

RESEARCH ARTICLE

Disciplinary Managing Power: A Case Study in the Judiciary Public Management

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Abstract

The disciplinary managing process performs a meaningful role in investigating and punishing serious misconducts performed by public servants or other people liable to functional regime from some administration departments. This study has as its main aim to analyse the disciplinary power in a judiciary public administration office. It presents as specific objective: (1) to collect the main elements of which a disciplinary administrative process is composed in the service place studied, (2), to elaborate an analysis about the convergences in view of the administrative norm, and, (3) to propose innovation in the practices of the disciplinary administrative process. This study has as a basis the Weber's Theory of Bureaucracy and resources to conceptual complements about Administrative Powers by Meirelles and its major fundament lies on the administrative disciplinary proceedings concept presented by the Brazilian Complementary Law number 68, of December, 1992. So, it searches a case study formulation and its required proceedings. As a result, it was concluded that the disciplinary administrative proceeding is an extensive process composed of 12 steps, divided in three phases: (1) as for convergences concerned to administrative norms, it was concluded by means of a case study, applied to the office investigated, that no divergences were reported; (2) as a suggestion for improving this process, or even, for putting an end to the useless resort to this device, it is proposed the adoption of intensive courses about the Administrative Detailed Reports that form part of the processes, which would be a tool to get less bureaucratic disciplinary administrative processes; (3) this work concludes that previous conciliation before the beginning of disciplinary administrative proceedings is a possibility, aiming at reducing procedural costs.

Keywords: *Administrative Powers, Disciplinary Administrative Proceedings, Theory of Bureaucracy.*

Introduction

The Administrative Powers are indispensable elements for the public interest, they operate as tools, by means of which the Public Authority will go for that interest. Thus, the required prerogatives are offered to Administration in order to reach the collective's interests. They are a "can-must" setting up, they are inalienable and conditioned to the law limits, and, in case of their non-fulfilment, the faulty authority must be charged of abuse of power, whether in commissive or omissive conducts.

The Disciplinary Power is the power the Public Administration is vested with to permit it to punish and to pronounce sentences on public servant's fault in performing official duties and on everyone who is under Public Administration discipline, as, for example, those that keep contracts with it. This kind of scrutiny and

punishment is carried out by means of Disciplinary Administrative Process which is an entail act (non-subjective decision) and unavailable, and this process omission brings on administrative misconduct charge. Aiming at knowing this act's reality, the following question was formulated: How to innovate in the Disciplinary Administrative Process, in a swift and low-costing way? For so, the theme analysis intends to spot innovations inside this process.

This work is composed of items and sub-items, which put together the objectives, the theoretical and conceptual reviews that respond to the context studied, the methodology and the proceedings handled, in the results analysis and discussion. The general objective here is to study the disciplinary power in a judiciary public administration office and the specific objectives are

(1) to collect the elements which a Disciplinary Administrative Process are made of in the study unit, (2) to elaborate an analysis about the convergences on the administrative form and (3) to propose innovation in the Disciplinary Administrative Process practices.

Conceptual and Theoretical Review

To support this study the Theory of Bureaucracy was used as theoretical reference because it makes possible the hierarchical, formal, regular characters verification, among others, of the many components from the studied justice office. The bureaucracy is based on: legal aspect of norms, communications formal aspect, work division, relationship impersonality, authority hierarchization, routines and proceedings, technical competence and merit, Administration specialization, professionalization and functioning for accessibility, according to Diniz [1]. These norms and regulations are written and also are exhaustive because they comprehend all the organization areas, foresee all the occurrences and frame them up inside a definite scheme capable to regulate everything that goes on inside the organization. The norms and regulations are legal because they grant the people vested with authority a coercion power over subordinates and coercive means capable to impose the discipline. Therefore, bureaucracy is a legally organized social structure.

