Harmonization in Determining Actions of State Civil Services (Asn) Who Qualify as Maladministration with Criminal Acts of Corruption

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Abstract. This paper aims to determine the boundaries between the actions of the agency or the State Civil Apparatus (ASN) or government officials (bestuurhandelingen) that harm state finances of quality as maladministration or constitute a criminal act of corruption. Constitutional Court Decision No. 25/PUU-XIV/2016 confirms the limits of administrative and criminal liability, as referred to in the Government Administration Act (UUAP) and other legislative policies. Efforts to eradicate corruption with a repressive approach tend to deny the means of administrative law in preventing the occurrence of criminal acts of corruption, which from the point of view of administrative law is a form of maladministration. This decision of the Constitutional Court needs to be followed up in future legislative policies, in order to better regulate the relationship between: (1) Harmonization of understanding of state finances; (2) Harmonization between the return of state losses in criminal law and administrative law; (2) Harmonization of Institutions Between Internal and External Supervisors; (3) Synchronization of legal efforts as referred to in Article 35 PP. No. 48/2016.

Keywords: Corruption · Crime · Maladministration

1 Introduction

Corruption is one of the selected problems in legal studies, especially criminal law. Corruption in Indonesia is like a flu virus that spreads throughout the government, so that since the 1960s eradication measures have been stagnating [1]. Nyoman United Putra Jaya also stated that, corruption in Indonesia has permeated all aspects of life, to all sectors and all levels, both at the central and regional levels, the cause is that corruption that has occurred since decades ago is allowed to continue without adequate action from the government legal glasses [2].

Internationally, corruption is recognized as a global phenomenon that is an extraordinary crime [3]. Therefore, the handling of criminal acts of corruption requires special handling (extra ordinary measure). In the context of tackling criminal acts of corruption that permeate all aspects of Indonesian people's lives, law enforcers often use criminal

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law as the primum remidium to solve these problems. This is of course contrary to the nature of criminal law itself which is ultimum remidium or as a last resort/last resort in tackling crime.

Reality shows that many in handling corruption crimes carried out by State Civil Apparatuses (ASN) who are suspected of having committed corruption crimes Law Enforcement Officials (APH) prefer to use criminal law as a means, although there are other means that can be taken in law enforcement against Government Officials through the Internal Supervisory Apparatus (APIP).

Based on Article 20 of Law Number 30 of 2014 concerning Government Administration, supervision and investigation of alleged abuse of authority is first carried out by the Government Internal Supervisory Apparatus (APIP). The results of APIP's supervision of alleged abuse of authority in the form of no errors, administrative errors, or administrative errors that cause state financial losses.

Government agencies and/or officials who feel that their interests have been harmed by the results of APIP supervision may apply to the State Administrative Court (PTUN) to assess whether or not there is an element of abuse of authority in decisions and/or actions as regulated in Article 21 of Law Number 30 of 2014 The Administrative Court has the authority to receive, examine and decide on applications for the assessment of whether or not there is abuse of authority in the decisions and/or actions of Government Officials prior to criminal proceedings as regulated in Article 2 paragraph (1) of Supreme Court Regulation (Perma) Number 4 of 2015 concerning Guidelines Proceedings in the Assessment of Abuse of Authority Elements. Furthermore, in paragraph (2) it is stated that the PTUN is only authorized to receive, examine and decide on applications for assessment after the results of the supervision of the government's internal supervisory apparatus. The decision on the said application must be rendered within a maximum period of 21 (twenty one) working days after the application is submitted.

The enactment of Law Number 30 of 2014 concerning Government Administration has changed the legal view of eradicating corruption, which initially only used a criminal law approach to an administrative approach. Law Number 30 of 2014 concerning Government Administration confirms that administrative errors that result in state losses that have been subject to criminal acts of corruption due to unlawful acts and state losses must be reviewed. One form of maladministration related to corruption is "abuse of authority". The element of "abuse of authority" is contained in Article 3 of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning Corruption Crimes. In its development, the element of "abuse of authority" is not only contained in Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning Criminal Acts of Corruption, but it is also contained in Article 17 of Law Number 30 of 2014 concerning Government Administration.

