



Oversight of Appointment

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Abstract:

The public office has a role and great importance in life, as it is no longer as it was in the past limited to a certain category of the sons of the country, but has become a basic right enjoyed by all citizens equally, the legislation of countries has tried to develop legal rules that achieve justice between individuals in assuming those public positions due to this increasing demand for them, but the administration may not be committed, or deviate from the foundations and procedures set by the legislator, which must be taken into account before issuing the appointment decision in Public office, as well as the criteria and conditions that must be met by the public servant, and not to abuse the discretionary power granted to him by these legislations other than the purpose envisaged by the legislator in appointing the public employee or the weakness of administrative control, highlights the role of judicial and non-judicial control as the most important guarantees available to individuals against the deviation of the administration from the objective foundations and standards necessary for the appointment of the public employee, in addition to the role of administrative control that the administration must exercise based on the principle of legality of control over the conditions of Appointment to the public office.

Introduction

In view of the importance of the public office of the State and the individual, and the importance of choosing the right person in the right place, legislation has been working on developing legal texts that reflect the basic principles of assuming public office, in order to ensure the good selection of the public employee, since good selection leads to the success of public utilities, and in accordance with what is required by the public interest and according to the actual need, and therefore the administration has a discretionary power in this that is restricted only by non-deviation, and therefore the administration must be subject to judicial control in its work; In order for the necessary penalty to be imposed in the event that the administration violates the law, as judicial control is the real guarantee of the principle of legality, it is necessary to develop a supervisory mechanism that supervises the administrative activities carried out by the administration, which must operate within the scope of the law, otherwise its work is characterized by considering issues related to appointment and reappointment of illegality, and its decisions are subject to cancellation by the administrative judiciary represented by the courts of the State Council, which has the task of judicial control over a decision Reappointment to the public office, in addition to the role of the judiciary, which is more clear in achieving a balance between the requirements of the public interest that the administration seeks to achieve and the protection of the rights and

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freedoms of individuals from the arbitrariness of the administration in the event of its infringement on these rights, because it is the body that is characterized by neutrality and caused by the success of the human element that manages it. From the above, and the importance of the subject, we decided to address this topic and to know the most important types of control, in addition to the judiciary, there is also non-judicial control in addition to administrative control, and this is what we will address in the following three demands:

The first requirement: judicial control over appointment decisions

Judicial control over appointment decisions extends to the procedures preceding and subsequent to those decisions, in order to ensure the completion of control provisions, as judicial control is also an effective guarantee for legislation regulating the principle of administration in the field of public office. The judiciary exercises its control over the procedures prior to appointment decisions aimed at ensuring that the decisions on appointment have been issued in accordance with the law, in addition to the legislator setting certain procedures that the administration must follow before issuing a decision. As there are several conditions that precede or contemporaneously the issuance of the appointment decision, which must be followed for the decision to be valid, and these conditions are subject to judicial control in terms of their availability in the person to be appointed⁽¹⁾In Iraq, the General Assembly of the State Shura Council (currently the State Council), in its discriminatory capacity at the time, confirmed on the occasion of a decision in 2010, that it is proven that the conditions for appointment stipulated in articles (7) and (8) of the Civil Service Law No. (24) of 1960 are not met in the employee when he is appointed the first time obliges the administration to exclude him. The control of the judiciary on the existence of the vacant job grade, which is one of the procedures prior to appointment, as one of the conditions of the place of the appointment decision to be possible legally or realistically, if the place of the decision is legally or practically impossible, the appointment decision has become non-existent and not only subject to nullity or cancellation⁽²⁾The legal effect of the appointment decision must not be practically impossible so that it is not impossible to implement the decision, for example, a decision is issued to appoint an employee to an already occupied job, and in Iraq the Iraqi legislator attaches the conditions for the validity of the appointment to the existence of a vacant degree in the certified staff, in addition to the availability of the necessary financial appropriation for its work⁽³⁾. The majority of civil service regulations also require the need to advertise them, in newspapers, radios, television or any other means, in order to make room for all citizens wishing to apply to it, and if the administration omits this announcement, this is considered a violation of the law and abuse of power, invalidating all actions that are issued to hold jobs without announcing them, and the administration cannot cancel or amend this announcement as long as it entails rights for individuals so as not to affect the rights of I gained them⁽⁴⁾In Iraq, instructions were required⁽⁵⁾The vacancies shall be advertised by various means of advertising, in a daily newspaper and on the bulletin board of each ministry and the competent department, provided that the announcement includes sufficient details about the vacancy, its salary, the department in which it is located, the documents to be submitted and the qualifications required for its work, taking into

