



**Military unions and associations.  
Legal framework and case files of  
Romanian Ombudsman**

# **Military unions and associations- scope of activities**

## **Definition**

**According to the actual Romanian legislation, “The workers’ unions are independent jurisdictional persons, founded in order to defend and promote collective and individual rights, as well as professional, economic, social, cultural and sports interests of their members” or, in another words, “workers’ unions are founded in order to defend their members’ rights stipulated in their country’s legislation, in the international pacts, treats and conventions to which Romania subscribed”, and also in the collective work contracts, and in order to promote professional, economic, social, cultural and athletic interests of their members. The unions are independent to the public authorities, political parties and patrons’ organizations.” (art. 217 of The Labor Code, corroborated with art. 1 of the Law no. 54/2003, modified and completed), while the associations are private jurisdictional persons (art. 1 rank 2 of The Romanian Government Ordinance no. 26/2000 on the associations and foundations, modified by the Law no. 246/2005 given for adopting The Romanian Government Ordinance no. 26/2000 on the associations and foundations).**

**The nature of arrangements of these entities requires a double approach: the constitutional and the legal one.**

## The constitutional framework

- Romania's Fundamental Law, revised in 2003, stipulates in its 40<sup>th</sup> article on the association right, that „citizens may freely associate into political parties, trade unions, employer's associations, and other forms of association. The political parties or organizations which, by their aims of activity, militate against political pluralism, the principles of a State governed by the rule of law, or against the sovereignty, integrity or independence of Romania shall be unconstitutional. Judges of the Constitutional Court, the advocates of the people, magistrates, **active members of the Armed Forces, policemen** and other categories of civil servants, established by an organic law, shall not join political parties.”
- Therefore, the right of association has a constitutional limitation regarding the associations' members. The Constitution allows the organic law to establish the specific categories of people who are permitted to associate. The Romanian constitutional system is based on the theory of public services' neutrality, which impose the non-implication of this category of servants in the political field.

## **Legal framework for the organization and functioning of the People's Advocate Institution in the military field**

- The legal framework on the Army members' right to associate is the 28-29<sup>th</sup> article of the Law no. 80/1995 on military staff status, published in the Official Journal of Romania no. 155/July 20<sup>th</sup>, 1995, modified and completed.

## The boundaries of the military staff organizations and associations' activities

According to The Romanian Legislation, these social professional categories have a special regime in which a number of rights – as the association and representation ones, or the petitioning one – are restricted and expressed by a set of special reglementations, some of them being international ones ratified by Romania, but also by internal laws.

For example, one of these limitations consists into the prohibition of the strike manifestations. The trespassing cases in this matter are stipulated in the following:

The International Pact on the economic, social and cultural rights, adopted by The General Assembly of The United Nations Organization on December 16<sup>th</sup>, 1966, which stipulates in it's 8<sup>th</sup> art. Rank 1 point D, that the right to strike must be exercised according to every country's laws.

According to the 2<sup>nd</sup> rank of the same text, the recognition of the strike right does not imply the establishment of some legal restrictions regarding the exercise of this right by the members of the army force, of the police or of the public servants.

The Convention no. 87/1948 of The International Labor Organization on the unions' freedom and on the protection of the unions' rights stipulates in its 9<sup>th</sup> art rank 1: "The quantum of application of this convention's guaranties to the army and police forces depends on the each national legislation."

The Social European Charta, revised, adopted in Strasbourg on May 3<sup>rd</sup>, 1996, which disposes, in its 5<sup>th</sup> article, the 2<sup>nd</sup> thesis: "The quantum of application of this convention's guaranties to the police forces will be determined by the each national legislation or reglementations. The principle of these guaranties application to the army forces staff and the quantum of their application to this social category are also determined by each national legislation or reglementation."

The Law no. 80/1995 on the military staff status, which in its 3<sup>rd</sup> section (interdictions and prohibitions in performing some rights and liberties) stipulates the following:

**28<sup>th</sup> art. *“It is prohibited to the military active staff to practice the following rights:***

- a)** to be members of any political parties, groups and organizations or to practice any form of propaganda or other activities in their benefit or in the favor of an independent candidate for public dignities;
- b)** to candidate in order to be elected in the public administration, either local or central ones, for the Romanian Parliament or for the Romanian Presidency;
- c)** to initiate or to participate to strikes.

**29<sup>th</sup> article: *Active military staff are restricted into exercising the following rights and liberties:***

- a)** political opinions and options may be expressed only off-duty;
- b)** it is forbidden to publicly express personal opinions that are contrary to Romanian State and military forces;
- c)** the circumstances in which active military staff could publicly present military information are specifically established by the order of The Minister of National Defense;
- d)** joining religious cults is free, excepting those that, according to the law, are disturbing public order, as well as those that are contrary to good behavior or work’s legislation;
- e)** excepting the union type of organization and the ones that are contrary to the unic military command, order and discipline, the active military staff is allowed to participate in different forms of association with professional, technical, scientific, cultural, athletic or charity character.