Doctrinally, here there is a blurred line or a vague interpretation regarding the element of "abuse of authority" which is a legal act that belongs to the realm of criminal law (wederrechtelijkheid), or only an act of maladministration which is the domain of administrative law whose settlement uses administrative procedures according to the provisions of the Law. -Law Number 30 of 2014 concerning Government Administration.

2 Research Method

Research on the Responsibilities of Directors in Making Corporate Decisions based on the Business Judgment Rule Doctrine is a normative legal research based on secondary data, consisting of primary legal materials, secondary legal materials and tertiary legal materials. The method of data collection was carried out by literature study and analyzed qualitatively.

3 Findings and Discussion

1. Qualified Abuse of Authority as Maladministration

Authority or authority (bevoegdheid) is basically a power to carry out certain legal actions. Authority has a very important role in the study of constitutional law and administrative law. According to Abdul Rokhim, authority is an understanding that comes from the law of government organizations, which can be explained as the overall rules relating to the acquisition and use of government authority by public legal subjects in public legal relations. [4].

Maladministration has many forms, and in Law Number 30 of 2014 concerning Government Administration there is no separate definition of the meaning of maladministration. This law only explains in detail the "Prohibition of Abuse of Authority" which is a form of maladministration. Based on Article 17 paragraph (2) of Law Number 30 of 2014 concerning Administration, the scope of abuse of authority in this law includes:

a. Prohibition of exceeding authority;
b. Prohibition of mixing authority;
c. Prohibition of acting arbitrarily.

According to Article 18 paragraph (1) a Government Agency and/or Official is categorized as exceeding authority, if the Decision and/or Action taken:

a. Exceeding the term of office or the time limit for the validity of the authority;
b. Exceeding the boundaries of the area where the authority applies; and/or
c. Contrary to the provisions of the legislation.

Then according to Article 18 paragraph (2), a Government Agency and/or Official is categorized as mixing authority if the Decision and/or Action taken:

a. Outside the scope of the field or material authority granted; and/or
b. Contrary to the purpose of the given authority.

According to Article 18 paragraph (3), a Government Agency and/or Official is categorized as acting arbitrarily if the Decision and/or Action taken:

a. Without the basis of authority; and/or
b. Contrary to the Court's Decision which has permanent legal force.

The occurrence of a maladministration, which is issued in the form of a decision, can occur based on a binding authority or an independent authority by a public official [5]. Based on this, between the decisions of state administrative officials originating from the binding authority and the free authority have their own parameters in determining whether there is a maladministration or not. In addition to using statutory provisions, in determining these parameters or limits, the doctrines or theories contained in the realm of administrative law can be used.

In government there is a government authority that is bound, if this authority occurs when the basic regulations are more or less specified about the contents of the decisions that must be taken in detail, then this government authority is called: bound government authority.[6] A state administrative body or official concerned cannot do other than carry out the provisions written in the formulation of the regulation. In short, it can be concluded that basically a public official only implements existing provisions without any space for freedom of action to determine other matters. The following is a simple example of a binding state administrative decision: regarding the requirements to obtain a driving license, you must be at least 17 (seventeen) years old. [4] So if a state administrative official issues a driver's license (which is a state administrative decision) against a child who is not yet 17 (seventeen) years old, even though the laws and regulations require a minimum age of 17 (seventeen) years, then the action of the official can be categorized as maladministration in the context of binding authority. According to Sjachran Basah, the parameter used to test whether or not there is an abuse of authority within the bound authority is to use the wetmatigheid principle (statutory regulations) [7].

While the government's free authority is a discretion (freis ermessen). According to Laica Marzuki as quoted by Juniarso Ridwan and Achmad Sodik Sudrajat that freis ermessen is a freedom given to state administration in the context of administering government, in line with the increasing demands for public services that state administration must provide for the increasingly complex socio-economic life of citizens. [8] In Article 1 point 9 (nine) of Law Number 30 of 2014 concerning Government Administration: "Discretion is a decision and/ or action that is determined and/or carried out by a government official in order to overcome concrete problems faced in the administration of government in terms of regulations. -the legislation does not regulate, is incomplete or unclear, and/or there is government stagnation".

