 Procedure No.: PS/00088/2020

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and based on

to the following

BACKGROUND

FIRST: A.A.A. (hereinafter, the claimant) on 09/24/2019 filed

claim before the Spanish Data Protection Agency. The claim is

directed against the GENERAL SECRETARIAT OF PENITENTIARY INSTITUTIONS with

NIF S2813060G (hereinafter, the claimed). Manifests:

"I have been sanctioned with the reduction of my wages up to

twice for not having attended to the demand by the Director of the

Lanzarote Penitentiary Center, place of my work, to transfer data and information

medical information regarding my state of health.

I will now recount the events in chronological order.

During the days ***DATE.1, ***DATE.2 and ***DATE.3 I did not go to work

for being sick. I presented the usual medical certificate in cases of

absences due to illness of up to three days, where the doctor reflected the days of the

indisposition (ANNEX 1)

On May 9, 2019, the Director of my work center issues a

resolution requiring diagnosis and medical treatment related to the absence

medical doctor mentioned (ANNEX 2 second section)

On May 17, 2019 I present allegations (Annex 3) in which I make

It must be stated in the Third and Sixth section that the diagnosis and treatment form part

of the right to privacy as well as the existing legislation on data protection

regarding medical documents

On June 2, 2019, I am notified of a resolution in which I am

communicates the deduction from the payroll of the days of absence for not having attended

the request for information on diagnosis and treatment (ANNEX 4, section

Second and third)

On the other hand

On ***DATE.6 I attended a medical consultation during the working day,

presenting proof of attendance at the consultation (ANNEX 5)

On May 17, I am notified of a resolution (ANNEX 6) indicating that

The supporting document does not include a diagnosis or treatment (Second and Third sections),

noting that if such information is not provided, the hours not

worked

On ***DATE.6 I present arguments (ANNEX 7). In its third sections

and Sixth I refer, again, that such information falls within the scope of privacy and that the

State legislation on data protection establishes that the receipt does not

must contain such data

Finally, ANNEX 8, notified on June 19, 2019. In its sections

Second and Fourth, the lack of diagnosis and treatment in the supporting document is reiterated, and the

consequent order to proceed with the reduction of assets in my payroll."

Provide a copy of supporting documents issued by a doctor:

-The first, a private medical center in which there is no diagnosis, contains the data

of the claimant “date of indisposition from ***DATE.1 to ***DATE.3,” “total 3 days”

signed on ***DATE.3 and with the doctor's seal.

-The second indicates in handwriting that the patient, with name and surname

of the claimant, has been attended on the morning of the day of the date, date ***DATE.6.

Provides written ANNEX 2, resolution of the Penitentiary Center of ***DATE.4,

in which it is indicated about the review of the proof of absence of service:

-He had work shifts assigned on days ***DATE.1 to ***DATE.3 and that the

04/16/2019 “Through a co-worker, he presents a rest part of

date ***DATE.3 in which the indisposition from ***DATE.1 to ***DATE.3 is recorded without

that until that day the reason for said lack of attendance was known.”

-It is indicated that in said part “there is no diagnosis or treatment or any

formality” and that according to the RESOLUTION of the Secretary of State for

Public function of 02/28/2019 (11.4 to .6) published in the BOE 03/1/2019, (in what

hereafter, THE RESOLUTION) where instructions are issued on the day and hours of

work of the AGE staff and the sixteenth section of INSTRUCTION 7/2019

of the General Secretariat of Penitentiary Institutions (hereinafter

INSTRUCTION) He first cites section 11.4 to 11.6 of the resolution that

points out:

“11.4 In cases of absence during the entire daily shift due to

illness or accident without a medical leave certificate having been issued, you must

notice of this circumstance to the hierarchical superior immediately and fully

will carry, where appropriate, the reduction in remuneration provided for in the regulations applicable to

absences from work due to illness or accident that do not give rise to

situation of temporary incapacity.

In any case, once the employee has been reinstated to his position, he must

immediately justify the concurrence of the cause of the disease."

