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Exemption from punishment of military servants unfit for military service but sentenced to service restriction, arrest or detention in a disciplinary battalion

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ABSTRACT

The purpose of the research. The purpose of this article is to clarify the peculiarities of the release from punishment of military servicemen sentenced to service restrictions but who are unfit for military service for health reasons (health-based release). The judicial practice of releasing from punishment military servicemen sentenced to service restrictions, arrest or detention in a disciplinary battalion but unfit for military service for health reasons is insignificant for influencing the criminal execution policy in the sphere of punishment execution. Methodology: consideration of materials and methods (based on the analysis of the legislation of Ukraine) of release from punishment of servicemen sentenced to restriction of service but unfit for military service for health reasons. Conclusions. It has been established that there is a lack of proper coordination of the legislation of the criminal cycle of Ukraine (provisions of the Criminal Code of Ukraine and the Penitentiary Code of Ukraine).

KEYWORDS: Military servants, military service, health, release, punishment, service restriction.

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Exención del castigo a los servidores militares no aptos para el servicio militar pero sentenciados a restricción del servicio, arresto o detención en un batallón disciplinario

RESUMEN

El propósito de la investigación. El propósito de este artículo consiste en aclarar las peculiaridades de la liberación de la pena de los militares condenados a restricciones de servicio pero que no son aptos para el servicio militar por razones de salud (liberación basada en la salud). La práctica judicial de liberar del castigo a los servidores militares condenados a restricciones de servicio, arresto o detención en un batallón disciplinario pero que no son aptos para el servicio militar por razones de salud, es insignificante para influir en la política de ejecución penal en la esfera de la ejecución del castigo. Metodología: Consideración de materiales y métodos (basados en el análisis de la legislación de Ucrania) de liberación del castigo de los militares sentenciados a la restricción del servicio pero que no son aptos para el servicio militar por razones de salud. Conclusiones. Se ha establecido que existe una falta de coordinación adecuada de la legislación del ciclo penal de Ucrania (disposiciones del Código Penal de Ucrania y el Código Penitenciario de Ucrania).

PALABRAS CLAVE: Servidores militares, servicio militar, salud, libertad, sanción, restricción del servicio.

Introduction

The current legislation of Ukraine in the sphere of military activity is characterized by existence of a number of problems that need to be solved. Not the least important in this list are certain types of punishments applied to military servants of the Armed Forces of Ukraine. As a rule, analysis of articles regulating the basic provisions of sentencing remains outside interests of scientists, in particular, it is observed in monographs, textbooks, comments to the Criminal Code, scientific articles, etc. We believe that closer attention to such issues will provide a further way to improve national legislation; it will also strengthen the rule of law and help to prevent errors in separate cases of sentencing.

Violations of the civil rights of military servants will not be allowed (paragraph 59 of the National Security Strategy of Ukraine) (Law of Ukraine, 2020); for this reason it is planned to create an effective health care system capable of adequately staffing troops (forces) with service personnel fit for military service according to health conditions”

(paragraph 4.6 of the Strategic Defense Bulletin of Ukraine) (Law of Ukraine, 2021).) (Law of Ukraine, 2021). Such tasks are set by the President of Ukraine for realization of state policy in the sphere of national security and military policy of Ukraine.

The issue of unfitness of a military servant for military service deserves special attention, as it is a ground for dismissal from military service and an unfit military servant may be subject to release from punishment.

1. Literature review

Recognition of a military servant to be limited fit for military service does not create grounds for his release from punishment according to Part 3 of Article 84 of the Criminal Code of Ukraine which is in good reason pointed out by Y.O. Pysmenskyi (Pysmenskyi, 2014). However, courts do not always follow this recommendation, and apply a broader interpretation of the provisions of Part 3 of Article 84 of the Criminal Code of Ukraine.

V.M. Burdin notes as follows: “It is not clear why military servants find themselves in a better position than other prisoners whose sentence can be only suspended” (Burdin, 2010). Y.O. Pysmenskyi points out that “Legislators do not unjustifiably take into account the degree of possible social danger of a crime committed by a military servant” (Pysmenskyi, 2014).

