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DISCIPLINARY MEASURES
APPLIED TO CONVICTED PERSONS
SERVING IMPRISONMENT UNDER THE LEGISLATION
OF THE REPUBLIC OF KAZAKHSTAN
AND THEIR CLASSIFICATION

МЕРЫ ДИСЦИПЛИНАРНЫХ ВЗЫСКАНИЙ,
ПРИМЕНЯЕМЫЕ К ОСУЖДЕННЫМ,
ОТБЫВАЮЩИМ ЛИШЕНИЕ СВОБОДЫ,
ПО ЗАКОНОДАТЕЛЬСТВУ РЕСПУБЛИКИ КАЗАХСТАН
И ИХ КЛАССИФИКАЦИЯ

Abstract. Based on the analysis of the system of penalties provided for by the Penal legislation of the Republic of Kazakhstan, which can be applied to convicts serving imprisonment for violation of the order and conditions of serving a sentence, organizational and legal aspects of their application and taking into account existing theoretical developments, the author of the article attempts to classify them. The author concludes that all penalties provided for by the Penal legislation of the Republic of Kazakhstan, which can currently be applied to convicts serving imprisonment, are of a one-time nature and are not associated with long-term changes in the conditions of convicts' detention. Their classification was based on the following criteria:

categories of convicts to whom such measures can be applied, i.e. the degree of universality of their application (universal, limited-universal, specific and special penalties);

belonging to a particular branch of law (general, which in addition to penal legislation are provided for in other branches of law, and special penalties applied only to persons deprived of their liberty);

the level of misconduct of a convicted person serving a sentence of imprisonment (penalties applied for a single disciplinary offense; penalties that are a reaction to the continued negative behavior of the convicted person; penalties applied to convicted persons who have committed malicious violations of the established procedure for serving a sentence).

Keywords: institution of the Penal system, a person sentenced to deprivation of liberty, deprivation of liberty, disciplinary action, penalties.

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Аннотация. В статье на основе анализа предусмотренной уголовно-исполнительным законодательством Республики Казахстан системы мер взыскания, которые могут применяться к осужденным, отбывающим лишение свободы за нарушение порядка и условий отбывания наказания, организационно-правовых аспектов их применения и с учетом имеющихся теоретических разработок предпринята попытка осуществить их классификацию. Автор приходит к выводу о том, что все предусмотренные уголовно-исполнительным законодательством Республики Казахстан меры взыскания, которые в настоящее время можно применять к осужденным, отбывающим лишение свободы, носят разовый характер и не связаны с длительными изменениями условий содержания осужденных. За основу их классификации были взяты такие критерии, как:

категории, осужденных к которым такие меры могут применяться, то есть степень универсальности их применения (универсальные, ограниченно-универсальные, специфические и специальные меры взыскания);

принадлежность к той или отрасли права (общие, которые кроме уголовно-исполнительного законодательства предусмотрены и в других отраслях права, и специальные меры взыскания, применяемые только к лишенным свободы);

уровень неправомерного поведения осужденного, отбывающего лишение свободы (взыскания, применяемые за совершение единичного дисциплинарного проступка; взыскания, являющиеся реакцией на продолжающееся отрицательное поведение осужденного; применяемые в отношении осужденных совершивших злостные нарушения установленного порядка отбывания наказания).

Ключевые слова: учреждение уголовно-исполнительной системы, осужденный к лишению свободы лишение свободы, дисциплинарное воздействие, меры взыскания.

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When executing a criminal sentence in the form of deprivation of liberty, one of the tasks of Institutions of the Penal system (hereinafter – the Institution) is to strengthen law, order and discipline among persons serving this sentence by various organizational, legal and other means. The norms of the Penal legislation provide for special rules of conduct among convicted persons serving imprisonment, which are enforced by a combination of necessary means, methods and measures.

Among them, an important place belongs to disciplinary measures, which, as noted by V. N. Chorny and S. N. Smirnov, are a response of the Institution's administration to violations of the established order of serving a sentence (Chorny, V. N. 2012, pp. 4–5; Smirnov, S. N. 2012, p. 4). The implementation of disciplinary responsibility of convicted persons is also a measure of punishment that can be applied to convicted persons.

