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LEGAL EXAMINATION PLACE IN CASES MILITARY ADMINISTRATIVE OFFENSES INVOLVED BY MILITARY SERVICES NATIONAL GUARD OF UKRAINE

Scientific problem definition. The article is devoted to the investigation of types of military administrative offenses committed by servicemen of the National Guard of Ukraine and the possibility of specific expertise use while hearing such cases. The author analyzed the judicial practice, which became the basis for concluding the possibility of appointing different types of forensic examinations in the proceedings on cases of military administrative offenses provided for in Chapter 13–B Code of Ukraine on Administrative Offenses.

The purpose of the article is to determine forensic examination as a means of establishing the truth in cases of military administrative offenses committed by servicemen of the National Guard of Ukraine.

Main research results. Working out various scientific works concerning the problem of establishing the responsibility of servicemen of the National Guard of Ukraine for military administrative offenses, allowed to determine the object of military administrative offenses provided for in art. 172-10–172-17, 172-19–172-20 Code of Ukraine on Administrative Offenses. The author emphasizes the fact that not all subjects of forensic expert activity, listed in art. 7 of the Law of Ukraine «On Forensic Examination» carry out forensic expert activity in cases on military administrative offenses, in case the offender in the case serves a serviceman of the National Guard of Ukraine.

Conclusions. It was emphasized that in cases concerning military administrative offenses committed by servicemen of the National Guard of Ukraine, can be assigned /ordered to conduct forensic, commodity, military expertise, as well as forensic medical expertise in individual cases.

Keywords: military administrative offenses, servicemen, National Guard of Ukraine, subjects of forensic expert activity, forensic examination.

Formulation of Research Problem. When it comes to building an effective management system for law enforcement agencies, research into the factors that constrain these processes has become a matter of concern in the work of many scholars. It should be noted that war crimes and crimes are those obstacles that affect the state of military discipline and law and order in the National Guard of Ukraine (hereinafter referred to as – NGU).

In this article, we propose to focus on two interrelated issues: the investigation of the basic types of military administrative offenses committed by NSU servicemen on the one hand, and the role of forensic

expertise as one of the means of establishing real facts and truth in such cases on the other.

In our opinion, this causes not only theoretical but also practical interest in solving the announced issue.

Analysis of recent researches and publications. As is well known, representatives of various branches of legal science have repeatedly paid attention to the issues of legal responsibility of military personnel. We consider it advisable to cite the individual approaches of administrative scholars to the determination of military administrative responsibility. We share the opinion of M. Turkota, that public relations in the sphere of military (military) security of Ukraine are protected by criminal, administrative and disciplinary sanctions, which are applied with the purpose of general and special prevention of offenses¹.

We state that the object of military administrative offenses under Art. 172-10 -172-17, 172-19 -172-20 Code of Administrative Offenses made by the servicemen of NGU is established the procedure of passing the service in the ranks of NGU. According to O. I. Ostapenko, who devoted his research to the issues of granting legal qualifications to military administrative offenses, the procedure established by the legislature for passing military service obliges servicemen and persons equal to them:

- comply with orders and other legal requirements of commanders and commanders;
- not to leave the military units or place of service without authorization;
- to handle military property with care and care; to use the powers of a military official for official purposes only;
- abide by the rules and procedures for military service and behavior during and outside the service².

We support the views of V. L. Babich, who considered the administrative responsibility of conscripts and conscripts as a change in the legal status of these entities, carried out by an authorized body (official), in the absence of relations of official subordination as a result of the use of only certain for this category (special sub ' of administrative penalties and manifests itself either in the restriction of the rights of conscripts and conscripts, or in the imposition of additional duties for

¹ *Turkot M. S.* Rozmezhuvannia administratyvnoi i dystsyplinarnoi vidpovidalnosti viiskovosluzhbovtiv [Distinguishing administrative and disciplinary responsibility of servicemen]. *Visnyk Natsionalnoi akademii prokuratury Ukrainy.* №1(47). 2017. S. 41 [in Ukrainian].

