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**CORRELATION AND DETERMINATION OF CONCEPTS IS A
"PUBLIC OFFICER" AND "OFFICIAL PERSON"
IN UNDERSTANDING OF GOVERNMENT SERVICE,
AS A CONSTITUENT OF STATE ADMINISTRATION**

In independent Ukraine development of institute of government service is important constituent of process of creation of the state, in fact efficiency of activity of all branches of state machine depends foremost on staff composition and quality of the legal providing of activity of civil servants.

In the conditions of adoption of administrative and legal reform in Ukraine before research workers-administrative law scientists necessity appeared for forming of new theoretical-conceptual principles of government service. Thus finding out of maintenance of concept vehicle which will contain a new legislation about government service must become fundamental principle, notably maintenance of concepts "public officer" and "official person", and determination of their correlation.

Till 90th of the last century in a legislation and legal literature a concept "official person" was used. In the first time in the legislation concept "public officer" appeared with adoption of Act of Ukraine "About government service" of

1993. Gradually it purchased the wide use in legal acts.

However legislator assumed a severe error, not specifying the criteria of differentiating of concepts "public officer" and "official person". Adopted on July 11, 1995 The law of Ukraine "About making alteration and additions in some legislative acts of Ukraine in relation to responsibility of public officers" made alteration only to Criminal, Criminal procedural codes and Code about administrative offences - in relation to the use of term "public officer" in place of "official person", and in relation to other legislative acts this question remained unsolved.

A national legislation, using these both terms, does not contain the unique approach in determination of their correlation which is negatively reflected in practice of application of corresponding norms. Avoiding differentiating of concepts "official" and "public" persons, legislator often utilizes the generalized concepts "employees", "workers". Particularly, in Laws of Ukraine "About Security Service" and "About a militia".

By the way, in Law of Ukraine "About Security Service" these concepts are used as identical, that follows from item 5, where is fasten a right on an appeal in the court of "wrong acts of public (official) servants and organs of Security Service". Subsequent actualization of examined problem took place after adoption of Constitution of Ukraine of 1996, which next to term "public officer" fastened and term "official person" (items 19, 40 and 56).

Adoption of new Criminal code of Ukraine (in 2001) more complicated a situation with the use in the legislation of these concepts. Without any motivation and ground legislator in determination in Code of concept "official person" utilizes definition "public officer" which was contained in previous release of the Criminal code of Ukraine.

It is necessary deep research of maintenance of concepts "public" and "official" servant for the purpose of decision of collisions in legislation and overcoming of inconsistencies in realization of the corresponding legal norms which will be instrumental in hallmarking their differentiating.

A concept "public officer" is possible to probe through the prism of official-legal relations where it is. Character of activity of civil servant is always conditioned by kind and place of position in the structure of public organ. Some civil servants take part in all of the stages of administrative process, and other - only in separate. An important element for determination of role of person in official activity is a presence of imperious (in this case state imperious) plenary powers. Determining of legal status of office worker, it is necessary to pay a regard to organizational and law aspect of power - as "approach of intrusion own will to other subjects and rule their conduct and acts in way fixed by legal norms." [1]. At presence of imperious plenary powers distinguish two groups: first, office workers who have them,

and second, those which do not own such plenary powers.

The presence of imperious plenary powers determines the important role of person in an administrative process, giving him levers of influence on forming of organ or his subsection and on direction of activity of inferiors on service of workers in the direction of implementation of tasks and functions in accordance with jurisdiction of this organ. As a transmitter of imperious plenary powers, such office worker is conferred by the right of organizationally prescriptive actions which are accompanied by determination of forms and application of the corresponding methods of administrative activity, by the choice of model of influence on inferiors and creations of terms for implementation by them official-labor duties. Public officers concern exactly to this group of office workers.

Executing plenary powers, public officer simultaneously realize jurisdiction of the corresponding organizational structure and carries out a management of people, "influencing on their conduct with the help of legally imperious actions" [2]. Specifying this sign, somebody marks ability of public officer to "do compulsion to the action" [3]. However, taking into account organizationally official character of connections between a public officer and his inferiors, it follows above all things to mark a right of public officer to apply the measures of disciplinary compulsion. Also public officer is competent to utilize encouraging measures which are instrumental in the increase of degree of implementation incumbent businesses.

As a rule, public officers are provided with imperious plenary powers from the moment of substituting of leading position. Leading position lays on them a task of accomplishing of organizationally prescriptive actions and representative office of interests of organ or his structural subdivision in external relations. Exactly herein "ambivalent" nature of legal status of public offi-

cer shows up "to execute own plenary powers and simultaneously to be of interest" headed organizational structure, providing realization of its jurisdiction. On this sign attention was repeatedly accented by research workers [4].

On occasion laying on the person of imperious plenary powers takes a place on the basis of the special normative legal acts, commissions on realization of organizationally prescriptive actions, it liquidation (reorganization) of public organ or his subsection can exemplify, as a result redistribution of tasks and functions which belonged to jurisdiction of this organ. An office worker can acquire status of public officer in the case of temporal implementation of plenary powers of leader of organizational structure or its subsection, although, here, substituting of leading position does not take a place.

Thus, for a public officer a characteristic sign is holding leading position, which confers the right to accomplish legally imperious actions which spread on inferiors by service of persons. It is thereon marked in definition which is contained in item 2 of Law of Ukraine "About government service": "Public officers are consider leaders and deputies of leaders of public organs and their vehicle, other civil servants on which laws or other normative acts are fix realization of organizationally prescriptive and advisory deliberative functions". However, determining this concept, at the wrong time to mark implementation of "advisory deliberative functions" by public officers, as from maintenance of "service", as activity of man follows that all office workers are provided with such functions. We will notice that in relation to this position in legal literature already were remarks [5].