Based on Article Paragraph (2) of Law Number 2014 concerning Government Administration, it is stated that discretion can only be exercised by authorized Government Officials, with the aim of:

a. Streamlining government administration;
b. Filling legal voids;
c. Provide legal certainty;
d. Overcoming government stagnation in certain circumstances for the benefit and public interest.

The form of abuse of free authority is detournement de pouvoir, for example is, due to an error in the use of discretion (freis ermessen), or policy deviations by public officials in carrying out their duties as government organs. The [8] bestuurshandeling government action by using policy regulations (beleidsregel) sourced from discretion (freies ermessen) is indeed very necessary, because discretion (freies ermessen) is a freedom given to state administration in the context of administering government, in line with increasing public demands (bestuurzorg). That the state administration must provide for the increasingly complex socio-economic life of citizens. [9].

In this regard, Philipus M. Hadjon by citing Mariette Kobussen's opinion to measure abuse of authority in relation to "beleidsvrijheid" (discreationary power, freis ermessen) should based on the principle of speciality that underlies the authority itself. [8] Based on this, the testing of policy regulations is more based on doelmatigheid, so the benchmark used is used are general principles of good governance. In line with this, according to H. Abdul Latif, in measuring abuse of authority, it is mainly related to beleidsvrijheid (discreationary power, freis ermessen) must be based on on the general principles of good governance, because the wetmatigheid principle is not sufficient. [8] According to Philipus Hadjon, the general principles of good governance are unwritten legal principles (AUPB), from which for certain circumstances applicable legal rules can be drawn.[10] Therefore, to prove the existence of a violation of AUPB must be measured factually [9].

2. Limitations of Qualified Abuse of Authority as a Corruption Crime

In accordance with the results of the National Working Meeting of the Supreme Court of the Republic of Indonesia which was held on 2 – 6 September 2007 in Makassar, in essence the opinion is that, among others: [16].

a. A policy is a matter of "policy freedom" (beleidsvrijheid, freis ermessen) from the apparatus the state in carrying out its public duties, so that it cannot be judged by criminal judges or by civil judges;
b. If it is related to the application of policies (beleidsvrijheid, freis ermessen, beleidsregels), then administrative penal law does not included in the domain of criminal acts of corruption, not all acts / offenses that cause state finances are corruption;
c. Beleidsvrijheid and wijsheid are owned by every official or state administrator, who has the authority based on the existing laws and regulations. Restrictions on beleidsvrijheid apply, if: there are acts that fall into the category of abuse of authority (detournement pouvoir and abu de droit). Settlement of these irregularities, is carried out through administrative courts or state administrative courts;
d. Freis ermessen used by officials or state administrators to act in the context of resolving important and urgent situations that arise and are faced in the practice of state administration, and must be carried out for the achievement of state goals. The benchmark for the use of ermessen milling is parameters of the general principles of good governance.

Abuse of authority is indeed a form of maladministration, namely violations committed by public officials in the realm of administrative law. However, this can enter the

realm of criminal law due to certain factors. According to the adage " actus non facit reum nisi " men sit rea " (an act does not make a person guilty, unless the mind is legally blameworthy) which means, to determine an act committed by a person is not a crime except on the basis of evil intentions. Based on the adage, it can be concluded that there are two conditions that must be met in order for a person to be punished, namely actus reus (a forbidden outward act) and menses. Rea (despicable mental attitude).

The act of abuse of authority is listed as one of the elements of the offense or criminal act in Article 3 of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning Corruption Crimes which reads: "Every person who with the aim of benefiting himself or another person or a corporation, abuses the authority, opportunity, or means available to him because of his position or position that can harm state finances or the state economy, shall be punished with life imprisonment or a minimum imprisonment of 1 (one) year and a maximum of 20 (twenty) years and or a minimum fine of Rp. 50,000,000 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah)". In the explanation section of Article 3 of Law Number 31 of 1999 jo. In Law Number 20 of 2001 concerning the Crime of Corruption, there is no further explanation regarding what is meant by abuse of authority". Therefore, theories or expert opinions can be used to explain the meaning of the term "abusing authority". To find out whether acts of abuse of authority committed by officials or the government fall into the category of criminal acts of corruption, it must look at the overall elements of the offense in the article.