² *Ostapenko O. I.* Pro yurydychnu kvalifikatsiiu viiskovykh administratyvnykh pravoporushen [On the Legal Qualification of Military Administrative Offenses]. *Visnyk Natsionalnoho universytetu «Lvivska politehnika».* Yurydychni nauky. 2016. № 837. S. 96 [in Ukrainian].

committing certain administrative offenses, in the manner and under the conditions stipulated by the rules of administrative law¹.

We have reason to point out that most scientists are united in their approaches to considering the issue of administrative responsibility of conscripts and conscripts.

The **Article Purpose** of the is to determine the place of judicial expertise as a means of establishing the truth in cases of military administrative offenses committed by servicemen of the National Guard of Ukraine.

Main content presentation. According to Art. 14 of the Law of Ukraine of 13.03.2014 №. 876 *On the National Guard of Ukraine* for committing unlawful acts and inaction of servicemen of the NSU bear disciplinary, material, civil, administrative and criminal responsibility in accordance with the law². The administrative responsibility of NGU servicemen for committing military administrative offenses is stipulated by the Administrative Code and the Disciplinary Statute of the Armed Forces of Ukraine. Thus, Article 15 of the Code of Administrative Offenses establishes that, for committing military administrative offenses, servicemen, as well as servicemen and reservists, during the meeting, shall be held liable under Chapter 13-B of the Administrative Code, provided that such offenses do not entail criminal responsibility³. At the same time, clause 45 of the Disciplinary Statute of the Armed Forces of Ukraine stipulates that for committing administrative offenses, servicemen shall bear disciplinary responsibility, except in cases stipulated by the Code of Administrative Offenses. Servicemen are also responsible for committing corrupt administrative acts or other corruption-related offenses, in accordance with the Code of Administrative Offenses⁴.

In the context of the consideration of military administrative offenses, attention should be paid to Art. 19 of the Constitution of Ukraine, which acts as a kind of guarantor of ensuring the legal order in the state and the proper behavior of officials during the exercise of their powers. Yes, this constitutional provision stipulates that state and local authorities, their officials are obliged to act only on the basis, within the

¹ Babych V. L. Administrativna vidpovidalnist viiskovozoboviazanykh ta pryzovnykiv za porushennia vymoh Zakonu Ukrainy «Pro viiskovy oboviazok ta viiskovu sluzhbu» [Administrative responsibility of conscripts and conscripts for violation of the Law of Ukraine "On Military Duty and Military Service"]. Chasopys Kyivskoho universytetu prava. 2013/3. S. 135 [in Ukrainian].

² On the National Guard of Ukraine: Law of Ukraine dated 13.03.2014 № 876 – VII. information of the Verkhovna Rada of Ukraine. 2014. № 17. Art. 594.

³ Kodeks Ukrainy pro administrativni pravoporushennia [Code of Ukraine on Administrative Offenses]: Zakon Ukrainy vid 07.12.1984 № 8073–X. Vidomosti Verkhovnoi Rady Ukrainy. 1984. № 51. St. 1122 [in Ukrainian].

⁴ Dystsyplinarnyi statut Zbroinykh Syl Ukrainy [Disciplinary Statute of the Armed Forces of Ukraine] : Zakon Ukrainy vid 24.03.1999 № 551–XIV. Vidomosti Verkhovnoi Rady Ukrainy. 1999. № 22. St. 197 [in Ukrainian].

powers and in the manner provided by the Constitution and laws of Ukraine¹. It should be noted that this constitutional provision also applies to military officials to a certain extent, since the efficiency of functioning and organization of the activity of the state apparatus of military administration the Main Directorate of NGU, territorial departments of NGU, units, military units, higher educational institutions, depends on the exercise of their powers. institutions, educational military units (centers), bases, establishments and institutions of NGU, etc., as well as timely and fair resolution of social problems, ensuring the implementation of constitutional rights and freedoms of servicemen and other citizens, legal interests of legal entities.