Point 11.5 refers to a case unrelated to the claim, the

of temporary disability with part of medical leave and 11.6 to its parts of confirmation

tion.

In the Center's resolution, the content of the text is not expressly transcribed.

sixteenth section of INSTRUCTION 7/2019, but expressly indicates a

article of the aforementioned instruction that determines:

"The part of the working day not performed without just cause will give rise to the deduction

proportional payment of assets, within the three months following the pro-

duced, in accordance with the provisions of article 36 of Law 31/1991, of 30 December

December, which approves the general budgets of the State for 1992, modified

by article 102.2 of Law 13/1996, of December 30, on fiscal measures, administrative

nistrative and social order, without prejudice to the disciplinary measures that could,

if applicable, be adopted.

Article 36 states: "Modification of Law 30/1984"

"The difference in monthly computation, between the statutory working day and

the one actually carried out by the official will give rise, unless justified, to the corresponding

pending proportional deduction of salaries.

For the calculation of the applicable hourly value in said deduction, it will be taken as

based on the full monthly remuneration received by the official

Divided between the number of calendar days of the corresponding month and, in turn, this re-

as a result of the number of hours that the official has the obligation to fulfill,

day, every day.

Articles 31.2 of Law 30/1984, of August 2, are repealed,

and 14, section d), and 17, second paragraph of the Disciplinary Regime Regulations of

Officials of the State Administration of January 10, 1986, as well as

any rules that oppose the provisions of the two preceding paragraphs."

Likewise, section 16 of the aforementioned INSTRUCTION states:

"SIXTEENTH. EXCUSES OF ABSENCES"

What is established in section 11 of the RESOLUTION of February 28,

2019 of the Secretary of State for Public Administration, issuing instructions

on the day and work schedules of the personnel at the service of the General Administration

of the State and its public bodies (BOE of March 1)."

-In a resolution of the Center, it is required to correct said "part of

rest presenting a new one with all the required formalities in case of not

doing so will proceed to deduct all of their remuneration for the days not

carried out without just cause". It ends by informing him that "the

communication of your unjustified absence in a timely manner to the area of analysis and

prison inspection for the appropriate purposes"

It is provided as ANNEX 3, written by the claimant to his employment center

making allegations indicating that the "diagnosis / treatment" cannot be recorded

in medical certificates or in medical part of temporary disability, it also indicates

that in any case, prior to joining his job, he proceeded

to deliver the corresponding part of rest of the 3 days that he was absent from his

job.

As ANNEX 4, it provides a resolution of the center of 05/02/2019. In the part of

□

FACTS It is contained that the official presented on 05/16/2019 a letter to send to

the General Secretariat where he makes allegations without justifying by any means

service absences. Refers again to Instruction 7/2019 of Institutions

Prisons in its section 1.7 regarding the control and monitoring of working hours and hours

of work, indicates that the part of the working day not performed without just cause will give rise to

to the proportional reduction of salaries within the 3 months following the

has produced, in accordance with the provisions of article 36 of law 3/1991 of

30/12 modified by article 102 of law 13/96 of 30/12 and proceeds to the

proportional deduction of the days considered as unjustified attendance

***DATE.1 to ***DATE.3.

Provides a new ANNEX, dated 05/13/2019 in which again the address of the

□

Penitentiary Center requires you in this case regarding an absence from work of the

***DATE.6, day that the work shift was assigned, and it is indicated that he appeared at

the service at 12:00 accompanying a receipt where it simply states that it has

been treated in consultation on the morning of the date and it is required

expressly to submit correcting said document by submitting one

new containing the required formalities. It is indicated that it does not appear in said

document or diagnosis or treatment or any formality.

Finally, a document of ***DATE.5 is provided, from the claimant against said

resolution, and resolution of 06/18/2019 ratifying the origin of the deduction "for

not accredit it", understanding the time of the workday not carried out, without just cause

for the day *** DATE.6 since it was presented at 12 noon accompanying proof

where it states "has been treated in this consultation on the morning of the date", and

"given that there is no diagnosis or treatment or any formality in it,

adding that it is understood that said consultation could have been carried out during

outside of working hours.