None of the international documents mentioned above stipulates specifically the interdiction of a strike right for these social-professional categories, leaving to every each state the freedom to establish, through the national Law, the quantum of application of those international treaties' guaranties to the army and police forces.

The Parliament recognize the strike right, specifically, only for the employees. Therefore, the right to strike is specific only for the employees.

There are several exceptions, expressed in legal dispositions that limit employees' right to initiate a strike.

According to 43<sup>rd</sup> art., 2<sup>nd</sup> rank of The Fundamental Law stipulates that the strike right can be exercised only under the Law The legislator provided interdictions and restrictions of the strike right in order to insure the security of the economical and social activity and to guarantee the general well-being interests of the society.

In this sense, we consider fully natural and justified the interdictions stipulated by the Romanian legislator, both in the 45<sup>th</sup> art. 1<sup>st</sup> rank point E of the Law no. 360/2002 on the policemen code, and in the 63<sup>rd</sup> art. of the Law no.168/1999 on the work conflicts solving, modified by the Law no. 261/2007, which stipulates:



**“It is not allowed to declare strike: the prosecutors, the judges, the staff of the Defense Ministry and of various institutions and structures in it’s subordination or coordination, the foreign military personnel deployed on the Romanian territory, the military personnel and public servants with special status on the Ministry of Internal Affairs and various institutions and structures in it’s subordination or coordination.(...)”**

This kind of reglementation is justified by the fact that army and police staff are public servants with special status, acting and working in the public interest and for the well-being of people, of the community and of the state institutions, only according and obeying to the Law, so that ceasing their activity would affect a basic and essential service for the society: “insuring public order”.

The prohibition of exercising the strike right doesn’t affect this category in the sense of making impossible the defense of it’s professional and social interests, along with other legitimate rights. So, in order to satisfy their interests, beside the right to report to the superiors, policemen may appeal – through The National Policemen Union – to common means (mutual agreement, mediation and so on) for solving work conflicts appeared in their relation with the central administration.

# The relation between the military associations/unions and the Romanian ombudsman

In 2005, the Institution of the People's Advocate received a series of petitions referring to the area of military service, justice, law enforcement and penitentiaries. In the aforementioned area, the following six inquiries were included: the office attached to the court of section 2 Bucharest; the maximum security penitentiary, Bucharest-Rahova; the central military emergency clinic-hospital, "Carol Davila"; the medical management of the Ministry of National Security; the house of Health Care of the Army, public ordinance, National Security and Justice (C.A.S.A.O.P.S.N.A.J); Ministry of Education and Research.

In the area of **Army, Justice, Police, Penitentiaries**, there were registered **908 complaints**, in 2006, representing 14,2% of 6407 complaints, registered at the People's Advocate institution.

In the area of army, justice, police, penitentiaries, there were registered **822 complaints**, in 2007, representing 11, 9% of 6919 complaints, registered at the People's Advocate Institution.

During the year 2008, a number of 1104 petitions were registered in the activity field of army, justice, police and penitentiaries, representing 13.75% of the total number of 8030 petitions, registered with the People's Advocate Institution.

In 2009, in the field of activity of army, justice, police, penitentiaries a number of **1591 petitions** were registered, representing **30.2%** from the total number of **5264** petitions, registered at the People's Advocate Institution.

In 2010, the institution has received **83** petitions regarding the army, containing: criticism made by retired military staff on the unconstitutionality of some dispositions of the Law no. 119/2010 that established measures applicable in the pensions' field and of the Law no. 118/2010 that established some measures for the budget balance; information concerning the obtaining of the military pension in the case of not fulfilling the legal conditions of attending military stage; quantifying confidentiality bonus assigned to the classified information, under the provisions of The Governmental Ordinance no. 1/2010 regarding some measures of staff reassignment into the military structure, of The Governmental Ordinance no. 19/2006 regarding the salary increasing of the military personnel and public servants with special status in the national defense, in the public order and in the national security, of The Law no. 330/2009 regarding the unique salary system of the employees remunerated from the public finance.

In 2005 persons who confronted difficulty in obtaining from the Military Unit 02405 Pitesti, proofs regarding military service, further notified the Institution of the People's Advocate. Additionally, a portion of the petitions addressed to the institution of the People's Advocate in the area of the army, had as their basis; the establishment and recalculation of military pensions; obtaining information regarding the interpretation of legal provisions with respect to military staff; the framework of military staff, after transitioning to the reserves, as civil personnel.