Undoubtedly, committing administrative offenses by NGU servicemen is a destabilizing factor, which testifies to mistakes made in the organization of the management system and in the work with personnel. It should be noted that positive developments in the direction of moral and psychological support for military discipline have been undertaken by the administrations of all territorial departments of the NGU of the relevant educational measures. Thus, the atmosphere created by the inevitability of punishment for committing an offense in the units of military units had a positive effect on the state of military discipline and law and order. The commanders ceased to conceal criminal offenses committed by personnel and began to take the necessary measures to identify and prosecute those responsible. As an effective form of influence on offenders, active involvement of military servicemen in military administrative responsibility, as well as severe disciplinary penalties: lowering in military rank and position, deprivation of military rank and dismissal from the ranks of NGU. Thus, changing systematic approaches to the evaluation and prevention of offenses contributed to a 5-fold reduction in the number of committed administrative and criminal offenses between 2015 and 2016.²

We propose to list the main types of military administrative offenses envisaged by the Code of Administrative Offenses, which are committed by NGU military personnel:

- 1) refusal to fulfill the legal requirements of the commander (chief) (Articles 172-10 of the Code of Administrative Offenses);
- 2) unauthorized abandonment of a military unit or place of service (Art.172-11 of the Administrative Code);
- 3) careless destruction or damage to military property (art. 172-12 of the Administrative Code);

¹ Konstytutsiia Ukrainy [Constitution of Ukraine] vid 28 chervnia 1996 roku. Vidomosti Verkhovnoi Rady Ukrainy. 1996. № 30. St. 141 [in Ukrainian].

² Natsionalna hvardiia Ukrainy [National Guard of Ukraine]. Bila knvha. 2016. S. 57–59. URL : <http://ngu.gov.ua/ua/bila-knyga-nacionalnoyi-gvardiyi-ukrayiny>. (data zvernennia 10.05.2019) [in Ukrainian].

4) abuse of military authority or authority (Articles 172-13 of the Code of Administrative Offenses);

5) exceeding by a military official of authority or official authority (Article 172-14 of the Administrative Code);

6) negligent attitude to military service (Articles 172-15 of the Administrative Code);

7) inaction of the military authorities (Articles 172-16 of the Administrative Code);

8) violation of the rules of combat duty (Article 172-17 of the Administrative Code);

9) violation of the rules for handling weapons, as well as substances and objects that pose an increased danger to the environment (Articles 172-19 of the Code of Administrative Offenses);

10) drinking alcoholic, low-alcoholic beverages or using narcotic drugs, psychotropic substances or their analogues (Articles 172-20 of the Code of Administrative Offenses)

During the trial, the judge in the proceedings of which a military administrative offense is committed by a serviceman of NGU establishes the presence or absence of such an offense, causation, guilt of the person in his act and other circumstances that are relevant for the adoption of the correct and a positive decision on the case. Such data, according to Art. 251 of the Code of Administrative Offenses are established by a protocol on an administrative offense, explanations of the person who is held administratively liable, victims, witnesses, physical evidence, testimony of technical devices and technical means having the functions of photo and filming, video recording, expert's opinion, as well as other expert evidence. We propose to elaborate on the evidence used by the court in establishing the truth in a military administrative offense case. The case-law was used as a benchmark for establishing an approximate list of evidence by which it is possible to establish the guilt of a NSU military officer in committing a military administrative offense.

Thus, to the evidence in cases of military administrative offenses committed by servicemen of NGU we shall include:

1) the protocol on military administrative offense, which is drawn up for the relevant offense provided for in Chapter 13-B of the Administrative Code;

2) orders of commanders of the military unit in which the serviceman of the NGU is serving;

3) the conclusion of the official investigation into the commission of a military administrative offense;

4) written explanations, reports;

5) information (for example, accounting records and fixing of weapons (ammunition located at the operational point (checkpoint)),

6) copies of books, magazines (for example, a copy of the magazine of the Evening List of personnel for the respective month and year);

- 7) the official and medical characteristics of a serviceman who has committed a military administrative offense;
- 8) functional responsibilities of the NGU serviceman;
- 9) contract for the passage of military service to the National Guard by the citizens of Ukraine;
- 10) expert opinion and other documents.