The first element is "with the aim of benefiting oneself or another person or corporation". According to Lilik Mulyadi, when viewed from the aspect of evidence, the element of "benefiting oneself or another person or a corporation" can be more easily proven by the Prosecutor / Public Prosecutor because the "beneficial" element does not require the dimension of whether the suspect/Defendant of a criminal act of corruption becomes richer or gets richer. Therefore. [11] In the phrase "with a purpose" is an inner element that determines the direction of the abuse of authority committed by that person. [12].

The second element is "abusing the authority, opportunity, or means available to him because of his position or position". H. Abdul Latif is of the opinion that the element of abusing authority in corruption is a species delict from elements against the law as a genus delict will always be related to the position of a public official, not in relation to and understanding of the position in the realm of civil structure. [11] The formulation of the criminal act of corruption must be interpreted as a state apparatus or public official which of course fulfills the elements, namely: being appointed by an authorized official, holding a position or position, and carrying out part of the duties of the state or state government equipment. [10] Based on this, the meaning of "abuse of authority" must be interpreted in the context of public officials, not officials in the private sphere even though private officials also have positions.

Referring to the above formulation, basically, this second type of corruption is only applied to an official/ civil servant because only a civil servant can abuse his/her position, position and authority, opportunity, or means. According to the provisions of Article 1 paragraph (2) of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning Corruption Crimes, the definition of civil servants includes:

a. Civil servants as referred to in the Employment Act (Law Number 43 of 1999);

b. Civil servants as referred to in the Book of the Criminal Code (Article 92 of the Criminal Code);
c. A person who receives salary or wages from a corporation who receives salary or wages from a corporation that receives assistance from state or regional finance; and
d. People who receive salaries or wages from other corporations that use capital or facilities from the state or society.

Lilik Mulyadi stated that the term "abusing" is very broad in its scope of understanding and is not limited in a limitative manner as stipulated in Article 52 of the Criminal Code. [11] In simple terms it can be explained that the word "abusing" here can be interpreted in the context of the existence of rights or powers that are not properly exercised such as having benefited oneself, other people or corporations. Likewise, regarding the word "abusing opportunity", it can be interpreted that there is an abuse of time or opportunity by the perpetrator because of the position or position held.

In line with this, according to H. Abdul Latif, what is meant by "opportunities" are: "opportunities that can be exploited by perpetrators of criminal acts of corruption, which opportunities are stated in the provisions on working procedures relating to the position or position held or occupied by perpetrators of criminal acts of corruption. [7]The definition of "abusing facilities" means that there appears to be an abuse of equipment or facilities obtained because of the position or position of the perpetrator. Based on this, what is meant by means is a way of working or working methods related to the position or position of the perpetrator of a criminal act of corruption. [10].

The third element is, "the act can harm state finances or the state economy". According to the legislators in their explanation, state finances are all state assets in any form, separated or not separated, including all parts of state assets and all rights and obligations arising from: [11].

a. Being in the control, management, and accountability of state officials, both at the central and regional levels; and
b. Being in the management and accountability of State-Owned Enterprises/Regional-Owned Enterprises, foundations, legal entities, and companies that include third party capital based on agreements with the state.

Based on this description, it can simply be concluded that a detrimental act is an act that results in a loss or a reduction, so that the element of "detriment to state finances" is defined as a loss of state finances or a reduction in state finances. [10].

Constitutional Court Decision No. 25/ PUU-XIV/2016 in its decision stated that the word "can" in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law does not have binding force. So based on this Article 2 paragraph and Article 3 of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning the Crime of Corruption is a material offense which means that the existence of a criminal act of corruption must cause unwanted consequences, in this case the state loss must be clear in amount.