Theory of Bureaucracy

Data collection done in Carrieri [2] indicates that the Theory of Bureaucracy developed itself in the Administration Science with the aim to define rationalization standards. The Weber's studies approach the functional modern bureaucracy under specific forms. The bureaucracy is under the rule of official and fixed jurisdiction areas, ordered by laws and administrative norms. It establishes authority relationships, marked out by norms relative to means of coercion and of consensus. A hierarchical relationship is established, by defining posts and authority's levels, besides a system of command and subordination with activities management and tasks delegated by authority. Following that reasoning line, the activities and objectives were thought about rationally, and the work divisions were explicitly given out. Weber also believed that technical competence should be emphasized and that the performance evaluations should be totally merit-based.

Kobalet. al. [3] state that bureaucracy is only possibly understood inasmuch as its story is

analysed, and they see that it is a form of social arrangement that gets apart from the rest of society and imposes itself over society, dominating it, by means of organizations like the State, companies, schools and parties. Still, according to Kobalet. al. [3], the rational-legal organization's attributes proposed in Weber's bureaucratic model, were oriented to grant the work division among the participants, the hierarchy, the existence of general rules for the effective functioning, the separation between personal and organizational propriety, and the personnel selection according to their technical qualifications. The model intended to rule the social grouping by means of rules, statutes, regulations, documentation, hierarchy observance, formality and impersonality.

Concepts on Administrative Powers

Following Rodrigues et. al. proposals [4], Meirelles states that administrative powers are a set composed of offices, personalized beings and guided by agents and it carries out many different activities. Such activities are supposed to meet the population's needs and interests, and be complimentary among themselves. In order the State can carry out the activities in charge of the Public Administration, some powers are consigned to it, which will be explained ahead.

Thus, the Administrative Powers present themselves in many ways, which get diversified according to the activity demands to be developed and as well as to the public interest. Incorporated in this diversity, the powers are classified in: entail power, discretionary power, regulatory power, hierarchical power, disciplinary power and police power.

Founded on Rodrigues et. al. studies [4] Meirelles says that the disciplinary power "is the faculty to internally punish the servants' functional infractions and other people subject to the discipline of Administration offices and services".

Concepts about Disciplinary Administrative Process

Based on Brazil's Complementary Law number 68, of December 1992, the Disciplinary Administrative Process (DAP) is a tool meant to survey the servant responsibility for misconduct practiced in performing his or her attributions, or that keeps relation with the position's attribution that he or she is vested with.

Based on theoretical data collection from Santos it can be stated that the DAP is the means of

investigation and punishing the public servant's serious misconduct in performing official duties and on everyone who is under Public Administration discipline. This process is based on the special supremacy that the State keeps on all the ones that are linked to its services or activities whether in a definitive or temporary way, thus, under its discipline.

Guedes [5], defines DAP as a series of procedural acts that, formalized in observance of other rituals, drawn by the norms and law sources, propose to investigate the facts, to supply basis for a legitimate disciplinary decision, which will be able to exert whether condemnatory or absolving effect. Still according to Guedes [5], the DAP has as its function to investigate the misconduct committed by the servant, as well as to ponder the circumstances in which it was committed and apply the pertinent sanctions and not just subsidize the administrative authority with basis for the punishment imputation.

Regimental Concept of the Complementary Law number 68, of December 9th 1992

This law sets the State's civil public servants' juridical regime which rules the studied juridical office, the government agencies, the State-run public foundations, other providences, and all servants are subject to the Single Legal Regime instruments, instituted by this Complementary Law.

Relatively to the DAP, the Complementary Law cites in its article 192 that the Disciplinary Administrative Process is an instrument for

investigating the servant's responsibility for faults occurred when performing his or her official duties, or that has to do with his or her position's attributions. The defendant is granted the right to defend himself.

Concept of Process Innovation

According to Batista [6] processes are the configurations of the activities used in the firm's internal operation conduction. The innovation, in this dimension, pre supposes the re-projection of processes to seek major efficiency, major quality or a smaller answer time (cycle). That is why the need to explore deeply this theme is suggested to demonstrate the benefits of developing an innovation based on disciplinary administrative process.

