to the implementation of his job duties, or due to the implementation of direct orders from his superior based on written instructions from him, Including outside his will, for example, cases of insanity and drunkenness without his will, and in necessity and force majeure, that all these circumstances do not prevent the employee from responsibility if he knows that it has occurred or participates in it, even if it is outside the official working hours because the employee's private life is linked to the working life in a manner that does not contradict the rules of conduct and morals.

## References

### *First: the books*

- Dr. Maged Ragheb Al-Helweh, Administrative Law, Mansha'at Al-Maaref, Alexandria, in 1992.
- Dr. Muhammad Abdullah Al-Falah, Administrative Law Provisions (Comparative Study) Dar Al-Fikr University Alexandria, year 2016.
- Dr. Muhammad Abdullah Al-Falah, Provisions of Disciplinary Authority and Control over it (a comparative study), New University Publishing House, Alexandria, 2016 .
- Dr. Muhammad Suleiman Al-Tamawi, Disciplinary Judiciary, a comparative study, fourth edition, Dar Al-Nahda Al-Arabiya, Cairo, 1987.
- Dr. Abdel Aziz Abdelmoneim Khalifa, , The Disciplinary responsibility in Public Function , Maarif Foundation, Alexandria, year 2007.
- Dr. Abd al-Hafiz Ali al-Shimy, Impediments to the Disciplinary Responsibility of the Public Employee at the Supreme Administrative Court, first edition, Dar al-Nahda al-Arabiya, Cairo, 2006.
- Dr. Khalifa Salem Al-Jahmi. Judicial Control on the proportionality between punishment and crime in the field of discipline (a comparative study), Al-Fadil House and Library for Publishing and Distribution, Benghazi, 2013.

### *Second: The provisions*

1. Judgment of the Libyan Supreme Court.

### *Third: The laws*

1. Libyan Penal Code
2. Libyan Code of Criminal Procedure
3. Libyan Labor Relations Law No. (12) of 2010.

### *Fourth: The Internet*

1. <https://www.aljazeera.net/news/lifestyle/2019/5/17/>
1. <https://www.alanba.com.kw/kottab/mahmoud-abdulhadi>.