SECOND: The claim was not admitted for processing on 10/24/2019, although it was

appealed in replacement RR/00798/2019 and was estimated by agreement of the Director of

02/28/2020.

THIRD: A copy of the website of INSTRUCTION 7/1/2019, Resolution

of the Secretary General of Penitentiary Institutions and President of the State Entity

such Penitentiary Work and Training for Employment, for which instructions are issued

tions on the day and work schedules of civil servant and labor personnel assigned to

the peripheral services of the General Secretariat of Penitentiary Institutions and the

State Entity Penitentiary Work and Training for Employment, signed by the Se-

General Secretary of Penitentiary Institutions on 04/09/2019 and in the provisions that

repeal states: "Instruction 3/2013, approved by Resolution of

October 25, from the General Secretariat of Penitentiary Institutions, as well as all

all provisions of equal or lower rank in what contradicts or opposes what

provided in this Resolution".

Neither in INSTRUCTION 1/7/2019, nor in the preceding one mentions the obligation

importance of the provision of medical diagnoses or treatments as data that have

to be recorded in the medical certificate, ignoring the origin of said interpretation.

tion.

Both instructions are incorporated into the procedure.

It should be noted that the date of the first absence covers from

***DATE.1 to ***DATE.3, and the doctor signs the receipt on ***DATE.3, it is

say an instruction signed on the same day ***DATE.3 is applied to a situation of

illness started on ***DATE.1. In addition, the information on diagnosis and treatment

doctor is health data.

FOURTH: For the clarification of the justification for medical assistance without medical leave,

corresponds to a medical consultation visit of one day, or with the absence of several,

subscribes here for being related to the object, the report of the AGENCY

MADRILEÑA OF DATA PROTECTION that appears on the web and that is incorporated

to the procedure, considering their conclusions and legal reasoning to be valid.

This is INSTRUCTION 2/2009, of 12/21, of the Data Protection Agency

of the Community of Madrid, on the processing of personal data in the issuance of

medical documents, published in the Official Gazette of the CAM on 01/21/2010.

FIFTH: On 06/9/2020, the Director of the AEPD agreed to START

SANCTIONING PROCEDURE of WARNING to the SECRETARY

GENERAL OF PENITENTIARY INSTITUTIONS, (Penitentiary Center of

Lanzarote), for the alleged infringement of article 5.1.c) of the RGPD as indicated in the

article 83.5.a) and 58.2.b) of the aforementioned RGPD.

SIXTH: On 07/01/2020, the respondent makes the following allegations:

- As a background, it considers that the General Penitentiary Law has assigned the function

to guarantee penitentiary services that allow the execution of the custodial sentence of

freedom and control of the services provided by its officials. The facts keep

relation to the context of an activity where the unplanned absence of

effective may pose an additional risk in maintaining security and

internal regimental order of a center.

Regarding the absence from ***DATE.1 to ***DATE.3, it indicates that the claimant, “During the

cycle that had to work was repeatedly called by phone by the

staff office of the Penitentiary Center without answering the calls” As soon as

to the incidence of ***DATE.6, the interested party does not appear at the beginning of his day, 8

in the morning, but at 12 in the morning, presenting the consultation part in which

It is indicated that it has been attended to on that morning.

-“Given the suspicion that they were fictitious incapacities, especially the

first from the Penitentiary Center was asked to specify more

specific to the events that occurred

“They consider that there are specific legal grounds to take into account

account to prevent the Data Protection regulations from being used in fraud

of law and this in the face of the risk of turning into non-controllable and opaque for the

administration, absences from the service of officials.

