

**THE TRANSFER OF CIVIL SERVANTS ACCORDING TO LAW NO
188/1999 - RECENT MODIFICATIONS**

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Abstract

Transfer for work considerations is mostly unilateral, mainly based on the public authority's will – the civil servants cannot refuse the transfer, otherwise they might be released from office. The only case exempted from this rule is transfer on request. Modifications with regard to the transfer of civil servants with management positions have occurred starting with October 6th 2009, while important modifications will affect the process of job occupation in case of collective transfer, starting with January 1st 2010.

Key words: executive and management civil servants, transfer, public interest, occupation, January 1st 2010.

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1. Introduction

The administrative action of appointing one in a public service job is governed by the principle of work stability, one of the principles found at the core of the practicing civil services, according to art. 3, letter f) of Law no. 188/1999, The Civil Servants Statue¹. Although it is regarded as a warranty for the right to a career, from the point of view of public authority stability represents more than just a right, being settled mainly due to its efficiency and independence. It governs the organized mobility of labour force within public administration².

The general definition of the term *to transfer* means “ moving jobs from one institution to another, without terminating the work contract (with the agreement of, or on the request of the employee)³”. In the case of public jobs, there is a modification of work relations due to the transfer – termination of the previous relation, immediately followed by the start of a new one. Thus, the transfer has a double nature – it is both a way of modifying the work relation, as well as of taking over a civil service job. As this mobility results from the stability existing within the civil service job, no interview for the job is necessary.

In labour public law, the modification of work relations for work reasons (by delegation, transfer, moving to another compartment or structure without legal nature of the authority or public institution, as well as by temporarily carrying out a management civil service job) is unilateral, based on the public authority’s will. The civil servants cannot refuse the

¹ Reprinted in The Romanian Official Gazette, Part I, no. 365 from May 29th 2007, with subsequent alterations including The Government Emergency Ordinance, No. 105/2009, relevant for some measures in the field of civil servant positions, as well as for the reinforcement of the managerial ability of the decentralized public services from ministries and other entities of the central public administration, territorial one, and other public services as well as regulating some measures related to de public official office, prefect office, and locally elected position (published in the Official Gazette, Part I, No. 668, from October 6th 2009)

² Ana Cioriciu *Consideratii privind transferul functionarilor publici*, in Revista Romana de Dreptul Muncii, No. 3/2007, p. 6

³ See Dictionarul limbii romane, DEX, Romanian Academy, Linguistic Institute Iorgu Iordan, 2nd Edition, Bucharest, 1998, p. 1103

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transfer, otherwise they might be released from their office¹. However, there are exceptions related to personal situation which are mentioned in art 91. paragraph 6 of Law 188/1999. In conclusion, permanent promotion and transfer on request are exceptions of the above rule. The fact that both the transfer for work considerations transfer for work reasons, as well as the permanent moving of a civil servant to another compartment by the manager of the public authority or institution may be done only “with written consent of the civil servant who is to be transferred²”, gives the process a formal nature rather than an imperative one.

Taking into consideration that civil service law, as part of administrative law, thus of public law, was created to increase the power of public authority over civil servants appointed in public jobs, as opposed to labour law which stemmed from the need to protect the weaker employee³, this type of measure is very natural, as long as it does not turn into an abuse coming from the manager of the public institution or authority.

2. Scope of transfer stipulated by Law no. 188/1999.

Transfer stipulated by Law no. 188/1999. is directly applied to civil servants:

- a. that are under the incidence of this status – most of those who carry out their activities within central or local public administration authorities, or within autonomous administrative authorities – as well to those who could have enjoyed special status or for whom this kind of status is related to the general one.
- b. Whose special status does not contain any regulation regarding this legal institution.

¹ Art. 87, paragraph (2) and (3) and art. 77, paragraph (2), letter i., from the Law 188/1999. See also The Civil Servants National Agency *Human Resources Booklet*, policy 7 - Civil Servant Mobility, p. 3, http://www.anfp.ro/oip/doc/publicare/ghiduri%20si%20brosuri/59706ABCDEFMR_U_final_fara_anexe.pdf.

² Art. 90, paragraph (3) from the Law 188/1999

³ Alexandru Ticlea *Opinii privind dreptul public al muncii - subramura a dreptului muncii*, in Revista Romana de Dreptul Muncii, No. 4/2009, p. 14

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This regulation directly affects the civil servants who benefit from special status, as long as it does not imply derogatory stipulations¹.