In the context of the issues raised at the beginning of the study, we consider it appropriate to pay attention to such evidence as the expert opinion on military administrative offenses provided for in Chapter 13-B of the Administrative Code. Indeed, where there is a need for specialized knowledge, including to determine the extent of property damage caused by a military administrative offense, the authorized body or official has the right to appoint a judicial review. However, it should be emphasized that military administrative offenses are inherently specific and practically no such evidence as forensic evidence is used to establish objective truth in such cases. As a rule, the court, a military prosecutor or an official of the NSU, when considering/shaping an administrative case, independently assess or determine the guilt of a person in a military administrative offense, without the use of special knowledge. Forensic examination is intended only if there is a genuine need for specialized knowledge to establish the factual data included in the subject of evidence, ie when the expert's opinion cannot be replaced by other means of proof¹. Neglecting such a means of proving in our opinion may affect the degree of objectivity in considering specific military administrative offenses (eg, Articles 172-12 of the Code of Administrative Offenses inadvertently destroying or damaging military property; Articles 172-19 of the Code of Administrative Offenses, also substances and objects that are of high danger for the environment; Articles 172-20 of the Code of Administrative Offenses of drinking alcoholic, low alcoholic beverages or the use of narcotic drugs, psychotropic substances or their analogues) and the correctness of taking the answer a court order. It should be noted that the following persons who have the right to appoint or order a judicial expertise in cases of military administrative offenses committed by NGU servicemen include: a judge, a military prosecutor, an official of the NGU, a serviceman of the NGU who is subject to an administrative case. At the same time, the judge and the military prosecutor are the subjects of the appointment of forensic examination, and the official of the NSU and the serviceman of the NSU in the case of the administrative offense are the subjects who have the right to order the judicial examination in private.

As a rule, forensic activities in the proceedings in administrative offenses are carried out by:

¹ Pro deiaki pytannia praktykv pryznachennia sudovoi ekspertyzv [Some questions about the practice of appointment of forensic examination]: postanova Vyshchoho hospodarskoho sudu vid 23.03.2012 № 4. Visnyk hospodarskoho sudochynstva. 2012. №3. S. 15 [in Ukrainian].

1) State Specialized Forensic science institutions of the Ministry of Justice of Ukraine;

2) expert services of the Ministry of Internal Affairs of Ukraine, SBU and SBGS;

3) research institutions of judicial examinations, forensic and forensic psychiatric institutions of the Ministry of Health of Ukraine;

4) Certified forensic experts who are not employees of state specialized institutions and other specialists (experts) in the relevant fields of knowledge in the manner and under the conditions specified by the Law of Ukraine: *On Forensic Examination*¹.

However, not all these entities carry out forensic expertise in military administrative offenses when the NGU military officer is the offender in the case. In view of this, we suggest that the subjects directly involved in conducting judicial examinations and expert investigations into military administrative offenses committed by NGU military personnel be:

1) State Specialized Forensic science institutions of the Ministry of Justice of Ukraine;

2) expert services of the Ministry of Internal Affairs of Ukraine

3) certified court experts who are not employees of state specialized institutions; 4) forensic science institutions, forensic medical institutions and forensic psychiatric establishments of the Ministry of Healthcare of Ukraine, in individual cases.

Attention should be paid to the research institutions of judicial expertise of the Ministry of Justice of Ukraine.