Any public officer is transmitter of imperious plenary powers which create the real possibilities for providing of internal management of corresponding organizational structure and right for an external management - in accordance with the hierarchy of construction of the system of

public agencies. The public officer of government service is provided with state imperious plenary power, which gives him a right to present the corresponding public authority or his subsection in the process of implementation of official tasks and functions. At the same time it carries personal responsibility for activity of organizational structure, whose interests it presents.

Consequently, to activity of public officer such signs are inherent:

- realization of multifunction management in relation to inferiors persons at service;
- management of financial resources;
- right of applying the measures of the official influencing (measures of encouragement and disciplinary responsibility);
- present interests of the corresponding authority or subsection in external relations, that foresees the personal responsibility for activity of the corresponding organizational structure.

Thus, it all testifies about "linear" (but not "functional") character of power which public officer is provided with. On this basis, it is possible to define, that public officer of government service is a civil servant which with the purpose of permanent or temporal management of public authority or his subsection, and also representative offices of his interests in external relations, provided with state imperious plenary power and competent to accomplish official juristic meaningful acts.

Depending on a volume and sphere of imperious influence it is accepted to distinguish "functional" character of power, in other words, functionally imperious plenary powers. It follows to define the last kind, like competence of person to apply the imperious influence on other participants of relations within limits of executable by it official functions, notably to this group, in our opinion, it is necessary to take official persons.

In a note to item 364 of Criminal code of Ukraine definition of "official person" is given: "Official persons are persons, which carry out the

functions of public agents constantly or temporarily, and also work constantly or temporarily on enterprises, in establishments or organizations regardless of patterns of ownership positions, related to implementation of organizationally prescriptive or administrative duties, or carry out such duties by the special authorities". Such signs of official person are selected:

- 1) realization of functions of public agent;
- 2) implementation of organizationally prescriptive functions in obedience to position;
- 3) implementation of administrative duties in obedience to position;
- 4) implementation of organizationally prescriptive functions or administrative duties on the basis of administrative act.

It is necessary to express a few critical remarks in relation to this position of legislator.

At first, it is impossible to consent, that the volume of duties of all public agents is identical, particularly, when status of official person and public officer coincide (for example, ordinary militiaman and chief of regional department of internal affairs).

Secondly, maintenance of organizationally prescriptive functions are: organization of work of organ or his subsection, placing of staff, planning of activity of agency, edition of administrative acts. It is necessary to mark that realization of organizationally prescriptive functions engulfs and administrative duties as plenary powers from a management or disposing of state collective or private property. The resulted signs characterize the process of the use of "linear" power and are determining for public officers.

Thirdly, the lack of the analyzed criminal legislation is equation of concepts of "function" and "duties". However concept of "function" and "duties" is correlated as "general" and "partial". Functions specify directions of activity of office worker, and duties specify this activity, determine facilities, methods and forms of realization of

functions, predetermine the choice of management style.

Thus, determination in the criminal legislation of concept "official person" through different criteria is not instrumental in a synonymous estimation him legal nature.

The basic criterion of differentiating of concepts "public officer" and "official person" must become character of imperious plenary. Notably, the actions of official person generate legal consequences for physical and legal persons, which are not with them in official-legal relations. An official person within the limits of current legislation is conferred the right to apply the measures of the administrative forcing to the participants of legal relationships which violate the normatively set rules of conduct.

Opinion of O. Kulbasha in relation to it is seemed suitable, that an official person is a participant of administrative and legal relations, unlike a public officer which is the participant of official-labor relations [6].

Probing legal nature of concept of official face of government service, it is necessary to select such incident to it signs:

- 1) presence of the special authorities which are fastened by normative legal acts;
- 2) competence to give out pointing of obligatory character both for physical and legal entities which are not in official-labor relations;
- 3) application of measures of administrative compulsion in cases, foreseen by legislation.

On the basis of worded it is possible to formulate definition of official person: an official face of government service is a physical person, which occupies constantly or temporarily position in public authorities, related to implementation of the special authorities, given in the set by law order, in relation to persons who are not with it in an official submission, and in cases, foreseen by legislation, has a right to apply the measures of administrative compulsion.

In this connection it is impossible to accede to the Law of Ukraine provision "About notarial system" which attributes notaries to the public officers. Legal status and nature of their plenary powers specify on belonging of notaries to the category of official persons, as a result of activity of notaries is an offensive of legal consequences for persons, which are not with them in official-labor relations.

Status of public officer and official person coincides on occasion: the example of it is leaders and deputies of leaders of law enforcement authorities, state inspections. These persons are allotted both "functionally" and by "linearly imperious" plenary powers, that gives a right to provide an internal management of the corresponding organizational structures and carry out a supervision after the observance of legislation subjects, what not inferiors to them at service, that to diffuse operating on the so-called extraneous persons.

Making a conclusion, it is necessary to mark that the basic criteria of differentiating of concepts a "public officer" and "official person" are:

- character of imperious plenary powers (linearly imperious or functionally imperious);
- character of legal bonds between participants (official-labor or administrative and legal);
- type of compulsion which can apply (disciplinary or administrative);
- tenure of leading appointment or imple-

mentation of plenary powers of leader by the special commissions for public officers.

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