3. Transfer groups and general conditions

According to art.90, paragraph 1, of Law no. 188/1999., the transfer may be done between public authorities or institutions, for work reasons and on employee's request.

There is the general rule, stipulated in paragraph 2, of the same article, stating that the transfer to a public job position may be done for those positions for which all the requirements mentioned in the job description are fulfilled.

According to art 54, letter g) of Law no. 188/1999, the person who wants to have access to a public job, including transfer, must fulfil the job requirements which are mentioned in the job description, according to Appendix 1 of the Government Decision no 611/2008 regarding the approval of norms for organizing and developing the civil servants' career², that is:

- a. specialized education
- b. trainings
- c. computer/programming skills
- d. foreign languages needed to carry out the activities.
- e. Skills, qualities and abilities needed to carry out the activities.
- f. Other specific requirements such as: frequent business trips, temporary transfers, willingness for working longer hours in certain conditions.
- g. Managerial skills.

Additional to these conditions, art 120, paragraph 2 of the Romanian Constitution³, art 108 of Law no. 188/1999., art 19 of the Local Public

¹ Ana Cioriciu *transferul functionarilor publici care beneficiaza de statute soeciale*, in *Revist Romana de Dreptul Muncii*, Nr. 5/2007, pp. 32-51

² Published in the Romanian Official Gazette, Part. I, No. 530 from July 14th 2008, with subsequent alteration including The Government Decision No. 1173/2008 (published in the Romanian Official Gazette, Part I, No. 677 from October 2nd 2008)

³ Revised by the Law 429/2003 (published in The Romanian Official Gazette, Part I, No. 758, from October 29th, 2003)

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administration Law no. 215/2001¹ and art 20, paragraph 3 of the Government Decision no. 611/2008, stipulate the need to acknowledge the language of national minorities: "Within the territory-administrative units where the number of persons belonging to a national minority is higher than 20%, some of the civil servants who have direct contact with the citizen will have to speak the language of that national minority."

The need to comply with the requirements existing in the job description is quite new, having been introduced in our legal system in regards to occupying the public positions by art. XII, 37 and 48 of Law no. 161/2003 regarding some measures for insuring transparency of publicly held positions, of civil services and of the business environment, and for preventing and sanctioning corruption².

Collective transfer, according to art. 169-170 of the Labour Code and to Law no. 67/2006, regarding the protection of the employees' rights in case of transfer of the company, unit, or parts of it³, is also applied in the case of the three public powers, thus it to civil servants, on administrative re-organization and taking over the staff.

4. Transfer for work considerations

The logic behind this type of transfer is based on increasing the efficiency of public authorities and institutions, and on public interest.

According to art 90, paragraphs 3 and 4 of Law no. 188/1999, transfer for work considerations is granted on the request of the management of the institution from which the employee leaves, only with the written consent of the civil servant and may take place only to a job of the same hierarchical position, category and professional degree or to a lower one this not being subject to the equivalence of the new position to

¹ Published in The Romanian Official Gazette, Part I, No. 1031, December 23rd 2006, with subsequent alterations and completions, including the Government Emergency Ordinance No. 105/2009

² Published in The Romanian Official Gazette, Part I, No. 279, April 21st 2003, with subsequent alterations and completions, including the Law 144/2007 stipulating the incorporation, organization and functioning of The National Integrity Agency (published in The Romanian Official Gazette, Part I, No. 359, Mai 25th 2007)

³ Published in The Romanian Official Gazette, Part I, No.276, March 28th 2006

the same level of hierarchy. Failure to obtain the consent leads to release from office.

As the law maker does not distinguish between the hierarchical level of the job, this type of transfer (both for executive civil servants, as well as for those within management) can take place on the same position of any of the existing levels within the system, just as delegation or detachments.

5. Transfer on request

Art. 149, paragraph 1, of the Government Decision no. 611/2008 stipulates that civil servants may request transfer to another public authority or institution.

According to art 90 paragraph 5 of Law no. 188/1999, transfer on request takes place for a job of the same hierarchical position, or a lower one, after the civil servant's request has been approved by the manager of the public authority or institution within the local public administration.