Methodology

The methodology is the detailed explication of all the planning developed for the work's investigation method. Here, the case study was applied and it is a specific field research method, with meticulous investigations reporting how the process came about.

This is a qualitative investigation that serves as a basis for further questionings, studies and new theories' formation. Methodology can be understood as the stage in which are shown the approaches and proceedings adopted in the research elaboration, in a way other persons will be able to reapply it. Bibliographic collecting was carried out by means of books, sites, manuals and other articles as well as *in loco* visits to the studied office. Following, comes the Figure 1 with the explaining diagram of the methodology adopted.

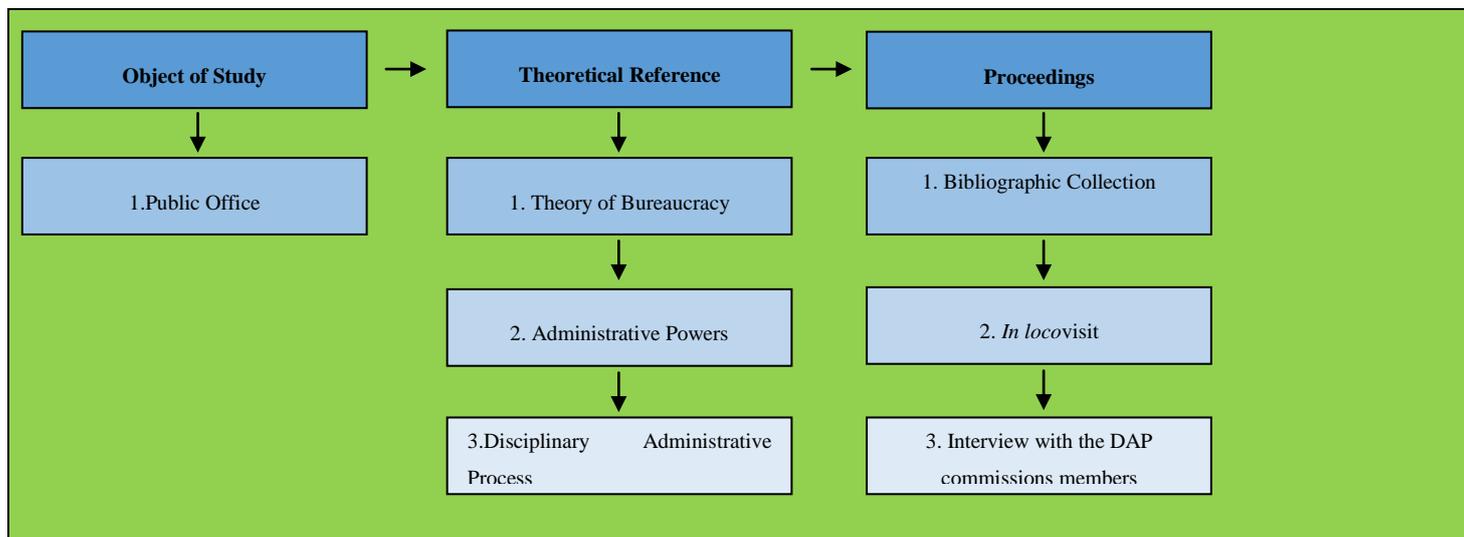


Figure 1: Methodological proceeding diagram

Source: Elaborated by the authors.