Based on this description, it is very clear that the actus reus in Article 3 of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning the Crime of Corruption is "abusing the authority, opportunity, or facilities available to him because of his position or position" which results in "financial losses and the country's economy". While the

mens rea element is contained in the phrase "with the aim of benefiting oneself or another person or corporation", which means that the perpetrator really wants or has a goal to benefit himself or another person or corporation. The mens rea element is very important for proven, because if this element cannot be proven, then the act of "abuse of authority" committed is included in the act of Maladministration which is the realm of State Administrative Law because the act is not a criminal act.

3. Harmonization of Regulations in implementing law enforcement against ASN suspected of committing a criminal act of corruption

The enactment of Law Number 30 of 2014 concerning Government Administration has" changed the legal view of eradicating corruption, which initially only used a criminal law approach to an administrative approach. Law Number 30 of 2014 concerning Government Administration confirms that administrative errors that result in state losses that have been subject to criminal acts of corruption due to unlawful acts and state losses must be reviewed. One form of maladministration related to corruption is "abuse of authority". The element of "abuse of authority" is contained in Article 3 of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning Corruption Crimes. In its development, the element of "abuse of authority" is not only contained in Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning Criminal Acts of Corruption, but also contained in Article 17 of Law Number 30 of 2014 concerning Government Administration.

In addition to changing the legal view of eradicating corruption, which initially only used a criminal law approach to an administrative approach, the issuance of Law Number 30 of 2014 concerning Government Administration, its presence provides peace and legal certainty for Government Officials or ASN in carrying out their work who were originally afraid of being involved in criminal or criminal activities. Looking for faults to be punished, so that regional development can run effectively, but some parties are of the opinion that the issuance of this Law creates friction and actually hinders the eradication of criminal acts of corruption and as a place to hide the corrupt.

This kind of situation needs harmonization between the administrative approach and the criminal approach, especially in the prevention/eradication of corruption which at this time has not been a special concern of the government. The enactment of Law Number 30 of 2014 concerning Government Administration and the issuance of the Constitutional Court Decision No. 25/ PUU-XIV/2016 in its decision stated that the word "can" in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law does not have binding force. So based on this Article 2 paragraph and Article 3 of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning the Crime of Corruption is a material offense which means that the existence of a criminal act of corruption must cause unwanted consequences, in this case the state loss must be clear in amount.

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goal to benefit himself or another person or corporation. The mens rea element is very important for proven, because if this element cannot be proven, then the act of "abuse of authority" committed is included in the act of Maladministration which is the realm of State Administrative Law because the act is not a criminal act.

The Constitutional Court's decision encourages the optimization of the functions of the Government Internal Supervisory Apparatus (APIP), in the future the functions and roles of APIP will be more significant and strategic, because they are at the forefront to determine whether there is abuse of authority that results in state losses. APIP will increasingly be expected to be able to determine the elements of state financial losses in real terms, because the Constitutional Court's decision has required that the elements of state financial losses are no longer understood as estimates (potential loss) but must be understood as having actually occurred or real (actual loss). See Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law, to be applicable in criminal acts of corruption. In order to streamline the efforts to affirm administrative and criminal responsibilities, related to the aims and objectives of the UUAP and the Constitutional Court's decision above, it is necessary to harmonize, among others,

First, Harmonization of Definition of State Financial Losses. In In the context of administrative law, the meaning of state financial losses must be real and have occurred, this refers to the UUAP and the State Treasury Law and the Constitutional Court's decision no. 25/2016. The criteria for state financial losses like this poses its own challenges because it will face obstacles with the nature of proving state financial losses in criminal law which so far has embraced potential losses [13] As stated by Theodorus M [13]. ' will never be applied. Furthermore, he conveyed that the characteristics of corruption, especially those that are large in number and involve abuse of authority, are conflicts of interest, collusion, and agreements where "everything is regulated". [13].

Second, Harmonization of Provisions for Returning State Losses. As required in the State Treasury Law, UUAP that state financial losses due to administrative errors accompanied by abuse of authority will be subject to sanctions for the obligation to repay state losses. However, there is a question whether this provision will actually not conflict with the principle of non-double jeopardy, which more or less means in this context 'double punishment' if it is associated with the Anti-Corruption Law. The point is that if the administrative process will be put forward and followed by the obligation to pay compensation, how will this be effective if after the administrative process a criminal process will be continued, while in the criminal process, the return of state losses will not abolish the crime. Based on the formulation of Article 4 of the Anti-Corruption Law, if the proceeds of corruption have been returned to the state, the perpetrators of corruption can still be brought to court and can still be sentenced. Corruption is considered to have been completed (voltoid) with the fulfillment of the elements of a criminal act as formulated in the articles indicted [14].