¹Dr. Abdel Aziz Abdel Moneim Khalifa, Appeal against the cancellation of the administrative decision, Knowledge Foundation, Alexandria, 2004, p. 337

²Dr. Abdel Aziz Abdel Moneim Khalifa, Appeal against the Cancellation of the Administrative Decision, previous source, p. 340

³Article (8/I) of the Civil Service Law No. 24 of 1960 (as amended)

⁴(Dr. Hussein Abdel Aal Mohamed, Administrative Control of the Administrative Apparatus of the State between Management Science and Administrative Law, PhD Thesis, Ain Shams Law, p 264

⁵(See Instructions No. (119) of 1979 and the controls contained in Appendix No. (1) attached thereto.

account the availability of the relationship between those qualifications and the nature of the work and the job whenever possible.⁽⁶⁾These procedures prior to the issuance of the appointment decision are subject to judicial oversight. These procedures entail the issuance of the appointment decision by the competent authority in accordance with the conditions prescribed by law, and therefore a public employee is not considered a person who assumes job duties before the issuance of the decision to appoint him, even if he receives a salary for his work, and is not considered an employee who usurps the job and involves himself in it without a decision for appointment from the competent authority.⁽⁷⁾The issuance of the appointment decision requires the knowledge of the appointed person in order for the appointment process to be correct and productive of its effects, as it is necessary to notify the concerned parties of the appointment order as it is an important formality and knowledge of the decision is through publication and is intended to follow the administration of the established formalities in order to inform the public of the decision⁽⁸⁾Accordingly, if the law provides for a certain method of publication, the administration must follow that method and the administration cannot replace it with others, and if the law does not specify a specific means of publication, it is necessary to publish in the Official Gazette, the legislator may decide or the decision stipulates the methods of publication and the wisdom of publication is that everyone knows the decision, or that the appointment decision is known through notification and is intended to notify the administrative decision to the addressee in particular, and the original notification It is done by all known means through which the person concerned can be informed of the decision, such as delivering the decision directly, through a record or by mail, or pasting it in the place designated for the announcement. ⁽⁹⁾These means are intended to know with certainty the appointment decision and it is intended that the decision reaches the knowledge of individuals in a certain manner through the administration ⁽¹⁰⁾ The administrative judiciary in Iraq has settled that the plaintiff's certainty of the contested order is a date for the validity of the period of appeal for annulment ⁽¹¹⁾.

Second Requirement: Non-judicial control over appointment decisions

It means that the activity of the administration is subject to the control of organs that do not have a judicial capacity, and this is represented in the political control that is achieved when the political authorities, whether an individual political authority or a collective political authority, exercise control over the actions ¹² of the administration. This type of control is exercised by a political body separate from the rest of the State authorities and often takes into account the diversity of expertise in it, where the work is carried out This body shall include in its membership political, economic and legal expertise and shall be formed by appointment by the legislative or executive authority or by election by the people. Whatever the way in which they are constituted, the most important characteristic of them is their lack of constraint by the existence of judicial elements ¹³.

