

## **Legal Comment on a Judicial Judgment Regarding the Failure to Record the Statements of the Public Employee before the Investigative Committee**

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### **Abstract**

*The Supreme Administrative Court in Iraq issued its judgment, in which it ruled “The discriminatory (objector) objects to the penalty of reprimand issued against him by administrative order No. (S) issued No. (S) on 19/3/2014 for hiding bids (5) and not sending them to the Bids Audit and Analysis Committee in Governorate (D) because he is the Chairman of the Bids Opening Committee, the Court of Employees Justice ruled to cancel the contested order for not recording the statements of the objector from the investigative committee that recommended the imposition of the penalty, whereas the investigation of the employee referred to the investigation and the recording of his statements by the investigative committee are essential matters required by law, its violation entails the invalidity of the penalty imposed based on the recommendations of the investigative committee, which requires the cancellation of the penalty imposed against the objector, whereas the discriminatory provision has proceeded in accordance with the foregoing, it shall be valid and in accordance with the law, therefore, decided to ratify it, reject the discriminatory regulation, and charge the distinguished person the paid fee, but this does not prevent the administration from taking the proper legal procedures and punishing the violating employee in accordance with the law, and the decision was issued by majority on 4 / Shaaban / 1442 AH corresponding to 17/3/2021” .*

**Keywords:** *Legal Comment, Judicial, Public Employee.*

## **INTRODUCTION**

### **FIRST: JUDGMENT**

The Supreme Administrative Court in Iraq issued its judgment, in which it ruled “The discriminatory (objector) objects to the penalty of reprimand issued against him by administrative order No. (S) issued No. (S) on 19/3/2014 for hiding bids (5) and not sending them to the Bids Audit and Analysis Committee in Governorate (D) because he is the Chairman of the Bids Opening Committee, the Court of Employees Justice ruled to cancel the contested order for not recording the statements of the objector from the investigative committee that recommended the imposition of the penalty, whereas the investigation of the employee referred to the investigation and the recording of his statements by the investigative committee are essential matters required by law, its violation entails the invalidity of the penalty imposed based on the recommendations of the investigative committee, which requires the cancellation of the penalty imposed against the objector, whereas the discriminatory provision has proceeded in accordance with the foregoing, it shall be valid and in accordance with the law, therefore, decided to

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ratify it, reject the discriminatory regulation, and charge the distinguished person the paid fee, but this does not prevent the administration from taking the proper legal procedures and punishing the violating employee in accordance with the law, and the decision was issued by majority on 4 / Shaaban / 1442 AH corresponding to 17/3/2021” .

This judgment of the Supreme Administrative Court raises a set of questions regarding the compatibility of the judgment in its preference for the logic of guarantee over effectiveness, before going into that, we must review the facts, merits and operative part of the judgment, which will illuminate the way for us in order to analyze the judgment, comment on it and summarize it according to the following:

#### SECOND: FACTS

The facts of the judgment are summarized in an appeal filed by discriminatory against the decision of the Personnel Justice Court to cancel the reprimand penalty that discriminatory had previously imposed on one of his employees, who was assigned to head the Bids Opening Committee, for hiding five bids and not sending them to the Bids Audit and Analysis Committee in the department in which he works, the basis of the appeal submitted by the objector was the failure to record his statements before the investigative committee, the Personnel Justice Court had based its decision on appealing the violation of the penalty on the formal aspect and the provisions of the law.

#### THIRD: RATIONALE

The Supreme Administrative Court based its judgment on the failure to record the statements of the employee from the investigative committee that recommended imposing the penalty against him, stressing that investigating the employee referred to the investigation and recording his statements is one of the essential matters required by the law and that violating it entails the invalidity of the penalty imposed.

#### FOURTH: OPERATIVE

In the form: Appeal accepted

In the matter: Ratification of the decision of the Personnel Justice Court and dismissal of the discriminatory regulation.

#### FIFTH: COMMENT ON THE JUDGMENT

Recording the employee's statements before the investigative committee is one of the most important guarantees granted to him, as it takes the right to confront and defend together, it is noted on the aforementioned judgment that it canceled the administrative decision to impose the penalty due to the failure to record the employee's statement, stressing the importance of this procedure when he described that recording the employee's statements from the investigative committee is one of the essential matters required by law , pointing out that violating it entails the invalidity of the penalty imposed, as the recording of the employee's statements is the cornerstone of the investigation, the disciplinary penalty issued when it is issued without taking it into account is forfeited by his absence, the investigation does not meet its legal requirements unless it is confronted with the staff member concerned; the investigation conducted in his absence cannot be relied upon, even if an investigative committee is formed on the violation attributed to the employee, however, the court based its judgment on the fact that the employee did not record his statements before the investigative committee, however, it did not indicate in its judgment that it investigated what indicates that the employee was duly informed to appear before the investigative committee or not, and this is very important, however, we note that the judgment was sent in this regard without any facts to support it, this invites us to examine how the Council of State deals with the hypothesis mentioned, upon investigation, we found that the State Council had issued a fatwa in its decision No. (72/2016) on 14/8/2016 that “The failure of the violating employee to appear before the investigative committee despite being duly informed does