In accordance with Part 1 of Article 131 of the Penal Code of the Republic of Kazakhstan (hereinafter – the PC of the RK), for violation of the established order and conditions of serving a sentence, the following penalties may be applied to convicted persons serving a sentence of imprisonment: warning; reprimand; placement in a disciplinary isolator (hereinafter – DISO) for up to 15 days; the solitary cell for up to 4 months. In addition the cancellation of the right to stay outside the dormitory and the prohibition to leave the territory of the Institution in their free time, in both cases, for a period of up to 30 days, can also be applied to convicted persons serving their sentence in a minimum security institution (Part 2 of Article 131 of the PC of the RK).

In turn, under Part 3 of Article 154 of the PC of the RK the following penalties may be applied to juvenile convicts, who are serving a sentence of imprisonment for violating the order of serving a sentence: warning; reprimand; severe reprimand; placement in the room for temporary isolation for up to 72 hours. At the same time, it should be noted that penalties are applied to persons between the ages

of 18 and 21 who are serving sentences in medium-security institutions for the detention of juveniles for violations of the order and conditions of serving a sentence provided for in Part 1 of Article 131 of the PC of the RK (Part 5 of Article 154 of the PC of the RK).

These norms of the PC of the RK provide an exhaustive list of penalties that can be applied to convicted persons serving imprisonment. In this case the current PC of the RK, unlike the PC of the RK adopted in 1997, the legislator refused to include in the system penalties that can be applied to this category of convicts, disciplinary measures related to changes in the conditions of serving a sentence in the framework of a progressive system of serving imprisonment (in particular, the transfer from one condition of serving a sentence to another within one institution or to another type of institution). In addition, the following types of penalties were excluded from the system: placement in a penal isolation cell, transfer of malicious violators of the established order of serving a sentence to a cell-type room; placement of juvenile convicts in a DISO and deprivation of their right to watch movies for a month.

However, when listing the types of disciplinary penalties in the norms of the PC of the RK, the legislator does not classify them. The classification of these measures is quite important in the legal regulation of their application. Thus, S. S. Alekseev, noting the importance and significance of classification, emphasizes that the classification of certain objects and phenomena is important not only for the primary processing, ordering of the relevant material, but also makes it possible to identify new and qualitative features of these objects and phenomena when determining its criteria (Alekseev, S. S. 1987, p. 16).

At the same time, various variants of penalties classification, applied to convicted persons serving imprisonment, were proposed in the legal literature. First of all, it is necessary to agree with S. N. Smirnov and E. V. Lyadov that these penalties can be divided into

general and special measures depending on their belonging to a particular branch of law (Kalinin, Yu. I. (ed.) 2013, p. 342). In addition to specific penalties, the rules of the PC of the RK contain such penalties, which are used not only against convicted persons serving their imprisonment, but under other branches of law (administrative, labor), for example, a fine, a reprimand, a severe reprimand.

Penalties applied to convicted persons serving imprisonment can be classified according to their severity. But in the legal literature, different points of view were expressed on this issue. Depending on the degree of their severity N. A. Struchkov, Yu. M. Tkachevskiy, A. S. Mikhlin, I. S. Samoshenko and some others suggested dividing all penalties into two groups. In the first group they include those that are applied to convicts of single offenses, are of a precautionary nature and do not entail a long-term change in the conditions of serving a sentence. The penalties assigned by them to the second group are related to changes in the conditions of serving sentences of convicted persons, with the transfer of convicts to another institution, which is why they entail a complex change in the conditions of detention from the best to the worst (Babayan, S. L. 2003, pp. 162–163; Fedyaev, A. E. 2005, p. 35).