Recommendations of N.I. Polishchuk are aimed at solving this issue; the author points out the need to “separate health-based release from punishment of military servants performing elements of war crimes (according to the caused level of damage) from all other crimes” In other words, it is proposed to provide health-based release from punishment for military servants performing military crimes, i.e. offenses aimed at violation of the established military service order. Such instructions of N.I. Polishchuk are debatable, as far as complications of law enforcement practice are not taken into account, and while appealing to such non-alternativeness the author does not give any contradictory judgments of the scientific environment. (Polishchuk, 2019).

The opposite view is held by A.V. Savchenko, who provides the following arguments:

- execution of special basic types of punishments for military servants (service restrictions for military servants, arrest on guard duty (in the box) and detention in a disciplinary battalion) is associated with further military service, with appropriate

restrictions (*imprisonment incompatible with further military service - a remark from the candidate for the degree*);

- health-based unfitness of a military servant for military service entails further dismissal from military service (in reserve or retirement);

- if a legislator provides for the possibility of applying these punishments for crimes of average gravity, it is obvious that it provides for the possibility of release from these punishments for persons who due to their health status cannot serve them (Sávchenko, 2013).

2. Materials and methods

The research is based on the works of foreign and Ukrainian researchers, as well as on the empirical material of national and international legal acts and juridical (forensic) practice.

Comparative analysis and the dialectical method of research gave an opportunity to comprehensively investigate (research) health-based release from punishment for military servants sentenced to service restriction if they are unfit for military service for health reasons. The synthetic method was used to determine peculiarities of health-based release from punishment of military servants sentenced to service restrictions.

3. Results and discussion

According to the provisions of Part 3 of Article 84 of the Criminal Code of Ukraine, military servants sentenced to service restriction, arrest or detention in a disciplinary battalion shall be released from punishment if declared unfit for military service due to their health status (Law of Ukraine, 2001). Thus, release from punishment provided for in Part 3 of Article 84 of the Criminal Code of Ukraine shall be applied in the presence of the following mandatory conditions:

- 1) the subject of release from punishment is a military servant;
- 2) conviction to restriction of service, arrest or detention in a disciplinary battalion;
- 3) health based unfitness (unsuitability) for military service.

In such cases, convicted military servants shall be subject to mandatory and final (unconditional) release from serving their sentences. These mandatory conditions and other

circumstances that determine the specifics of health-based release from punishment of military servants are subject to further careful analysis and research.

Application of the provisions of Part 3 of Article 84 of the Criminal Code of Ukraine is possible in respect of military servants convicted of committing any crimes. After all, punishment in the form of restriction of service for military servants (Article 58 of the Criminal Code of Ukraine), arrest (Part 2 of Article 60 of the Criminal Code of Ukraine) and detention in a disciplinary battalion of military servants (Article 62 of the Criminal Code of Ukraine) may be imposed by court according to Article 69 of the Criminal Code of Ukraine, in particular, a milder punishment than that provided by the law may be imposed.

The procedure of health-based release of military servants from serving a sentence (military servants declared unfit for military service due to their state of health) is regulated by the Penitentiary Code of Ukraine (Law of Ukraine. 2003). Thus, the penitentiary legislation of Ukraine determines two types of health-based release of military servants from serving sentences:

- those unfit for military service due to their health status with deregistration, accompanied by dismissal from military service in accordance with paragraph “b” of Part 1 of Article 26 of the Law “On Military Duty and Military Service” “b” of Part 1 of Article 26 of the Law “On Military Duty and Military Service” (Law of Ukraine,1992);

- those unfit for military service in peacetime, in particular during a special period (except martial law), accompanied by discharge from military service in reserve for military servants serving conscription (national service) in the army during mobilization, for a special period, military service for conscription of persons from among reservists in a special period, in accordance with subparagraph “b”, paragraph 1, Part 4 of Article 26 of the Law “On Military Duty and Military Service” (Law of Ukraine, 1992).

The penitentiary legislation of Ukraine establishes a separate procedure for release from punishment for each special basic type of punishment of military servants (service restriction, arrest or detention in a disciplinary battalion).