Thus, the Institution of the People's Advocate received a complaint by a petitioner with regard to provision of Government emergency Ordinance nr. 90/2001, corroborating with provisions of the Government emergency Ordinance no. 4/2004 for modification and completion of Law no. 80/2005, regarding the statues of military staff. Appropriate to these legal provisions, the grade of "Fleet Rear-Admiral" was changed to the grade of "One Star Rear-Admiral", while the grade of vice admiral was changed to "Two Stars Fleet Rear-Admiral" which, by acceptance, would constitute a demotion as well as an insult to military honor. Conforming to the information received by the People's Advocate, from the State Major of the Naval Forces of Bucharest, and the Ministry of National Security, between the grades of Rear-Admiral, regulated by the Decision of the former Ministry Council, no. 1177/1965 and Law no. 80/1995 and grade fleet one-star Rear-Admiral, regulated by Government emergency ordinance 90/2001, respective to Government emergency ordinance nr. 4/2004, made no difference, in terms of neither insignia nor rights, therefore it could not bring dishonor to the petitioner.

*File no. 14123/2005*

Nicolae (a fictive name) requested the intervention of the Institution of the People's Advocate, at the Military Unit 02405, Pitesti, because he had repeatedly requested the release of records documenting his period of effective military service. The Military Unit had previously communicated the petitioner that they do not have records for people born in 1925 and asked Nicolae additional proves (papers) of identification (his place of residence at the time he passed into the reserves, the name of the army unit in which he completed his military service).

As a result of the measures undertaken by the Institution of the People's Advocate, UM 02405 Pitesti notified us that the records requested by the petitioner were (finally) sent to him. In addition, it was specified that, following the laws of a reparatory nature (for example, Law no. 309/2002 regarding the recognition and granting of rights to the persons who underwent military service under the General Management of the Labor Board between 1950 and 1961, with modifications and subsequent completions), the Military Unit 02405 Pitesti is confronted with a large number of requests, finding it impossible to respect the legal time limit for response, established by the Government Emergency Ordinance no 27/2002, on the activities requested in the resolution of complaints by petitioners, granted by the Law no.233/2002.

*File no. 11418/2005.*

Paul (a fictive name) submitted a complaint to the Institution of the People's Advocate regarding his requests addressed to the Military Unit (U.M.) 02405 Pitesti. In the first place, the petitioner requested the release of records referring to his period of military service, necessary for obtaining inducements and rights, as established in Law no. 309/2002, modified and completed. Subsequently, the petitioner returned with a new request of the Military Unit 02405 Pitesti, asking for the release of records that would contain changes of deployments during the time of his military service. Referring to the request, the Military Unit (U.M.) 02405 Pitesti specified that the military unit in which Paul served (U.M. 03852, Ploiesti) does not appear in its evidence as "work deployments" under the General Management of the Labor Board (D.G.S.M.) and this information does not figure in the archives of work deployments within (D.G.S.M.). In order to clarify the petitioner's requests, the Institution of the People's Advocate contacted the Military Unit (U.M.) 02405 Pitesti, who sent the petitioner his record of military service in the Military Unit (U.M.) 03582 Ploiesti between March 1<sup>st</sup> 1953 and February 16<sup>th</sup> 1956, which does not appear in the evidence for work groups and units of the General Management of Labor Board, and that it (the Military Unit (U.M.) 02405 Pitesti) does not hold the archives of detachments and work units in its evidence. Additionally, we were sent a copy of the petitioner's record, which was remitted to the petitioner as well.

***File nr. 13935/2005***

Dan (a fictive name), major in the reserves (r), submitted a complaint to the Institution of the People's Advocate, regarding his repeatedly request to recalculate his pension addressed to the military pension section and social security of the Ministry of National Security since 2004. He had not received any answer. As a result of the People's Advocate intervention, the Management Department of Finance and Accounting of the National Security Ministry communicated to us that the pension rights of the petitioner were revised, according to seniority in the service, and recalculated, according to provisions of 79<sup>th</sup> art. of Law no. 164/2001, regarding the state military pensions, republished. Additionally, the National Security Ministry informed us that, due to the diversity and large number of work (with reference to the establishment of rights to pension for work, disabilities and survivorship, the recalculation of military state pensions), considering also the institution's financial possibilities, the Military section of pensions and social securities was not able to resolve mr. Dan's complaint within the legal term limits (provided by laws concerning pensioner requests), and that, therefore, these were re-scheduled for resolution in term of a year, according the registration of the same request.