Following, in the Table 1, it is presented the

proceedings description adopted in this case study in a segmented way:

Table 1: Specification of the methodological proceedings used

| Proceedings | Description |
|-------------------------------|--|
| Bibliographic collection | It involved consultation in books, manuals and papers relative to the study object. |
| Webliographic collection | Searches in sites were carried out, like electronic magazines, virtual appropriations available in the web and government pages as the General Accounting Office and others. |
| Technical Visit | <i>In loco</i> visits were accomplished in order to analyse the process carried out in the office. |
| Interview | Informal conversations were brought about with commission members that comprise DAP. They made it possible to get information about the proceedings used in the study. |
| Meetings about results gotten | Meetings among the task's authors were held, inclusively involving the adviser's presence to put out possible doubts about the task's planning. It has made possible the listing and analysis of the information gotten to elaborate the case study. |

Source: Adapted by authors.

Case Study about Disciplinary Power

This study has as a scenario a court of justice, the maximum office of the common justice in a Brazilian State. In its structure, a state court of justice is composed of judges of law who act in first instance, and of judges who act in civil or criminal intermediate appeal instance. A Justice Court in Brazil comprises the civil and criminal special courts, which judge minor cases, whose path by means of specific legislation makes the responses faster to the benefitted society. In Brazil, it is in charge of a justice court the competence of judging the causes that are not under jurisdiction of another court as labour's, federal's, electoral's or military's. The court of law's actuation is provided for in the articles 125 and 126 of the Federal Constitution. As it involves persons in the institutional and bureaucratic order, a court of law includes in its rules the disciplinary powers as a form to establish the servants' compromises and guide their practices, norms and proceedings, that all must obey.

Collection of the DAP Main Elements in the Studied Office

This study was developed by means of investigations accomplished in the studied office with the DAP processing commission. The process in this study object is divided in phases: phase 1: comprises steps 1 to 3, phase 2: steps 4 to 9 and finally, phase 3: steps 10 to 12.

In the first phase, denounce, instauration and opening term of the process, are treated. The processing commission takes statements, proceeds face-to-face confrontation, investigations and reasonable steps, with the objective to collect proofs, resorting, when necessary, to technicians and experts, in a way to make possible the facts verification. The second phase involves the citation, the hearing, the previous defence, the witnesses' testimony taking, the final defence and the report. The last phase comprehends the closing term, judgement by competent authority and appeal, the conclusive report, the establishing unity as well as the competent authority decision based on the judicial reports proofs and, at last, the appeal. See Figure 2 below: and following, the Table 2 with the description of steps of DAP in sequence way.

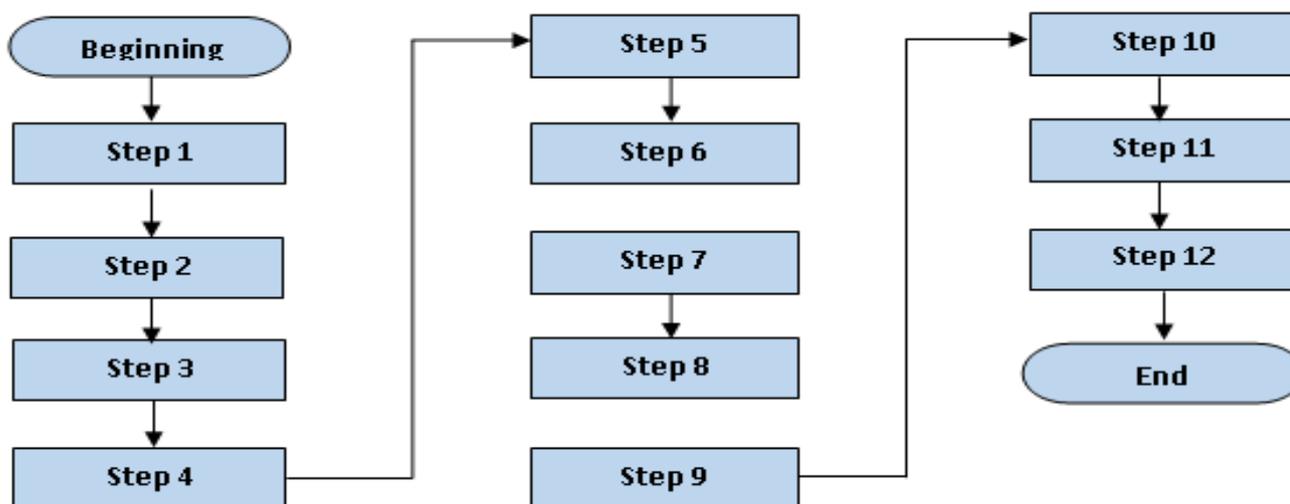


Figure 2: General flowchart of the investigated disciplinary administrative process.