-Mentions the publication of 07/30/2018, Royal Decree 956/2018 of 07/27, by which

The agreement adopted by the general negotiating table of the AGE of

08/23/2018, in relation to the remuneration regime for the disability situation

Temporary staff at the service of the AGE and public entity bodies in "the

that the days of absence from work by public officials

prisons motivated by illness or accident that do not give rise to a situation

of temporary incapacity do not entail any deduction of remuneration, provided that

are duly justified", unlike the previous regime in which

imposed the deduction of assets as a general rule. It is about avoiding the use

fraudulent of mechanisms established for its protection.

RESOLUTION 02/28/2019 of the Secretary of State for the Function

Public, by which instructions are issued on the day and work schedules of the

personnel at the service of the AGE and its public bodies, 11.3 and 4 indicate:

11.3 "in cases of partial absence from work as a result of

the existence of consultation, proof of medical treatment, said period of time is

be considered effective work as long as the absence is limited to the time

necessary and if you document your attendance and the time of the appointment."

11.4 "in cases of absence during the entire daily shift due to

illness or accident without a medical discharge report having been issued, it must be

notification of these circumstances to the hierarchical superior immediately and will entail

, where appropriate, the reduction in remuneration provided for in the regulations applicable to

absences from work due to illness or accident that do not give rise to a

situation of temporary incapacity. In any case, once the employee has been reinstated

or employed at your discretion, you must immediately justify a concurrence of

the cause of illness. "

-Indicates that although they know they should avoid including diagnosis or treatment

any in the absences, a greater specification of the parts must be made

doctors presented and that she finds protection in articles 6 c) and 6 e) of the RGPD.

SEVENTH: On 01/18/2021, a resolution proposal was formulated, of the literal:

“That by the Director of the Spanish Data Protection Agency,

sanction the GENERAL SECRETARIAT OF PENITENTIARY INSTITUTIONS, for

an infringement of article 5.1.c) of the RGPD, as determined in article 83.5 a) of the

RGPD, with a warning fine.”

EIGHTH: Allegations are received from the respondent that, in addition to reiterating what

manifested indicates:

1 On the considerations noted in the proposal of the way in which they were

acting after the initial agreement regarding the proof of absence from working hours

states that the General Secretariat of Penitentiary Institutions does not require its

workers in a case like the one at hand, which in general in all

proof of punctual and occasional attendance that they present, state the

diagnosis in the case at hand lies in the need felt by the

prison administration to be able to adopt a plus of guarantees in positions of

work that concerns the prison of Arrecife Lanzarote, which is a

establishment with a high statistical frequency of sick leave that does not reach

become Temporary Disability for not exceeding 4 days but which usually

coincide with the days on which work should be done and that coincide before or after

behind with other days off or vacations, which generates an overexertion in the

other colleagues reducing the attention that should be given to the population

recluse

2) To achieve a “proportionate resolution” they specifically consider the

following allegations:

a) Although they recognize that the express request for a medical diagnosis to

may imply access from the point of view of the regulations in

Data Protection considers it necessary to contextualize it in the field

precise labor conflict in which it occurs. The high rate of

absenteeism that occurs in the penitentiary center facilitated by “parties

virtually opaque doctors for penitentiary administration”.

b) There has not been an effective injury to the fundamental right to

privacy of the interested party to the extent that despite having been

requested the data or more data related to their situation in no case

I stand

PROVEN FACTS

The claimant, a penitentiary institution official, did not attend his Center

1)

of work nor did he render his services on days ***DATE.1, ***DATE.2 and ***DATE.3, for

be sick. Provide on the 16th of the same month in your center, a proof of

medical assistance to a private medical center in which the data of the

claimant, the “date of indisposition from ***DATE.1 to ***DATE.3,” “total 3 days”

signed on ***DATE.3, and with the doctor's stamp.

The Penitentiary Center, by resolution of *** DATE.4 sends a letter to the

1)

claimant in which it indicates about the revision of the proof of absence of service,

that has a term to correct it because: "there is no diagnosis or

treatment or any formality” and that according to the RESOLUTION of the

Secretary of State for Public Administration from 02/28/2019 (11.4 to .6) and in accordance

with Instruction no. 7/ 2019 of the General Secretariat of Institutions

Penitentiaries, section sixteen, and that if it does not carry it out "they will proceed to

deduct all of their remuneration for the days not performed without cause

justified". The claimant made allegations to said brief, indicating that there is no

legal obligation that implies that in medical proof of absence from work due to

sickness of up to three days, when medical leave is not issued,

provide the diagnosis or medical treatment to justify the absence.