In this situation, the transfer can take place only on the same level: between public authorities or institutions within central public administration; between autonomous administrative authorities, or, if that is the case, between public authorities or institutions within the local public administration.

We mention that for full compliance with the new classification of civil service job positions, local civil service jobs should be taken into consideration.

This rule is applicable both for executive and management civil servants.

We notice that in case of this type of transfer, local civil servants' access to state jobs is no longer guaranteed.

As a natural continuation of those mentioned previously, art 87, paragraph 1, letter c) of Law no. 188/1999. (mobility is done through transfer for developing careers in civil service) and art 90, paragraph 7 of the same law, stipulate that public authorities or institutions have the obligation to make public the job vacancies that may be filled by transfer on request.

Public authorities or institutions must display at their premises and on their internet site the add regarding occupying those vacancies by transfer on request. The add must be displayed with at least 30 days before

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the deadline for filling it by transfer upon request by another public servant.

The public servants interested in filling the vacancy must submit a transfer request, together with a resume within 20 days from the first display datum.

Although, as already stated, the transfer is not conditioned by any kind of examination, yet, article 99 line (7) from the Law 188/1999 introduces a new provision in terms of legally rendering the transfer: "in case two or more civil servants require to fill the vacancy by means of a transfer request, a selection will be made by resorting to an interview." Due to the lack of special stipulations related to the interview, it is our opinion that the rules relevant for recruiting are incidental.

The interview is to be held by the head of the institution or of public entity or by a person assigned by the abovementioned. The milestones, hour and place for the interview are to be notified with the applicants by means of the same advertising means as already mentioned.¹

The same procedure will be enforced for the cases in which the transfer is for the chief civil servants.

6. Recent alterations relevant for the chief civil servants

Before the recent alteration of the Law 188/1999 by the Government Emergency Ordinance no. 105/2009, paragraph (6) from art. 90, it used to stipulate only one difference in the transfer of the chief civil servant personnel which could have been made only on positions of the same level in the hierarchy, level sharing the same types of responsibilities with the previously held position if the requirements stipulated in the job description are met and if the already analysed requirements for the transfer upon request or for activity purposes are also met.

All in one, this type of transfer can be viewed as a specific type of the transfer either for activity purposes or upon request only due to the already mentioned difference. So, taking into account that in order to be transferred, the responsibilities had to be similar as well as the requirements of the operations to be, the class, category and professional

¹ Art. 149, line (5) from the Government Ordinance no. 611/2008

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rank or the inferior ranked position¹, one can say that the collocations as “similar duties” and “same position” need to be enlarged upon.

Now, paragraph (6) from art. 90 of the Law 188/1999 has the following content “in case of the chief civil servants, the transfer can be made on chief civil servant positions similar in rank, or as the case may require, of inferior rank, if the requirements of the professional expertise and filling the vacancy conditions are similar to these required by the transferee position, under close observance of the provisions of paragraphs (2), (4) and (5). The authorities of the entities between which the transfer is to take place are obliged to check whether the professional expertise and the vacancy filling conditions are similar.”

A few comments are to be made. The civil positions corresponding to these categories of chief civil servants are to be found on all levels of the administrative system. There are to be understood in the broader meaning of the managing (organisation, co-ordination, leading and control), representing, at the same time, decision-making positions. As far as the decisions-making process in the administration² is concerned, the managing positions are:

- Positions having responsibilities in all areas of the decision-making process;
- Positions having responsibilities mainly in achieving certain segments of managing (organisation, co-ordination, control, etc.)

Within the frames of these two positions, taking into account their self-containing nature, one can single out two types leading positions:

- Exclusively administrative leading positions (general director, director),
- Specialised leading positions (technical director, chief-accountant)

Saying these, we consider that the issue of similarity will be second first of all by the aforementioned aspects for each type of level in hierarchy. In conclusion, the transfer of the chief civil servants cannot be made for instance from a position of secretary in a specific administrative-territorial institution to a position of deputy director in the autonomous local

¹ That is simultaneously observing the provisions of paragraphs (2)-(6) from art. 90 of the reprinted statute.

² Antonie Iorgovan *Trata de drept administrative*, vol. I, 4th Edition, All Beck Publishing House, Bucharest, 2005, p. 590

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authority, in the ministry and other entities of the specialised public central administration as well as the positions similar to these.

