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EXPIRY IN DISCIPLINARY PROCEEDINGS

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SUMMARY: 1. THE EFFECTS OF EXPIRY; 2. SUSPENSION OF DEADLINES; 2.1 Who can suspend the deadline?; 2.2 Coordination between arts. 43.4 and 44; 2.3 Different suspensions.

1. The effects of expiry

One of the most contentious issues in disciplinary proceedings is whether the disciplinary proceedings have or have not expired.

Eduardo García de Enterría and Tomás-Ramón Fernández[119], referring to art. 92 of the Law on the Legal Regime of the Public Administrations and Common Administrative Procedure (prior to the latest reform), state that this precept relating to expiry: "*was certainly intended to release citizens from the indefinite and unlimited pendency of the risk of encumbrance, penalty or loss or limitation of rights announced by the Administration when bringing the procedure, but the evolution of case law has reduced this laudable purpose to nothing by underlining that the declaration of expiry does not extinguish the action of the Administration to exercise its sanctioning powers (...) which has come to be interpreted as the same as the declaration of expiry of the right of the Administration to exercise its sanctioning powers (...), which has come to be interpreted as an invitation to initiate a second procedure with the same purpose, a solution which, as J. A. Santamaría, the legislator + has not hesitated to confirm in some cases (...), thus converting the declaration of revocation into an iter inutilis".*

It is commonly asserted that expiry is a sort of penalty imposed upon the Administration that has not been diligent in its duty to process cases promptly and complete them within the time limit set by the law. However, we disagree with this statement, since it not a penalty, on the contrary, it allows the administration to make a further, better attempt, for example, knowing the party's allegations.

The battle-horse lies in the effects of a declaration of expiry.

The general rule is in art. 95 of the current Law 39/2015, of 1 October, on the common administrative procedure of the Public Administrations, which provides:

"1. *When procedures filed at the request of the interested party are frozen for reasons attributable to the interested party, the Administration will warn them that the procedure will lapse after three months. If this period lapses without the respondent having*

[119] García de Enterría, Eduardo / Fernández, Tomás Ramón, *Curso de Derecho Administrativo*, II, 13ª ed., 2013, page. 527.

done what is necessary to resume the process, the Administration shall agree to close the proceedings, notifying the interested party. The available appeals shall be lodged against the decision declaring revocation.

2. Expiry may not be said to have occurred simply because the person concerned has not completed the formalities, provided that they are not essential to issue a decision. The only effect of the inactivity is that they will forfeit their right to the procedure.

3. The expiry shall not of itself block the actions of the individual or of the administration, but the lapsed proceedings shall not interrupt the limitation period.

In cases where it is possible to bring a new procedure because the limitation period has not expired, the acts and formalities whose content would have remained the same if the limitation period had not expired may be incorporated into the new procedure. In any case, the formalities regarding allegations, submission of evidence and hearing of the interested party must be complied with in the new procedure.

4. Expiry may be waived if the matter in question affects the general interest or if it is desirable to substantiate it in order to define and clarify it.

The precept aims to determine what happens in relation to the expiry of the procedure, "in procedures initiated at the request of the interested party"; however, Paragraph 1.3 introduces the Administration, changing the meaning of the legal form, and Paragraph1.2 totally blurs the issue. Expiry is no longer (or is no longer solely) a defence available to the respondent against the inaction of the administration, but becomes an acquittal in the instance that gives the administration new opportunities; if it failed in the first instance, it is allowed to try again.

Clearly, a very narrow interpretation of expiry is required. It is clear that when the administration violates the fundamental rights of the person concerned in the sanctioning procedure or has failed to obtain proof, etc., it is not acceptable to permit it to try again. It is a sanctioning procedure and the *non bis in idem* principle must be applied to all its effects: the person concerned has a right not to be tried or punished twice for the same charges.

It is a subterfuge: in civil proceedings there is a limitation period[120] and it is transferred to the administrative procedure. However, it should be noted that it should not be applied to *all* administrative procedures, as it should exclude sanctioning procedures, given that it is not a civil matter, but the exercise of *ius puniendi*.

The position most often defended in the doctrine is the following:

The lapsing of the proceedings has a triple effect: a) that a valid decision cannot be issued and if such a decision were issued it would be null and void as it would be an act issued in total and absolute disregard of the established procedure; b) that it does not prevent a new disciplinary proceeding from being initiated whilst the limitation period has

[120] In this respect, Gómez Orbaneja, Emilio / Herce Quemada, Vicente, *Derecho procesal civil*, I, 1976, pages. 390 et seq.; Manresa y Navarro, José María, *Comentarios a la Ley de Enjuiciamiento Civil*, II, 1953, pages. 380 et seq.; in the current LECivil, see arts. 236 et seq.

not expired; and, c) that a new disciplinary proceeding cannot be initiated until the current one has lapsed.