⁶(Dr. Mosaddeq Adel Talib, Mediator in the Civil Service, Part 1, Dar Al-Sanhouri, Baghdad, 2015, p. 121

⁷(Dr. Mazen Lilo Radi, Encyclopedia of Administrative Justice, Volume Two, Modern Book Foundation, Lebanon, 2016, p. 72

⁸(Dr. Suleiman Muhammad Al-Tamawi, The General Theory of Administrative Decisions "A Comparative Study", 6th Edition, Ain Shams University Press, 1991, p 601

⁹Dr. Mazen Lilo Radi, Encyclopedia of Administrative Justice, previous source, p. 184

¹⁰(Dr. Sadiq Muhammad Ali, Judicial Control of the Conditions of Appointment, research published in Al-Muhaqiq Al-Hilli Journal for Legal and Political Sciences, Issue 1, Year 13, 2021, p. 17

¹¹Judgment of the Administrative Court No. 370 / Administrative Judiciary / 2012 / dated 17/12/2012, published in the decisions and fatwas of the State Shura Council for the year 2012, Ministry of Justice, p 354

¹²Sakar Amir Abdul Rahim Huwaizi, Judicial Control of the Purpose Pillar of the Administrative Decision, 1st Edition, Shehab Press, Erbil, 2010, p. 11

¹³(Dr. Ali Yousef Shukri, Principles of Constitutional Law, 1st Edition, Safaa for Publishing and Distribution, Amman, 2011, p. 313

Third Requirement: Administrative Control of Appointment Decisions

It is known that the administration seeks in all its work to achieve the public interest, but these actions must be in accordance with the principle of legality. The administration reviews and evaluates its work, and may cancel, amend or withdraw the illegal work in line with the principle of legality, thus avoiding other regulatory bodies from addressing it. The scope of this type of control extends to both legality and harmonization, as it is a legitimate control in terms of its conformity with the law in its general sense and control that is compatible in terms of its proportionality to the goal that the administration seeks to achieve.¹⁴ It deals with all the details of the previous and subsequent administrative process, in addition to that it may be exercised from within the administrative apparatus itself through the control of the subordinate boss or from the control units specialized in that device, and then it is called internal control or it may be exercised by institutions specialized in administrative and financial control that are independent of those subject to its control, and then it is called external control¹⁵, such as our National Audit Office, which expanded its powers by Law No. 31 of 2011, where it granted it the authority to conduct administrative investigation in certain cases specified by this law, then Law No. 104 of 2012 issued the First Amendment Law to the above law, adding to the Bureau the authority to investigate cases that the Council of Ministers requests it to investigate.

It should be noted that there are two types of administrative control related to the method followed by the legislator.

To achieve them, the legislator usually follows more than one method of this control to reach the intended goal, which is that the administration respects the principle of legality and achieving the public interest, and these two types are:

First: Self-censorship or automatic control This control is exercised automatically by the administration without the request of a victim on the basis that its actions must be evaluated in accordance with the principle of legality and the results of such evaluation of the withdrawal, annulment or amendment of the decision¹⁶.

Second: Oversight based on a grievance The grievance is one of the means granted by the legislator to individuals to demand that the administration reverse a decision taken against them, either by modifying it, canceling it, withdrawing it and replacing it with another.¹⁷ The legislator may allow the interested party to appeal against the administrative decision, as this is a grant to the interested party, so he may exhaust the stages of administrative grievance He may appeal the decision directly without the need to appeal against the decision, and this is known as the permissible grievance, and the administrative grievance is defined as the presentation of an individual's case to the administration, requesting it to do justice by submitting to the administrative authority issuing the decision or to its governing bodies in writing a request to withdraw the decision issued by it for illegality or inappropriateness.¹⁸ . It is considered one of the legal methods or means that allows for the issuance of an administrative decision in accordance with the law, and it can be classified in view of the body to which it is submitted into three types: state grievance, which is the grievance submitted to the authority that issued the decision, the presidential grievance, which is submitted to the head of the source of the decision, and the

¹⁴Dr. Mazen Lilo Radi, Encyclopedia of Administrative Justice, previous source, p. 52

¹⁵(Habib Al-Harmazi, Control of Public Institutions in Iraqi Legislation, Awqaf Press, Baghdad, 1977, p. 92

¹⁶Dr. Mazen Lilo Radi, Encyclopedia of Administrative Justice, previous source, p. 53

¹⁷Saleh Ibrahim Ahmed, Conditions of Appeal before the Administrative Court in Iraq, Master's Thesis, University of Baghdad, 1994, p. 154

¹⁸Abdel Raouf Hashem Bassiouni, Administrative Pleadings, 1st Edition, Dar Al-Fikr Al-Jamia, Alexandria, 2007, p. 229

grievance before the administrative committees, which is the grievance submitted to an administrative committee established by the legislator for this purpose.¹⁹In order for the grievance to produce its effect, it must meet the following conditions: 1. It focuses on a final administrative decision 2. The contested decision is of any interest²⁰ in appealing.