The assessment of the compliance with the vacancy filling conditions and the professional expertise level will require the analysis of the degree conditions, working period and of other requirements of such position.

If for the participation in the recruiting interview for filling a chief position vacancy, in accordance with art 57 paragraph (7) from the Law 188/1999, is conditioned by university graduate degrees or by post-graduate ones, one should understand, in the light of the recent alterations brought by art. 90, paragraph (6) from the same law, that these conditions are to be enforced when a transfer occurs for chief civil servants positions¹. In accordance with the same provisions, these studies have to be in the same field with that of public administration, management, or the same field with that in which the professionals will activate. Taking into account this specific requirement, the transfer will be assessed.

7. The effects specific to public servant transfers - recent alterations

In relation to the position the transfer is to take place and comparing the two categories it has - upon request and for activity purposes - it has been mentioned that only for the last situation a combination of effects may appear with those of a promotion², if the transfer is from an inferior to a superior position.

To this respect, the annual ordinances³ related to salaries which are to be abrogated stipulated that the public servants to be transferred will

¹ Putting on hold the master degrees or any type of post-graduate degrees until January 1st 2015 does not apply the transfer for chief civil servants positions. For this, check Ana Cioriciu-Stefanescu, *suspendarea conditiei studiilor de masterat sau postuniversitare pana la 1 ianuarie 2015*, on www.avocatnet.ro. (November 10th, 2009).

² See Ion Popescu *Functia publica - curs universitar*, Vol. I, The National School of Political and Administrative Studies, 2003-2004, Bucharest, p. 156

³ The last of these ordinances was The Government Ordinance No. 6/2007 stipulating some measures related to salary rights and other rights for civil servants valid until coming into force of the law for unitary public remuneration system and other rights for the public servants as well as the salary increasing for the civil servants for the year 2007 (published in the Romanian Official Gazette, Part 1, No. 66 from January 29th, 2007), with subsequent alterations and

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receive the salary equivalent to the level they used to hold, determined by the authority or the public entity to which they are transferred with the exception of the case in which the public servant transfers to an inferior institution, and in this case the salary is determined by the basic salary and the salary level relevant for a position of such.

As of January 1st, 2010 art. 14 from the Master Law related to the unitary salary system for the personnel paid from public funds, No. 330/2009: "the public servant filling a vacancy by moving in another department or by transfer, are entitled to a salary equivalent to the position they are filling by means of alteration of the working relationships, but by retaining the salary level they used to hold."

The prevailing of public interest over the personal one is presented inclusively by the material issues; only in cases of the activity purpose transfer to another locality, the civil servant is entitled, in accordance with art. 90, paragraph (3) from the Law 188/1999, to a compensation equal to the net salary computed at the level of the salary prior to the transfer month, as well as compensations for all transportation costs and a five-day paid leave.

In cases of collective transfers, the alterations come into force as of January 1st 2010.

In conclusion, if the provisions in force by this date stipulate that the transferred or taken-over personnel as a result of the reorganisation of some institutions used to retain all the rights gained before, including the salary (including the cases in which the transfer was from a superior to an inferior entity), in the spirit of the common law¹ (art. 169-170 from the Labour Law and the Law No. 67/2006²) today, as an exception, art. 6, paragraph 6, line 3 from the Law 329/2009 relating to the reorganisation of some authorities and public entities, the cutting of public expenditure, supporting the business environment and observing the master agreements with the European Commission and the International Monetary Fund³

completions, including the Government Ordinance No. 41/2009 related to some measures in the field of budgetary personnel salaries for the period between May and December 2009 (published in the Romanian Official Gazette, Part I, No. 286 from April 30th 2000)

¹ Magda Volonciu *Transferul colectiv (integral)* in Revista romana de dreptul muncii, No. 2/2004, p. 47

² Ana Cioriciu *Consideratii privind transferul functionarilor*, idem., p. 80-82

³ Romanian Official Gazette, Part I, No. 761, from November 9th 2009

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stipulates that “the personnel from the dissolved institutions will be hired in the limits of open vacancies approved for the institution which takes over the activity of the dissolved entity, benefitting from the salary rights given in accordance with the law for all categories of positions within the authority or the public entity” and, as a result, corresponding to the entity to which they have been transferred.

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