In addition, in the provisions of Article 64 paragraph (2) of the Law. No. 1 of 2004 concerning the State Treasury, it is stated that: "Criminal decisions do not release" of claims for compensation. " Fundamental issues in the national legal system is that the relationship between administrative law and criminal law develops in a complex that tends to bring about legal uncertainty. In the Indonesian legal system, almost every administrative violation is followed by the threat of punishment. The problem is that the

pattern of the relationship between administrative sanctions and criminal sanctions in Indonesian law is not clear: are they complementary or interdependent. As a result of this lack of clarity, there has been a phenomenon of policy criminalization in eradicating corruption and the overlapping of criminal law and administrative law in legal issues involving administrative penal law issues.

Third, harmonization of legislative policies both vertically and horizontally. There is a provision in Article 12 of the Law. No. 15 of 2004 concerning Audit of State Finance Management and Responsibility which states that in the context of financial and/or performance audits, BPK conducts tests and assessments on the implementation of the government's internal control system (or in this case APIP). With such provisions, there may be differences of opinion between the results of the external and internal assessments or differences of opinion between the results of the external supervisors and the decisions of the judiciary. As an illustration, if the APIP assessment results state that there is an abuse of authority that is detrimental to state finances and then after being tested at the State Administrative Court, it turns out that the State Administration has stated otherwise in the sense that there is no abuse of authority that is detrimental to state finances, but in an external examination by the BPK, the APIP findings are still declared correct. So that there will be no conflict between the court's decision and the results of the BPK's assessment, and vice versa.

In addition, the next problem is that the results of the examination from the government's internal supervisory apparatus can be in the form of administrative errors that cause state financial losses due to an element of abuse of authority. Consequently, government officials who commit administrative errors that cause state financial losses due to abuse of authority are subject to the obligation to return money to the state/regional treasury. Based on the provisions of Article 21 UUAP, if the Agency and/or Government Official feels that their interests have been harmed by the results of the supervision of the government's internal supervisory apparatus, the Agency and/or Government Official may submit an application to the competent Court containing a demand that the Decision and/or Action of the Government Official be declared to exist. or there is no element of abuse of authority (Vide article 3: Perma No. 4 of 2015, concerning Guidelines for Proceeding in Examination of Abuse of Authority).

4 Conclusion

The limitation for declaring a qualified ASN act as maladministration is by using a benchmark using general principles of good governance because the wetmatigheid principle is not adequate. Use of authority not properly, in this case the official uses his authority for other purposes that deviate from the goals and objectives that have been given to that authority. So based on this, the official has violated the principle of speciality.

Meanwhile, the actions of government officials in the form of negligence as a result of lack of knowledge or skills can only lead to criminal charges, if the negligence is formulated as an element of action or " dolus eventualis ". On the other hand, if the above parameters are met, then the decisions and or actions of government officials are in the realm of criminal law, because all of the negative parameters above have the nuances of malicious intent and create elements of an unlawful nature in criminal

law. Based on this description, it can be concluded to find out whether the decisions or policies issued by public officials are qualified as criminal acts of corruption if an act against criminal law has occurred, and it is found that there is an evil mental attitude (mens rea) from the public official.

Constitutional Court Decision No. 25/PUU-XIV/2016 has emphasized the non-penal approach in the form of an administrative approach as stated in the UUAP, as has also been regulated in other legislative policies that regulate the line of coordination between criminal law and administrative law in efforts to eradicate corruption. Among them are the provisions of Article 385 of the Regional Government Law which stipulates that law enforcement officers must first coordinate with the APIP in following up on alleged irregularities committed by the government administration, so that evidence of administrative irregularities is found, the further process is submitted to APIP. The existence of irregularities of a criminal nature, the further process is submitted to law enforcement officers in accordance with the provisions of the legislation.

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