Of these effects, I disagree with that which refers to the possibility of initiating a new procedure until the disciplinary offence has expired.

Therefore, in our opinion - which does not agree with the case law - the solution must be different.

Expiry is a sort of acquittal in the proceeding, in which the "administrative sanctioning action" can be re-exercised (and re-exercised and re-exercised) until the administrative violation has expired. It is impossible to entertain such nonsense, which Alonso Martínez rejected many years ago.

A very good definition of acquittal in the proceeding appears in Escriche's Dictionary[121]: "*To acquit and release the defendant, not of the crime of which he is accused or of the thing of which he is accused, but only of the trial that has been started, that is to say, of the proceedings that have taken place; which usually happens when there are no facts to declare him absolutely innocent, nor to condemn him; and in such a case, if new facts arise, he may be accused of the same matter or the same crime again, although the past trial will not be valid, but only the instruments and evidence, submitting them again*".

In view of this, Manuel Alonso Martínez, in the *Explanatory Memorandum* to the LECrim, signed in San Ildefonso on 14 September 1882, categorically states that "*it is equally useless to say that the absolution of the trial, this corruption which made the citizen whom the State had not been able to convict of guilt a kind of freedman for life, a true servant of the curia, tainted with the stigma of dishonour, is proscribed and expressly prohibited by the new Code, as it had been previously condemned by science, by the Law of 1872 and by the Compilation in force. It is to be hoped that the effects of the provisions of the new law will be enough to prevent such a practice from ever again intruding surreptitiously into our judicial customs*".

In our view, as generally understood are not acceptable, the effects of expiry in a state governed by the rule of law. We believe it is inadmissible from the point of view of guarantees and its possibility is contrary to dignity.

Because of this, we consider that the correct thing to do is that once expiry has been declared, the administrative offence in which the triple identity of person, thing and basis is present can no longer be pursued.

Thus, art. 211.4 of Law 58/2003, of 17 December, General Tax Law specifically states that "*the expiry of the period established in section 2 of this article without notification of an express resolution will cause the procedure to lapse*.

[121] Escriche, Joaquín, *Diccionario razonado de Legislación y Jurisprudencia*, augmented edition by León Galindo y de Vera and José Vicente y Caravantes, I, Madrid, 1874, page 145.

The declaration of expiry may be issued ex officio or at the request of the interested party and the proceedings shall be ordered closed. Such expiry shall preclude the initiation of a new penalty procedure.

The principle of effectiveness must also be taken into account. That is, art. 103 of the Spanish Constitution must be considered. Therefore, a new claim may not be filed when it is considered that the inactivity of the administration is due to causes or reasons that are at odds with this principle. The existence of an unjustified stoppage by the administration may mean that, once the case has expired, it cannot be reopened, even before the expiry deadline. This requires an analysis of the reasons for the expiry of the time limit and obliges the administration to justify its failure to process the case within the time limit, otherwise it will not be able to file new disciplinary proceedings.

The doctrine of the European Court of Human Rights in relation to administrative sanctions applies the so-called Engel test and, by virtue of this, when it is considered a criminal sanction, the *non bis in idem* principle will apply, which not only prevents double punishment but also double prosecution. The effect that is generally attached to a declaration of expiry is undoubtedly a double prosecution.

It is precisely because of the application of the *non bis in idem* principle, which prevents the same person for being prosecuted twice for the same crime, it is for this reason that, in our opinion, once disciplinary proceedings have been brought against a person and the case has expired, it is only fair that the disciplinary activity cannot begin again. This conclusion does not relate to the expiry but to the prohibition of *bis in idem*. Thus, the argument that the relevant period has not expired is not convincing, as the *non bis in idem* principle operates without any connection to the expiry.

2. Suspension of deadlines

2.1 Who can suspend the deadline?

It is settled case law that the only authority that can decree the suspension of the time limit is the Director-General of the Guardia Civil. Obviously, we are referring to the suspension of the period referred to in art. 65 of the Organic Law on the Disciplinary Regime of the Guardia Civil.