Appointment and carrying out of judicial examinations and expert researches by judicial experts of state specialized research institutions of judicial examinations of the Ministry of Justice of Ukraine their duties, rights and responsibilities, organization of carrying out of examinations and registration of their results shall be carried out in accordance with the procedure established by the Code of Administrative Offenses, Law of Ukraine: *On Forensic Examination*, the Order № 53/5 of the Ministry of Justice of 08.10.1998 *On Approval of the Instruction on Appointment and Conduct of Expertise and Expert Research and Scientific and Methodological Recommendations on the preparation and Assignment of forensic examinations*² and *Expert Research*, as well as other legal acts on forensic science activity.

¹ Pro sudovu ekspertyzu [On forensic examination] : Zakon Ukrainy vid 25.02.1994 № 4038–Xii. Vidomosti Verkhovnoi Rady Ukrainy. 1994. № 28. St. 232 [in Ukrainian].

² On approval of the instruction on the appointment and conduct of judicial examinations and expert studies and Scientific and methodological recommendations on the preparation and appointment of forensic examinations and expert studies: Order of the Ministry of Justice of Ukraine dated 08.10.1998 № 53/5. Official Bulletin of Ukraine. 1998. № 46. Art.1715.

Research institutions of judicial expertise of the Ministry of Justice of Ukraine may carry out different types of expertise, which are stipulated by the order of the Ministry of Justice of Ukraine № 53/5 of 08.10.1998 *On Approval of the Instruction on the Assignment and Conducting of forensic examinations and Expert research and Scientific and Methodological Recommendations on Preparation and the appointment of forensic examinations*¹, in particular: forensic, commercial, environmental, psychological, military forensic examinations, etc. Having analyzed the dispositions of military administrative offenses envisaged by Chapter 13-B of the Code of Administrative Offenses, we propose to identify those types of judicial expertise that are intended to clarify the circumstances of military administrative offense committed by a NGU military officer. Thus, in order to provide an expert opinion on military administrative offenses provided for in Art. 172-10 –172-17, 172-19, 172-20 of the Code of Administrative Offenses, special knowledge in the field of forensic, commodity and military expertise is used. In addition, within these military administrative offenses, in addition to military expertise, the relevant entities have the right to appoint forensic and commodity expertise under Art. 172-12 of the Administrative Code, and for the offense provided for in Art. 172-20 of the Code of Administrative Offenses in some cases forensic examination may be ordered.

In terms of demand for forensic examinations in military administrative offenses, it should be noted that, today, unfortunately, to establish the truth in this category of administrative cases in comparison with other types of administrative offenses, only in exceptional cases are authorized entities appointed or ordered to carry out forensic examinations and expert research. Despite this, we believe that the expert support of high-quality, substantiated and objective judicial expertise of the NGU as a military unit with law enforcement functions in military administrative offenses can affect the course and outcome of the trial.

Conclusions. Summarizing the above, the NGU expert support can be defined as the activity of the subjects of forensic activity aimed at providing this military formation with law enforcement functions, independent, high-quality and objective judicial expertise focused on the maximum use of the achievements of science and technology.

In view of the above, we propose to formulate the following conclusions: We consider that the provision of judicial expertise in cases of military administrative offenses, to which a participant of the NGU servicemen should act, should be carried out when there is a real need for such research, and also if the results of such research can affect the course and results of the case. The conducted analysis of the provisions of the current The Law of Ukraine *On Judicial Examination* made it possible to establish that not all the listed in Art. 7 subjects carry out forensic expertise in military administrative offenses in cases where the NGU

¹ Ibidem.

military officer is the offender in the case. . In cases of military administrative offenses committed by NGU military personnel, forensic, commodity, military, as well as forensic examination may be ordered / ordered. Appropriately forensic psychiatric examination of all types of military administrative offenses is used to check the status of conviction.