not prevent it from continuing its work,” it is clear from this fatwa that the employee's refusal to appear before the investigative committee after he has been duly informed of his attendance is a waiver of his right to defend himself, therefore, the investigative committee should proceed with its procedures and base its recommendations on the considered evidence presented by the Chamber before it, this shall not prejudice the validity of its procedures and the validity of the penalty issued in accordance with its recommendations, the employee cannot invoke this reason to cancel the penalty imposed on him, because whoever seeks to revoke what has been done at his hands, his quest is rewarded by him, it is also clear from this opinion that the Council of State supports the administration in achieving the principle of effectiveness at the expense of the employee's security in conjunction with the relaxation of the procedures followed by the investigative committee, however, we did not find in the merits of the judgment any evidence that the court investigated the fact of notification or not, because such a precaution would have balanced the effectiveness of the disciplinary system with the necessary guarantee to protect the rights of the employee had it been done by the court before issuing its judgment, in our assessment, this reason was behind the court's judgment by majority and not by agreement, it is possible that one of the members of the court presented his opinion regarding the investigation of the reason for not recording the employee's statements before the investigative committee, however, the rest of the members did not share his opinion and as a result of his insistence on his demand, the court issued its judgment by majority without investigating the reason.

It is also clear from the judgment that the annulment was based on one of the defects of external legality, which is the defect of the procedures, the defect of the procedures does not prevent the investigation from being re-conducted with the same employee after the penalty against him has been canceled for formal reasons, so that if his negligence is proven, the penalty is imposed again against him, and this is not considered the imposition of more than one penalty for one act, as the previous decision after its cancellation has canceled with it all its effects, but more than that, the investigative committee can recommend referring it to the competent courts if it considers that his act constitutes a crime committed in his official capacity, whereas it is obligated and not subject to referral to the competent court in accordance with the provisions of the law , the Supreme Administrative Court did well when it concluded its aforementioned judgment when it assured the administration that "However, this does not prevent the administration from taking proper legal procedures and punishing the violating employee in accordance with the law," in an important reference to the cancellation of the penalty for reasons related to the external legitimacy of the disciplinary administrative decision, the administration shall not be able to fulfill the correct procedures and impose punishment against him if it is proven that he is negligent without this being considered a violation of the authority of the judgment or directing orders to the administration, we hope that this welcome approach of the Court will continue; because of its role in establishing a belief in the administration in the need to take into account the formal aspect in its decisions.

However, we have another observation on the judgment in practice, by reviewing the merits of the judgment, it was found that the penalty imposed on the employee was under the order issued on 19/3/2014 and that the judgment of the Supreme Administrative Court was issued on 17/3/2021, meaning that it was issued after the passage of six years, eleven months and twenty-eight days from the date of issuance of the penalty, if we add to it the date of the occurrence of the violation, which is inevitably before the date of the issuance of the administrative decision to impose the penalty of reprimand, we will be facing a violation that has been committed for seven years, how can the investigative committee prove the violation after all these years have passed, and the features of the violation may have been lost, or the employee may have concealed any evidence that existed at the time that may be taken against him, what is the fate of the company if it has been referred to the one for whose benefit it was concealed and then it was proven that fraud in one of the

decisions of the composite operation is separable from the referral decision in accordance with the provisions of the theory of separate administrative decisions, and it was challenged before the judiciary and ruled to cancel it , what is the point of canceling after the contract was implemented seven years ago, as we noticed that most of the judgments related to external legality are issued after a relatively long period from the date of imposing the penalty, the other observation is that the honorable court has used a name that was not included in the instructions for the implementation of government contracts No. (2) of 2014, where it used the term committee for auditing and analyzing bids, while the legislator called it in the instructions in force the analysis committee only , the designation used in the judgment refers to the instructions for the implementation of government contracts No. (1) of 2008, which are canceled .

#### SIXTH: PRINCIPLES ABSTRACTED FROM THE JUDGMENT

1. The written investigation with the employee referred to an investigative committee is one of the essential procedures.
2. The omission of the investigative committee for its procedure entails the invalidity of the decision issued on the basis of its recommendations, in accordance with the legal principle "What is built on falsehood is false."
3. The defects of external legitimacy do not prevent the administration from fulfilling them and then re-issuing its decision again after it has been canceled by the judiciary.
4. The issuance of a new decision by the administration after fulfilling the deficiency that marred its decision annulled by the court, is not a violation of the authority of the judgment.
5. The judge has the right to direct the administration to exercise its right to reissue the decision after fulfilling the deficiency that was marred when it was defective by a defect in external legality, this amicable directive is not a violation of the principle of separation of powers, but the judge is prohibited from such guidance in the internal legitimacy defects of the decision, as this feature is limited to formal defects without objectivity.

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