In effect, the STS, 43/2019, of 27 March, following the consistent jurisprudential line points out that as stated in the judgement of 28 February 2014 that "*we stated in our judgement of 22 January 2013, followed by those of 19 March and 4 April 2013, that "the only authority competent to suspend the expiry period of the sanctioning proceedings is the Director-General of the Guardia Civil as established in art. 65.2 LO. 12/2007, and confirms the case law of this Chamber contained in the recent judgements 28.04.2011 and 23.09.2011", adding in the judgement of 22 January 2013 that "the causes or cases when the suspension is appropriate are listed exhaustively in the aforementioned provision (in paragraphs a), b), and c))", basic considerations for which, without resorting to other provisions of the aforementioned Disciplinary Law, it would be appropriate to declare the nullity of the Agreement adopted by the examiner in the proceedings*".

2.2 Coordination between arts. 43.4 and 44.

In connection with the legal suspension of processing times, the question arises as to the coordination or compatibility of Arts. 43.4 and 44 of the LORDGC. Both precepts are compatible, as Art. 44 establishes how notifications must be made and what must be done when notice cannot be served *"because the interested party cannot be located in his duty station or place of employment, or at his declared address*". The provision then provides the solution for such cases: If you cannot be located at your duty station or station, an attempt will be made to serve notice at your home address and, if unsuccessful, you will be notified by means of edicts on the notice board of your duty station or barracks and in the Official Gazette of the Guardia Civil; thus, in the event that an attempt has been made to serve notice at home, in order for it to be considered completed, two attempts must have been made at different times within a period of three days. And, if you are not located at your address, it will be time to publish the decision by means of the edicts.

Art. 43.4 refers to the suspension of the calculation of time limits by means of a reasoned agreement of the examiner when "*for reasons attributable to the interested party, it is not possible to carry out the investigations necessary to resolve the proceedings or make the necessary notifications within the time limits*".

Therefore, the question is whether it is only possible to suspend the time limits when the cause for which it is not possible to carry out a procedure or notification is attributable to the interested party. Therefore, for the suspension of the time limits to be in accordance with the law, the examiner must state the reasons for the suspension and why it is attributable to the interested party.

From the reading of both precepts, it cannot be concluded that when it has not been possible to notify any action, we would already have a cause for suspending the time limits. The notifications must be made in accordance with Art. 44 LORDGC. Whereas the suspension of time limits requires the cause of the impossibility to notify to be imputed to the person concerned.

In judgement number 112/22 of 21 December, the 5th Chamber of the Supreme Court states that "*this chamber considers that for the examiner of the case to be able to suspend the maximum period for processing the case for reasons attributable to the accused, it is not enough for the latter to be unreachable, it is necessary that previously, within the maximum period for processing, the examiner of the case has attempted to notify them of the disciplinary decision in due time and form and, therefore, as stated above, for the attempted notification - duly accredited - to serve to consider the disciplinary procedure as completed and to understand that it has been processed within the legally established period, it must be done in the terms legally established in the disciplinary regime of the Guardia Civil, that is, in accordance with the provisions on service of notifications in article 44, if, within the maximum period for processing, the decision was not notified in due time and form, it cannot then be attributed to the accused that it could not be carried out for reasons attributable to him and the period suspended until he is located, given that, if the attempt at notification had been carried out in due time and form, the sanctioning decision would have been considered notified within the maximum period - avoiding the expiry of the time limit - and if this had not been the case, it cannot then be attributed to the accused that it could not be carried out for reasons attributable to him and the period suspended until he is located.*".

If examiner's agreement suspending the time limits is not in accordance with the law, the consequence is that the period of time in which the time limit of the file was suspended should not be counted in the expiry period established in art. 65 of the LORDGC. And if, after excluding that period, the result is that more than six months elapsed from the agreement to bring the case until the date on which the decision terminating the case was notified to the interested party, the consequence is that the case must be declared to have lapsed.

2.3 Different suspensions

Now, although the above conclusion is the jurisprudential line, I will now set out my view on the matter.

In my opinion, one issue is the suspension of the time limits indicated "procedural matters and appeals", which is the responsibility of the investigator by means of a reasoned agreement (Art. 43). Another issue is the time limit for the expiry of the file, set out in art. 65.1, which can only be suspended "by agreement of the Director-General (...) of the Guardia Civil, at the proposal of the examiner (art. 65.2).

Therefore, the suspension of the processing time limits (Art. 43) does not affect the limitation period (Art. 65). The days during which any period of proceedings has been suspended in accordance with section 43 must not be discounted when calculating the limitation period.

The limitation period is that established in Art. 65 and its suspension only occurs in the cases foreseen in that article.

But, I want to make it clear that, as I have already indicated, this is my opinion and not the position followed by the case law.