According to A. S. Sevryugin and I. A. Vodolaz, the set of disciplinary sanctions by their legal nature, based on the degree of severity, consists of 3 structural groups. The first group includes reprimands, placement in a penal isolation cell, and others that do not significantly change the legal status of convicts. The second group involves a transfer to a cell-type room and a solitary cell and involves a long-term change in the conditions of detention within the same institution. The third group includes penalties related to changing the conditions of detention by transferring to other institutions (Sevryugin, A. S. & Vodolaz, I. A. 1980, pp. 7–8).

In turn, G. A. Firsov divided all penalties into four groups, taking into account the classification of violations of the regime. In

his opinion, penalties of the first group should be imposed for violations of the regime that are not “serious” and committed by a person who is characterized positively. Penalties of the second group can be imposed for “serious” and “less serious” violations of the regime, committed by a person who has not lifted penalties for previously committed violations, but are not classified as malicious violators of the regime. Penalties of the third group can be imposed on malicious violators of the regime who have previously been subject to penalties and have again committed “serious” or “less serious” violations. Penalties of the fourth group are intended for malicious violators of the regime, and are carried out in case of failure to apply other measures of influence, including penalties of the third group (Firsov, G. A. 1979, p. 19).

Based on this classification, A. E. Fedyaev offered his own version of the division of penalties that can be applied to convicted persons serving prison sentences, and it, in his opinion, should look like this: a) measures not related to the degree of internal isolation; b) measures related to the minimum degree of internal isolation; c) measures related to the average degree of internal isolation; d) measures related to the maximum degree of internal isolation (Fedyaev, A. E. 2005, p. 38).

In general, agreeing with the possibility of qualifying penalties based on their severity, depending on the proposed criteria, but, firstly, that as already noted, at present, the Kazakhstan legislator refused to include in their list such as those that would be associated with elements of a progressive system of serving prison sentences (transfer from one condition of serving a sentence to another within the same institution, transfer to an institution with a higher level of security).

Secondly, based on the fact that the PC of the RK does not divide disciplinary offenses into “serious” and “less serious”, in our opinion, the classification of penalties, depending on their severity, which is proposed by P. G. Ponomarev, is more acceptable. It divides

punitive measures into two main groups: punitive measures that are of a one-time nature or last for a relatively short period, and punitive measures that involve a long-term change in the order and conditions of convicts' detention (Seliverstov, V. I. (ed.) 2001, p. 354).

In this regard, penalties that can be applied to convicted persons, who are serving a sentence of imprisonment, provided for in Articles 131 and 154 of the PC of the RK, depending on their severity, can be divided into two groups. The first group includes penalties that are of a one-time nature and are not related to changes in the legal status of convicts (warning; reprimand; strict reprimand).

The second group includes penalties that entail significant restrictions on the convict's freedom of movement, both within the institution and outside it, as well as increased isolation, i. e. those that are to a certain extent associated with changes in the legal status of convicts. These penalties include: placing convicted adults in DISO and transferring them to solitary cells; revoking the right to live outside the dormitory for convicted persons who are serving their sentence in a minimum security facility or prohibiting them from leaving the facility in their free time.

In addition to the above-mentioned classification of penalties applied to convicted persons serving imprisonment, they can also be subdivided depending on the level of their misconduct. On this basis, we can distinguish three groups of them. The first category includes penalties applied for a single disciplinary offense. In this case, in accordance with Part 3 of Article 130 of the PC of the RK, the convicted person is recognized as a violator of the established order of serving a sentence.

The second category includes penalties that are a reaction to the continued negative behavior of the convicted person. Such penalties include those imposed on a convicted person who has an outstanding or unpaid penalty imposed for a previously committed disciplinary offense. At the same time, if two or more penalties are imposed on a convicted

person within 6 months, with the exception of placement in DISO or transfer to a solitary cell, then he is recognized as a systematic violator of the established order of serving the sentence (Part 3 of Article 130 of the PC of the RK).

The third group of penalties in this classification includes those that are applied to convicted persons who have committed malicious violations of the established procedure for serving a sentence. This is due to the fact that these violations differ, firstly, in an increased degree of danger, entailing the infliction of particularly serious negative consequences (harm) to protective penal relations. Secondly, a malicious violation is the result of a deliberate disciplinary offense (Isaev, S. V. & Sitnikov, G. V. (comp.) 2015, p. 25).