Source: Adapted by the authors.

Table 2: The specification of disciplinary administrative process' steps of the office in study.

| DAP Sequence | Description |
|--------------|---|
| Step 1 | Denunciation: in this step, it is admitted the denunciation or the representation for checking the legal admissibility requirements. The authority will determine the immediate investigation of facts by the inquiry commission or disciplinary administrative process. |
| Step 2 | Prosecution commencement: Prosecution will begin by means of the ordinance publication issued by competent authority, who will indicate the processing commission's components and will determine, among them, the one who will preside the commission. |
| Step 3 | Opening Term: the commission gets together to begin the works and deliberations about the first steps to be taken, inclusively about the need to ask the authority to remove the servant from office temporarily, issuing the term. |
| Step 4 | Citation: the accused servant is notified of the disciplinary administrative process establishment by receiving a complete copy of the inaugural ordinance and a date is scheduled for his or her hearing. |
| Step 5 | Interrogation: in the appointed date, the denouncer will be listened to, if there is one, as well as the accused, separately. |
| Step 6 | Previous defence: as soon as the interrogatory is concluded, the defendant presents previous defence within a five-day deadline, as well as the witnesses, previously notified, till the limit of three, will be heard. |
| Step 7 | Witnesses hearing: The witnesses will be summoned to testify by means of warrant issued by the commission president, with indication of place, day and hour for hearings. This document will also present the defendant's name and the nature of the DAP. A warrant's counterpart copy with the interested person's signature indicating that he or she is aware of the process is to be attached to the judicial record. |
| Step 8 | Final defence: when instruction is over, the accused servant is summoned to present final allegations, in a five-day dead line. |
| Step 9 | Report: the commission presents their conclusive report to authority, with the synthesis of what went on in the process and with analysis of every defence point, recommending the penalty to be sentenced, in case of being the defendant found guilty. |
| Step 10 | Closing term: the closing term is issued to communicate the result found and to forward the conclusive report to the authority in charge of the process. |
| Step 11 | Judgement by competent authority: the authority decides according to the record's proofs, and he or she can either accept or refuse the commission's record. If considered necessary, before deciding, it will be up to him or her, to determine new steps; the decision is published and the defendant and his or her prosecutor are summoned. |
| Step 12 | Appeal: appeal can be delivered to the authority who made a decision. If it is not surveyed in the established deadline, it is up to defendant to deliver it to superior authority. |

Source: Elaborated by the authors.

Analysis on the Convergences with the Administrative Norm

As verified in the case study, the office in study does not show any convergence with the administrative norm adopted for this process, since the organism in question strives hard for justice, therefore, in case of any irregularity be found during the process, it would be nullified. The article 212 of the Complementary Law number

164, spoken about in the theoretical reference, highlights that, if the occurrence of irreparable vice is noticed, the judging authority is to declare the partial or total process' nullity and is to order the constitution of another commission, to start a new process. Following, in Table 3, the specifications of possible motives for nullity is shown during the DAP of the office studied:

Table 3: Specification of the steps of the disciplinary administrative process of the organ being studied.