The Penitentiary Center issues on *** DATE.5 a resolution that appears

two)

as documentation attached by the claimant, as annex 4, in which, in addition to

not respond to the specific allegations of the claimant, considering that he has not

provided the correction of the required medical part, "sends the aforementioned resolution to the

Authorization Office, in order to make the proportional deduction of

assets."

3)

The very fact of requiring diagnosis or treatment for not containing

no formality, under penalty of reduction of remuneration, happens to the claimant for

your Work Center, about, in this case, a medical consultation on ***DATE.6,

returning to his work center at 12 in the morning, when his starting time

it was 8 o'clock. The claimant accompanied the center that same morning the supporting document

doctor of absence, consisting of a stamped part of the private doctor, and signed with

date ***DATE.6 indicating the name and surname of the claimant, and that "has

been treated in this consultation on the morning of the date". The resolution of

Center is dated 05/13/2019 (ANNEX 6) in the claimant's documentation, and

Similarly, after making allegations to the same effect as those of ***DATE.5, the

claimed on 06/18/2019 resolves in the same sense as with absences

from ***DATE.1 to ***DATE.3.

4)

Instruction no. 7/2019 of the General Secretariat of Penitentiary Institutions

and president of the state entity penitentiary work and training for the

pleo by which instructions are issued on the day and work schedules of the staff

official and labor assigned to the peripheral services of the General Secretariat of

Penitentiary institutions, signed on ***DATE.3, entry into force the following day

considering the specific hours in which prison officials provide their services

tentiaries, given the nature of their functions, rules in section 16: "JUSTI-

CERTIFICATION OF ABSENCES":

"The provisions of section 11 of the Resolution of 02/28/2019 of the Sec-

Secretary of State for Public Administration, which issues instructions on working hours

day and work schedules of the personnel at the service of the General Administration of the State

do and its public bodies (BOE of March 1)."

Section 17 establishes that "each penitentiary center required to justify

of all absences."

The aforementioned RESOLUTION, at point 11, and limited to absences, states:

"11.4 In cases of absence during the entire daily shift due to

illness or accident without a medical discharge report having been issued, it must be

notice of this circumstance to the hierarchical superior immediately and will entail,

where appropriate, the reduction in remuneration provided for in the regulations applicable to absences from work due to illness or accident that does not give rise to a situation tion of temporary disability.

In any case, once the employee has been reinstated to his position, he must immediately justify the concurrence of the cause of the disease."

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each control authority, and according to the provisions of articles 47 and 48 of the LOPDGDD, The Director of the Spanish Agency for Data Protection is competent to initiate and to solve this procedure.

II

Article 4 of the GDPR defines:

2) «processing»: any operation or set of operations carried out on on personal data or sets of personal data, either by autho- automated or not, such as the collection, registration, organization, structuring, conservation tion, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of authorization of access, collation or interco- connection, limitation, suppression or destruction;"

7) "responsible for the treatment" or "responsible": the natural or legal person, public authority, service or other body which, alone or jointly with others, determines the purposes and means of treatment; whether the law of the Union or of the Member States determines the purposes and means of the treatment, the person in charge of the treatment or the

Specific criteria for their appointment may be established by Union Law.

or of the Member States;

The circumstance that the diagnosis or treatment appears in an absence report

The procedure is considered to collect health data from the employee and obtaining it means that

health data processing operations are carried out, in this case the data

that the claimant requested, for diagnosis or medical treatment.