The list of violations of the established procedure for serving imprisonment that are malicious is described in Part 2 of Article 130 of the PC of the RK. At the same time, the concept of malicious violation of the order of serving a sentence, in this case, is based on two features. In one case – a single serious misdemeanor, and in the other – repeated commission within 6 months of violation the established order of serving a sentence, for which the convicted person was subject to punishment in the form of placement in DISO or transfer to a solitary cell.

In turn, juvenile convicts serving a deprivation of liberty committed a willful violation stipulated by Part 2 of Article 154 of the PC of the RK recognized as malicious violators of the established order of serving punishment under condition of applying them sanction in the form of strict reprimand twice or more (Part 2 of Article 154 of the PC of the RK). In this case, the convict who committed a malicious violation of the established order of serving a punishment in the form of imprisonment, in both cases, recognized as a malicious violator, simultaneously with the imposition on him of the penalty for committing the last of a disciplinary offense by decision of the head of the institution (Part 4 of Article 130, Part 4 of Article 154 of the PC of the RK).

However, in the legal literature, the possibility of determining a malicious violation, in fact the repeated commission of a violation, is doubted by some authors, since in this case, in their opinion, the basis of the malicious nature is not the severity of the offense, but the severity of the disciplinary penalty. And, as they note, in practice, this can lead to the fact that, for example, the convicted person may be recognized as a malicious violator of the established order of serving the sentence for repeated smoking in a place not designated for this purpose, careless making of the bed, being late in service or any other minor offense (Babayan, S. L. 2003, p. 169; Epaneshnikov, V. S. & Kozachenko, V. R. 1996, pp. 63–65; Kalinin, Yu. I. (ed.) 2006, p. 259).

But we can hardly agree with this opinion. In our case, the legislator, in particular, in Part 2 of Article 130 of the PC of the RK, when referring to a malicious violation of the established order of serving a sentence, established two conditions: first, only “repeated similar violation” is recognized as such, and secondly, “for which the convicted person was subjected to a penalty of being placed in a DISO or transferred to a solitary cell for 6 months”. At the same time, currently these penalties are not applied in the institutions of the Republic of Kazakhstan in practice for “minor offenses”.

Thus, according to the guidelines for application of incentives and disciplinary penalties made by the Committee of the Penal system of the MIA of the Republic of Kazakhstan, convicts in institutions of the Penal system are recommended (if they committed a willful violation, and there are circumstances mitigating their guilt) to be imposed a more lenient form of punishment than the placement in DISO, for example, in the form of reprimands. The circumstances, mitigating the guilt of the convicted person for a violation of the established order of serving punishment, are: the violation occurred for the first time; convicts' prevention of harmful consequences of the violation (voluntary compensation or elimination of the caused harm); the sincere repentance of

the committed violation, confirmed by a written explanation of the convict; no violations within 1 year and more, etc.

A convicted person is subject to placement in DISO, if from the date of the reprimand, within 3 months, without any circumstances mitigating his guilt, he again commits a violation of the established order for serving a sentence. If the convicted person continues to admit the facts of violation within 3 months from the date of release from DISO, he is subject to re- placement in it.

It is proposed the following algorithm for penalties application in the form of placement in DISO, taking into account the repayment of penalty after 6 months: first time placement of convicts in DISO for up to 7 seven days; second time for a period of 7 to 15 days (*Methodological recommendations on the use of incentives and imposition of disciplinary penalties for convicted persons in institutions of the penal system* 2019, pp. 8–10). In turn, in accordance with Part 7 of Article 132 of the PC of the RK, the application of penalties in the form of transfer to a solitary cell are allowed only in respect of a convicted person who has a penalty in the form of placement in DISO for a previous violation of the established order of serving a sentence. In addition, in order to verify the validity and legality of applying any penalty to a convicted person, a copy of the decision on its imposition must be sent to the Prosecutor no later than the next business day (Part 3 of Article 131 of the PC of the RK).