In accordance with Part 5 of Article 47 of the Penitentiary Code of Ukraine, convicts serving sentences in the form of service restrictions for military servants and recognized by the military medical commission unfit for military service with removal from military registration or unfit for military service in peacetime, shall be released by court from

punishment on representation of the commander of military unit and the conclusion of the military medical commission (Law of Ukraine. 2003).

According to Part 6., Article 55 of the Penitentiary Code of Ukraine, during the period of being under arrest a convicted military servant may not be presented for the next military rank, appointed to a higher position, transferred to a new place of service, discharged from military service, except in cases of unfitness for military service (Law of Ukraine. 2003).

According to provisions of Article 85 of the Penitentiary Code of Ukraine, convicts serving sentences in the form of detention in a disciplinary battalion and recognized by the military medical commission unfit for military service with removal from military registration or unfit for military service in peacetime, shall be released by court from punishment on representation of the commander of military unit and the conclusion of the military medical commission (Law of Ukraine. 2003).

Thus, when releasing military servants from serving their sentences, if they are declared unfit for military service due to their health status, legislators must be guided by the relevant provisions of the penitentiary legislation of Ukraine, but such release should be based on Part 3 of Article 84 of the Criminal Code.

This type of release from serving a sentence is characterized by certain peculiarities concerning the subject of release. A special subject (military servant within the meaning of Part 2 of Article 18 of the Criminal Code of Ukraine and certain provisions of the Penitentiary Code of Ukraine) is a mandatory component of the exemption from punishment provided for in Part 3 of Article 84 of the Criminal Code of Ukraine.

According to the Legal Encyclopedia the term military servant includes citizens of Ukraine who perform military service in accordance with the Law of Ukraine "On Military Duty and Military Service" (Shemshuchenko, 1998). However, there are certain doubts concerning correctness and completeness of this definition. The current legislation does not regulate a single definition of a military servant, but it provides for certain aspects of his/her legal status. When conducting a comprehensive analysis of current legislation of Ukraine, I come to the conclusion that it is necessary to scientifically clarify this term and define the concept as follows:

Military servants are citizens of Ukraine, foreigners and stateless persons who serve in the Armed Forces of Ukraine, other military formations formed in accordance with the

laws of Ukraine and citizens of Ukraine who serve in law enforcement agencies of special purpose (hereinafter - law enforcement agencies: Security Service of Ukraine, the State Border Guard Service of Ukraine - remark from the candidate for the degree), who serve in the territory of Ukraine, and military servants of the above military formations and law enforcement agencies - citizens of Ukraine who perform military service outside Ukraine (Part 3 of Article 2 Law “On Military Duty and Military Service” (Law of Ukraine,1992).

Military servant as a special subject of release from punishment is characterized by additional features:

(1) The subject belongs to an appropriate category of persons (conscripts, reservists or other persons specified by law may not be included);

2) Performing military service (conscription or contract);

Types of military service include:

- forced (compulsory) military service;
- conscription military service during mobilization, for a special period;
- military service under the contract of private corps (junior enlisted)
- military service under the contract of sergeant (noncommissioned officer corps) and sergeant major corps;
- military service (training) of cadets of higher military educational institutions, as well as higher educational institutions comprising military institutes, faculties of military training, departments of military training, branches of military training (hereinafter - higher military educational institutions and military educational units of higher educational institutions);
- military service under the contract of officer corps;
- conscription military service of officer corps;
- conscription military service for reservists in a special period. (Law of Ukraine,1992).

It should also be noted that "with entry into force of the court's conviction, military criminal relations are transformed into military penitentiary (penal) relations which determine further specifics of the subject" and the specifics of the execution of punishment" and the specificity of punishment execution (Nikolaienko, 2019).

As can be seen from the provisions of Articles 58, 60 Part 2, Article 62 of the Criminal Code of Ukraine, the special main types of punishment of military servants should include:

- service restrictions for military servants;
- arrest with detention in a guardhouse;
- detention of military servants in a disciplinary battalion (Law of Ukraine. 2001).