References

- Babych, V. L. (2013). Administratyvna vidpovidalnist viiskovozoboviazanykh ta pryzovnykiv za porushennia vymoh Zakonu Ukrainy «Pro viiskovy oboviazok ta viiskovu sluzhbu». *Chasopys Kyivskoho universytetu prava*. 2013/3. 134–137 [in Ukrainian].
- Dystsyplinarnyi statut Zbroinykh Syl Ukrainy: Zakon Ukrainy vid 24.03.1999 № 551–XIV. *Vidomosti Verkhovnoi Rady Ukrainy*. 1999. № 22. St. 197 [in Ukrainian].
- Kodeks Ukrainy pro administratyvni pravoporushennia: Zakon Ukrainy vid 07.12.1984 № 8073–X. *Vidomosti Verkhovnoi Rady Ukrainy*. 1984. № 51. St. 1122 [in Ukrainian].
- Konstytutsiia Ukrainy vid 28 chervnia 1996 roku. *Vidomosti Verkhovnoi Rady Ukrainy*. 1996. № 30. St. 141 [in Ukrainian].
- Natsionalna hvardiia Ukrainy (2016). Bila knyha – 2016. 57–59 URL : <http://ngu.gov.ua/ua/bila-knyga-nacionalnoyi-gvardiyi-ukrayiny> [in Ukrainian].
- Ostapenko, O. I. (2016). Pro yurydychnu kvalifikatsiiu viiskovykh administratyvnykh pravoporushen. *Visnyk Natsionalnoho universytetu «Lvivska politekhnika»*. *Yurydychni Nauky*. № 837. 92–99 [in Ukrainian].
- Pro deiaiki pytannia praktyky pryznachennia sudovoi ekspertyzy: Postanova Vyshchoho hospodarskoho sudu vid 23.03.2012 № 4. *Visnyk hospodarskoho sudochynstva*. № 3 [in Ukrainian].
- Pro Natsionalnu hvardiiu Ukrainy: Zakon Ukrainy vid 13.03.2014 № 876–VII. *Vidomosti Verkhovnoi Rady Ukrainy*. 2014. № 17. St. 594 [in Ukrainian].
- Pro sudovu ekspertyzu: Zakon Ukrainy vid 25.02.1994 № 4038–XII. *Vidomosti Verkhovnoi Rady Ukrainy*. 1994. № 28. St. 232 [in Ukrainian].
- Pro zatverdzhennia Instrukt sii pro pryznachennia ta provedennia sudovykh ekspertyz ta ekspertnykh doslidzhen ta Naukovo-metodychnykh rekomendatsii z pytan pidhotovky ta pryznachennia sudovykh ekspertyz ta ekspertnykh doslidzhen: Nakaz Ministerstva yustyt sii Ukrainy vid 08.10.1998 № 53/5. *Oftsiniyi visnyk Ukrainy*. 1998. № 46. St.1715 [in Ukrainian].
- Turkot, M. S. (2017). Rozmezhuvannia administratyvnoi i dystsyplinarnoi vidpovidalnosti viiskovosluzhbovt siv. *Visnyk Natsionalnoi akademii prokuratury Ukrainy*. № 1 (47). 2017. 40–47 [in Ukrainian].

О. В. Аганова

СУДОВА ЕКСПЕРТИЗА У СПРАВАХ ПРО ВІЙСЬКОВІ АДМІНІСТРАТИВНІ ПРАВОПОРУШЕННЯ, ЩО ВЧИНЮЮТЬСЯ ВІЙСЬКОВОСЛУЖБОВЦЯМИ НАЦІОНАЛЬНОЇ ГВАРДІЇ УКРАЇНИ

Статтю присвячено дослідженню видів військових адміністративних правопорушень в Національній гвардії України та

розглянуто можливість використання спеціальних знань під час розгляду таких справ.

Мета публікації полягає у визначенні судової експертизи як засобу встановлення істини у справах про військові адміністративні правопорушення. Підкреслено, що далеко не всі суб'єкти здійснюють судові експертизи у справах про військові адміністративні правопорушення у випадку, коли правопорушником у справі виступає військовослужбовець НГУ.

Встановлено, що можуть бути призначені різні види експертиз.

Ключові слова: військові адміністративні правопорушення, Національна гвардія України, судова експертиза.

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