The purpose of the legislator from imposing grievance against some decisions before appealing them before the judiciary is to give the administration the opportunity to review itself regarding its decision taken, as it may cancel, amend or withdraw it and make another its place, thus eliminating the need to challenge it as long as the administration responds to what the complainant wants, so the momentum on the judiciary decreases, and it is also in the interest of individuals, as it avoids them from bearing the expenses of appeal before the administrative court.

The Iraqi legislator has taken the mandatory grievance in article 15 of the Discipline of State and Public Sector Employees Law No. 14 of 1991, as amended, in the field of employees' appeals against disciplinary penalties imposed on them based on article 8 of this law. The grievance must be submitted to the authority that issued the decision to impose the penalty within (30) days from the date of informing the employee of it, and this body shall decide on it within (30) days of its submission to it, and if this period expires without a decision on it, this is considered a rejection of the grievance, and it is required that the appeal be submitted to the General Disciplinary Board (currently the Personnel Justice Court) within (30) days from the date of informing the employee of the rejection of the grievance as a fact or judgment, and the uncontested decision within the above period and the court's decision Issued as a result of the appeal definitively.

The Conclusion:

At the end of this study, the researcher reached a number of results and recommendations, the most important of which are the following:

First: Results:

- 1- Judicial oversight is indispensable for the protection of rights and freedoms, because it is legitimate and appropriate, and the judicial role must be activated by giving it more independence and guarantees that ensure their full performance.
- 2- The court competent to consider the validity of appointment decisions in the public service is the Employees Justice Court, if the individual is subject to the Iraqi Civil Service Law No. 24 of 1960 (as amended), but if the individual is not subject to the above law, the court competent to consider these decisions is the Administrative Court.
- 3- The laws of the countries of comparative law and Iraq unanimously agreed that there must be a vacant job grade prior to the issuance of the appointment decision in the public office, and this condition is obligatory for the validity of the appointment, and in the event that the appointment decision is issued and there is no vacant grade, the decision is null and void.
- 4- In the event that the employee loses one of the procedures followed in the appointment, the appointment decision may not be withdrawn, but he is removed from the job as stated under Article 62 of the Iraqi Civil Service Law No. 24 of 1960, as amended.

¹⁹(Dr. Muhammad Walid Al-Abadi, Administrative Encyclopedia, Administrative Judiciary, Part 1, 1st Edition, Al-Warraaq for Publishing and Distribution, Amman, 2008, p. 103

²⁰Abd al-Raouf Hashem Bassiouni, Administrative Pleadings, previous source, p. 235

Second: Recommendations

- 1- We call on the Iraqi legislator to expedite the legislation of the Federal Public Civil Service Law because of its great role in regulating everything related to public jobs, especially the process of appointment to state jobs in coordination between the various authorities concerned with providing vacant job grades and the necessary financial allocations to accommodate the huge numbers of our young people fit for appointment.
- 2- We call on the legislator to adopt the system of competition and probation in appointment, even for private jobs, because of its great role in achieving justice and equality in assuming these jobs, especially as it depends on testing the required qualifications practically away from the moods and selectivity of those in charge of the appointment process and the pressures of others on them, and therefore these positions are filled from among the competitors and according to the sequential order of their differential degrees from highest to lowest.

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13. Sakar Amir Abdul Rahim Huwaizi, Judicial Control of the Purpose Pillar of the Administrative Decision, 1st Edition, Shehab Press, Erbil, 2010, p. 11
14. See Instructions No. (119) of 1979 and the controls contained in Appendix No. (1) attached thereto.