| Cases of DAP nullity | Description |
|--------------------------------------|--|
| 1. Denunciation | 1.1. Absence of the denouncer's address and identification; 1.2. Formulated in writing and notarised; 1.3. Reasonable doubt about the defendant's mental health. |
| 2. Instauration | 2.1. If the act of irregularity verification is not provided by the competent authority (President); 2.2. If the ordinance is not published; 2.3. if any of the commission member is the defendant's husband, wife, partner or defendant's relative, consanguine or kindred. |
| 3. Opening term | 3.1. The accused servant's non notification to follow the instructions acts (the accused attendance in the acts prevents nullity). |
| 4. Citation | 4.1. Citation's failure; 4.2. Indicted servant's citation by means of public notice, who is in jail, has a fixed address, is exiled or admitted in hospital for health treatment; 4.3. Prompt citation, by public notice, when necessary steps were not appropriately fulfilled to find the indicted location. |
| 5. Interrogation | 5.1. Investigation proceedings development under the authority's command, revealing a guided work practice. |
| 6. Previous defence | 6.1. Absence of written defence; 6.2. Together with probative elements against the defendant and after the defence presentation, without the opening of a new situation for defence. |
| 7. Witnesses hearings | 7.1. Not occurrence of hearings of witnesses enrolled by defendant. |
| 8. Final defence | 8.1. Not to present final allegations on time. |
| 9. Report | 9.1. To present report that diverges from the facts. |
| 10. Closing term | 10.1. When a conclusive report diverges from its own information; |
| 11. Judgement by competent authority | 11.1. Judgement with basis in non-existent facts or allegations in the indicting piece; 11.2. Judgement made in a way that contradicts the existing proofs in process; 11.3. Judgement made by administrative authority who has revealed him or herself, under any circumstance, as the defendant's notorious enemy. |
| 12. Appeal | 12.1. To file a notice of appeal to non-competent authority. |

Source: Elaborated by the authors.

Innovating Proposal in the Disciplinary Administrative Process practices

When this paper's investigators came across the studied office's reality, they noticed a lay behaviour by the public servants on the norm that rules the DAP. It is to be said that such a fact results in misconducts sometimes performed without full awareness that these faults can be administratively punished. Thus, intensive courses on this subject are recommended as well as the study of the Law that supports the servants, and, still, the internal bylaw, in order the servants do not commit faults for being ignorant of consequences. If these measures taken, many disciplinary processes would be prevented to be opened, and it would reduce meaningfully the costs of Public Administration.

It is also suggested that the Administrative Detailed Report (ADR) which would be an

instrument to substitute the DAP, would be less bureaucratic and less expensive than it, and would act as a kind of conciliating tool. This way, the process itself would take shorter time, would be more effective and less expensive to the office administration. Therefore, the more complex cases would be supposed to be sent to DAP. The ADR was create damming at efficiency and the rationalization of the public financial resource use, as an alternative- under determined application conditions-to the expensive disciplinary rite (in the Investigations cases and DAPs), in which sometimes costs are higher than the benefits reached. The DAP is expensive to the Public Administration because many times the processing commission members do not live in the same city where the process is to be judged, and travelling and hotel expenses are covered by the justice office.

Table 4: Possible innovation in the studied office's APD

| Innovation proposal | Description |
|---------------------|--|
| Proposal 1 | Intensive course: About the studied office bylaw, and the CL number 68 and the DAP itself. |
| Proposal 2 | Administrative Detailed Report (ADR): it aims at efficiency and the use of public resources rationalization, as a means of innovation –under determined conditions of its application. |

Source: Elaborated by the authors

Final Considerations

The disciplinary administrative process is quite important for correcting the public agents who actas intellectual resources in public service, as well as for finding out irregularities in public services exerted by official organisms based on constitutional principles, which rule these servants' acts. It has been noticed by analysing the results that there are not divergences between

the disciplinary administrative process and the administrative norm adopted, once the public office in study holds the defence of justice as its main principle. As a suggestion for improving the process, it is recommendable the use of the Administrative Detailed Report, as soon as an irregularity is denounced because it is a means of getting efficiency and rationalization of the use of public resources, with the objective to eradicate unnecessary expenses [7-8].

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