## *Special report*

A petitioner notified the People's Advocate Institution, invoking the unconstitutionality of 2<sup>nd</sup> art. of Law no. 395/2005, regarding the suspending of the mandatory military service during times of peace and moving to voluntary military service. As per the legal dispositions criticized, "Beginning with January 1<sup>st</sup> 2007, attending the mandatory service, as military in the field and military with reduced term, is suspended. The last drafting of recruitments for soldiers within term will take place in October 2006, and, for the soldiers with reduced term, January 2006". Therefore, in the petitioner's opinion, the mentioned legal stipulations were contrary to the 55<sup>th</sup> art. of the Constitution, which stipulates that the citizens have the right and obligation to defend Romania. Regarding this aspect, the petitioner requested the reviewing of this law and the reinstalling of the mandatory military service for a period of 3-4 months, necessary for the military training of young men aged between 18 and 30 years.

The petitioner was informed of the fact that there are no significant reasons for the People's Advocate Institution to notify the Constitutional Court, because the disposition regarding the renouncing to the mandatory military stage was taken after consulting the population, by means of referendum, and modified the Constitution, taking into account the characteristics of the international military context, Romania's international alliances and agreements, the experience of other states that have optimized their army forces.



Furthermore, when it was taken into consideration the renouncing to the mandatory military stage, it was taken into account also the need for maintaining an adequate military ability, which would respond to the army's missions in the current geo-strategic context and the International Obligations accepted by Romania, according to the its security interests and objectives. Moreover, by the complete professionalizing of the army, Romania would benefit from a greater stability of the military system and the personnel will be more motivated, reducing the problems of military discipline. The petitioner was also informed on the stipulations of the 3<sup>rd</sup> art. of the Law no. 395/2005, according to which: "during the state of war, of mobilization, as well as of the state of siege, attending the military service becomes mandatory, in compliance with the law". Therefore, in times of peace, when reaching 20 years of age, young men have to present at the military centers, in order to be taken into military evidence (request no. 9070/2008).

*File No. 1893/2009.*

Andrei (fictional name) requested the People's Advocate Institution's point of view on the issue of income waging and taxation for the military personnel in permanent mission abroad, submitted to the provisions of the Government Decision No. 837/1995 as any criteria for remuneration in foreign currency and other rights concerning the foreign currency and Romanian currency incomes of the military personnel in permanent mission abroad, republished, dispositions that are not included in the content of the Fiscal Code.

Thus, the petitioner mentioned that when he received the fiscal record, he noticed the following: at point V "Calculation of tax on income from revenues" was registered only the income achieved in Romanian currency during his deployment on the Romanian territory and it's corresponding taxes - not all the monthly incomes in foreign currency and the corresponding taxes were registered, although he had signed also a payroll in currency, which increased the monthly contribution for the social insurances, unemployment contribution, retirement fund. In this context, the petitioner addressed to the General Department of Public Finances and to the Service of Direct Taxes – Resident citizens, which responded him that the military personnel is not tax exempted (cf. 55<sup>th</sup> art., 4<sup>th</sup> rank, point (m) from the Fiscal Code) and that the application of the Government Decision No. 837/1995 by the Ministry of National Defense does not comply with the provisions of the Fiscal Code.

At the request addressed by the People's Advocate Institution, the Financial Accountancy Department within the National Defense Ministry informed us that the issue invoked by the petitioner was analyzed by the National Agency for Fiscal Administration within the Ministry of Public Finances.

Following the action undertaken by the People's Advocate Institution, the National Agency for Fiscal Administration within the Public Finances Ministry informed us that, according to the provisions of the 42<sup>nd</sup> art., point (m), from the Law No.571/2003 of the Fiscal Code, further amendments and supplements included, "net incomes in foreign currency received by the members of Romanian diplomatic missions, consular offices and cultural institutes located abroad, according to the actual legislation, are subject to tax collection".

According to the point of view submitted to the People's Advocate Institution by the General Department for Legislation and Direct Taxes within the Ministry of Public Health, "military personnel within the representative structures abroad are not part of the category of Romanian diplomatic and consular personnel".

## Ombudsman activity in 2010

In 2010, we received a number of 83 petitions relating to army issues: critics formulated by military retired staff on the unconstitutionality of the Law no. 119/2010 dispositions regarding some measures taken on the pensions' field and of the Law no. 118/2010 regarding some measures taken in order to re-establish the right budget balance; on some information about obtaining the military pension in the context of uncomplaining legal requirements on the army service; on the specific dispositions regarding the financial bonus for working with classified information; according to the Governmental Ordinance no. 1/2010, to the Governmental Ordinance no. 19/2006 on the salary increases accorded to the military staff and to the public servants with special status in the national defense system, public order and national security institutions.