This position is the most acceptable among the scientific community and practitioners of criminal law; in particular, this opinion is shared by M.S. Turkot, Reserve Justice Colonel, a veteran of military service and an honorary employee of the Prosecutor's Office of Ukraine (Turkot, 2015).

The mentioned criminal punishments for military servants are special due to a combination of the following circumstances:

- special order of serving sentences;
- special legal status of persons serving their sentences;
- the opportunity to stay in the military service with the continued performance of military service duties as usual or with certain restrictions.

Service restrictions for servicemen are the main term-based punishment which can be imposed for committing a crime only on a military servant (except for conscripts) for a period from six months to two years.

The punishment is that while continuing to serve in the military the convict is subject to certain restrictions related to advance in rank, length of service and financial security. The sentence is executed at the place of military service. This type of punishment is commensurate with correctional labor.

Arrest is the main term-based punishment for military servants; it is applied within the range from one to six months.

Punishment is that while continuing to serve in the military and being subjected to restrictions due to the type of punishment and the order of its serving the convict is kept in isolation. The sentence is not served in detention centers, but in a guardhouse.

Detention in a disciplinary battalion is the main term type of term-based punishment applied exclusively to conscripts. The sentence is imposed for a period from six months to two years and consists in serving the sentence in a special military unit.

“A specific feature typical for punishments associated with isolation of military servants (*arrest and detention in a disciplinary battalion - remark from the candidate for the degree*) is also the presence of a special body that ensures their execution.

According to the Law of Ukraine “On the Military Law Enforcement Service in the Armed Forces of Ukraine”, the Military Law Enforcement Service (hereinafter - the Law Enforcement Service) executes decisions on keeping military servants on guard duty (guardhouse) and enforces criminal punishment for sentenced military servants [9, 105]. The reform of Ukraine's military sector includes transformation the Military Law Enforcement Service into the Military Police. This topic is covered in more detail in the scientific works by V.M. Kolomiets (Kolomiets, 2020).

The institution of health-based release from punishment can be applied both to convicted military servants (Part 3 of Article 84 of the Criminal Code of Ukraine) and to civilian convicts (Part 1, 2 of Article 84 of the Criminal Code of Ukraine). When conducting comparative studies modern comparativists of criminal law do not come to a consensus on the expediency of separating a special subject of health-based release from punishment (military servant).

I perceive A.V. Savchenko's position as the most reasonable one that explains the determinant legislative decision, namely the need to carry out the above punishments exclusively in military service conditions (Savchenko, 2013).

Determining the suitability of military servants for military service in peacetime and in military conditions is the main activity of Military Medical Commissions of Ukraine.

Military Medical Commissions of Ukraine (hereinafter - MMC), and Medical Flight Commissions) are an important structural component of the military medicine of Ukraine; they operate at all departmental military medical establishments (institutions), in particular military formations, formed in accordance with the laws of Ukraine, and law enforcement bodies of special purpose.

The system of Military Medical Commissions of Ukraine, including Medical Flight Commissions - full-time ones and part-time ones (permanent ones and temporary ones), consists of:

- Local MMCs (garrison MMCs);
- Regional MMCs;
- The Central MMC is a military management body, which manages regional WLCs and is the leading body for military medical examinations.

Military Medical Commissions of Ukraine have departmental affiliation to:

- The Armed Forces of Ukraine;
- The State Border Guard Service of Ukraine;
- The Ministry of Internal Affairs of Ukraine;
- The Security Service of Ukraine;
- The System of Emergency Bodies;

MMCs make their decisions in form of resolutions, which are supplemented with a certificate of the disease, a certificate from the military medical commission and minutes of the meeting of the military medical commission.

The low representational level of research on WLC activities due to the regime of limited access to information does not correspond to the social significance of this institution of military medicine. Structural features of MMCs and the procedure of performing their tasks have great potential for further scientific research (Leheza et., 2021).

Affiliation of Military Medical Commissions of Ukraine to various state agencies and their departmental legal regulation presupposes existence of many separate Lists of diseases (Schedules of diseases, health statuses and physical defects, which determine the degree of suitability (fitness) for military service).