Thus, we can say that the main characteristics of malicious disciplinary misconduct are:

firstly, it is a single serious offense, i. e. committed in a rude and audacious form, which entails significant negative consequences;

secondly, this is a multiplicity of violations, i. e. a repeated homogeneous violation, for which the convicted person was subjected to punishment in the form of placement in a DISO or transfer to a solitary cell for 6 months, and juveniles under the condition of imposing on them penalties in the form of a strict reprimand two or more times. The repeated violation of

the established order of serving a sentence manifests itself in a stubborn refusal of the convict to abide the rules and conditions of the sentence, and the failure of previous measures of disciplinary influence.

In our opinion, penalties applied to convicted persons serving a sentence of imprisonment can also be classified according to the categories of convicted persons, to which they can be applied, i. e. by the degree of universality of their application. At the same time, the analysis of the norms of the PC of the RK on penalties and the procedure for their application showed that they can be classified into the following groups based on this feature.

1. Universal, i. e. that can be applied to all convicted persons. Such measures include a warning and a reprimand.

2. Restricted-universal. However, the limitation is that the norms of the PC of the RK do not allow their application to certain categories of convicts. These penalties include: placement in a DISO and transfer to a solitary cell. This is due to the fact that:

first, in accordance with Part 8 of Article 133 and Part 3 of Article 154 of the PC of the RK, convicted women with infants at the children's home, women are exempt from work due to pregnancy and childbirth, and juveniles are not transferred to solitary cells and not placed in DISO;

second, these penalties do not apply to certain categories of convicts who suffer from certain diseases, because in accordance with Part 7 of Article 133 of the PC of the RK, convicts can be placed in a prison and transferred to a solitary cell only after a medical examination for the possibility of being there.

3. Specific penalties that can only be applied to persons serving sentences in minimum security institutions. These penalties include: cancellation of the right to live outside the dormitory with their families on a rented or private residential area within the locality where the institution is located, and prohibition of leaving the territory of the institution in

their free time (Part 2 of Article 131, Part 4 of Article 143 of the PC of the RK).

4. Special punitive measures that can only be applied to convicted minors who are serving a sentence of imprisonment. Such penalties include: a strict reprimand and placement in premises for temporary isolation (Part 3 of Article 154 of the PC of the RK).

Thus, we can state that all the penalties contained in the PC of the RK, which can currently be applied to prisoners serving imprisonment, are of a one-time nature, and are not associated with long-term changes in the conditions of prisoners' detention. However, they can be divided into certain groups, depending on a particular classification feature.

So, depending on the branch of the law, these penalties can be divided into general, i. e. such that in addition to the penal legislation are provided for other fields of law; and specific, i. e. that apply only to convicted persons who are serving a sentence of imprisonment.

Depending on the severity, these measures can also be divided into two groups. The first group includes penalties that are of a one-time nature and are not related to changes in the legal status of convicts. The second include penalties, the application of which entails a significant restriction on the freedom of convicts' movement, both within the institution and outside it, as well as increasing their isolation, i. e. those that, to a certain extent, are related to changes in their legal status.

Depending on the level of misconduct of a convicted person serving a sentence of imprisonment, there are three groups of penalties. The first category includes penalties applied for a single disciplinary offense. The second category includes penalties that are a reaction to the continued negative behavior of the convicted person, i. e. those imposed on the convicted person who has not repaid the penalty imposed for a previously committed disciplinary offense. The third category includes penalties applied to convicted persons, who have committed malicious violations of the established order of serving a sentence.

At the same time, a malicious disciplinary offense can be expressed as in the commission of a single serious offense or in the multiplicity of committed violations.

Penalties, applied to convicted persons serving imprisonment, can be classified into four groups according to the degree of universality: universal, which can be applied to all convicts; limited-universal, i. e. those that the law prohibits to apply to specific categories of convicts; specific, applicable only to persons serving sentences in minimum security institutions; special, applicable only to juveniles serving sentences of imprisonment.

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