Judicial practice of health-based release from punishment of military servants sentenced to service restrictions, arrest or detention in a disciplinary battalion but found to be unfit for military service is insignificant to influence criminal enforcement policy in the sphere of punishment execution. In recent years, only a few decisions (court rulings) on the issue have been presented in the criminal proceedings of Ukraine.

The decision of the Berdychiv City District Court of the Zhytomyr Region dated 12 May, 2021 (case №274 / 6697/18, proceedings №1-v / 0274/63/21) is an interesting occasion for practice of the researched issue. This decision satisfied the request of the Zhytomyr Zonal Department of the Military Law Enforcement Service to change the order of court sentence execution and determined that the convict must serve a sentence of arrest in a detention center (although being a military servant he had to serve his sentence in a guard house). Such a court decision may worsen the legal position of the convict, as the provision of Part 3 of Article 84 of the Criminal Code of Ukraine was not applied, although the convict raised this issue before the court and there were all legal grounds for applying the mentioned provision. Failure to ensure participation of a defense counsel is an indicative moment. In this case it is

a violation of the convict's right for defense and indicates significant violations of the requirements of the criminal procedure law as well as incorrect application of the Law of Ukraine on Criminal Liability.

The reviewed judicial practice of criminal proceedings of Ukraine on the raised issue testifies to low awareness of specifics of this category of case not only by judges, but also by other participants of the case (Leheza et., 2022).

The armed aggression of the Russian Federation against Ukraine caused an increase in the personnel of military officers to carry out military service. Under such circumstances, military medicine should take a leading place in the state policy. However, declarative norms of military doctrines in the sphere of military medicine are not always implemented, or do not cover all priority areas, including in particular the issue of health-based unfitness of military servants for military service as a ground for release from punishment (Leheza et., 2022).

Conclusions

When analyzing court decisions of Ukraine, we should draw attention to the following problems of judicial practice.

First, the resolution part of the court ruling does not contain a decision to release the convicted military servant from punishment, but only to satisfy the request filed by the commander of the military unit.

Secondly, when ruling on the criminal proceedings concerning execution of the court sentence (paragraph 6 of Part 1 of Article 537 of the Criminal Procedure Code of Ukraine) the judge of the local court erroneously released the serviceman from criminal liability, although the latter had already been convicted and Article 84 of the Criminal Code of Ukraine provides only for release from punishment.

Third, the court violated the procedural deadline for consideration of the given submission, as it was received by the court on 26 August, 2020, and decided on 22 October, 2020, i.e. after a 10-day period specified in Part 3 of Article 539 of the Criminal Procedure Code of Ukraine.

Fourth, the court resolution does not contain information on proper notification of the participants in the proceedings (only the prosecutor is present), which may indicate a violation of the provisions of Part 5 of Article 539 of the Criminal Procedure Code of Ukraine.

And practice of the appellate courts on the mandatory summoning of the convict and his defense counsel was not taken into account; violation of this practice may indicate significant violations of the requirements of the criminal procedure law and the court decision will be revoked.

Fifth, the court of the first instance erroneously established the priority of applying Part 5 of Article 47 of the Penitentiary Code of Ukraine, as the penitentiary standard only regulates the procedure for implementing Part 3 of Article 84 of the Criminal Code of Ukraine.

Based on the above, I come to the conclusion that the practice of law enforcement of the provisions of Part 3 of Article 84 of the Criminal Code of Ukraine is incorrect due to the following factors:

1. There is a lack of proper coordination of Ukrainian criminal cycle legislation (provisions of the Criminal Code of Ukraine and the Penitentiary Code of Ukraine.

2. There is insufficient attention and superficial representation of the scientific community on peculiarities of the legal regulation of military service resulting in making ungrounded statements about the privileged position of military servants in applying the provisions of Part 3 of Article 84 of the Criminal Code of Ukraine;

3. Judicial practice does not serve as a precedent for resolving these issues because of shortcomings in judicial reform and low legal awareness of all participants in the process.

However, despite these negative factors, I remain a holder of positive expectations concerning development of military medicine in Ukraine, and such studies can become catalysts of such processes.

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