Regarding health data, recital 35 of the RGPD points out:

“Personal data relating to health must include all data

related to the state of health of the interested party that give information about their state of

physical or mental health past, present or future. Information is included about the

natural person collected on the occasion of their registration for health care purposes,

or on the occasion of the provision of such assistance, in accordance with Directive

2011/24/EU of the European Parliament and of the Council; any number, symbol or data

assigned to a natural person who uniquely identifies him/her for purposes

toilets; information obtained from tests or examinations of a part of the body or

of a body substance, including from genetic data and samples

biological, and any information relating, by way of example, to a disease, a

disability, risk of disease, medical history, treatment

clinical or physiological or biomedical state of the data subject, regardless of their

source, such as a doctor or other health care professional, a hospital, a device

doctor, or an in vitro diagnostic test.”

“Health data” is defined as:

“personal data relating to the physical or mental health of a natural person,

including the provision of health care services, disclosing information about

your state of health” (art 4.15 RGPD).

Personal data related to health are considered as personal data.

special category in the GDPR, as they are particularly sensitive in relation to the

fundamental rights and freedoms as the context of your processing could

entail significant risks to fundamental rights and freedoms.

Regarding health data, the general regime of the same is indicated in the article

GDPR ass 9:

"1. The processing of personal data that reveals the origin

racial or ethnic origin, political opinions, religious or philosophical convictions, or

union affiliation, and the processing of genetic data, biometric data aimed at

uniquely identify a natural person, data related to health or data

relating to the sexual life or sexual orientation of a natural person.

2. Section 1 shall not apply when one of the circumstances

following:

a) the interested party gave their explicit consent for the processing of said data

for one or more of the specified purposes, except when the Right of

the Union or the Member States establishes that the prohibition referred to in the

section 1 cannot be lifted by the interested party;

b) the treatment is necessary for the fulfillment of obligations and the exercise of

specific rights of the person in charge of the treatment or of the interested party in the field of

Labor law and security and social protection, to the extent that it is so

authorized by the Law of the Union of the Member States or a collective agreement with

under the law of the Member States that establishes adequate guarantees of the

respect for the fundamental rights and interests of the data subject;

c) the treatment is necessary to protect the vital interests of the interested party or another

natural person, in the event that the interested party is not qualified, physical or

legally, to give your consent;

g) the treatment is necessary for reasons of an essential public interest, on the

basis of the law of the Union or of the Member States, which must be proportional

the objective pursued, essentially respect the right to data protection and

establish adequate and specific measures to protect the interests and rights

fundamentals of the interested party;

h) the treatment is necessary for the purposes of preventive or occupational medicine,

evaluation of the work capacity of the worker, medical diagnosis, provision of

assistance or treatment of a health or social nature, or management of systems and services

of health and social care, on the basis of Union Law or the

Member States or under a contract with a healthcare professional and without

prejudice to the conditions and guarantees contemplated in section 3;

i) the treatment is necessary for reasons of public interest in the field of health

such as protection against serious cross-border threats to health, or

to ensure high levels of quality and safety of healthcare and

of medicines or medical devices, on the basis of Union Law or

of the Member States to establish appropriate and specific measures to

protect the rights and freedoms of the data subject, in particular professional secrecy,

3. The personal data referred to in section 1 may be processed for the purposes

cited in section 2, letter h), when their treatment is carried out by a

subject to the obligation of professional secrecy, or under its responsibility, of

in accordance with the law of the Union or of the Member States or with the rules

established by the competent national bodies, or by any other person

also subject to the obligation of secrecy in accordance with the Law of the Union or of

Member States or the rules established by national bodies

competent.

4. Member States may maintain or introduce additional conditions,

including limitations, with respect to the processing of genetic data, data

biometric or health-related data."

THE LODGDD adds in its article 9.2:

"two. The data processing contemplated in letters g), h) and i) of article 9.2

of Regulation (EU) 2016/679 based on Spanish law must be

covered by a standard with the force of law, which may establish requirements

additional information regarding your security and confidentiality.

In particular, said rule may protect the processing of data in the field of

health when so required by the management of health care systems and services

and social, public and private, or the execution of an insurance contract of which the affected

be a part."

Seventeenth additional provision. Health data processing

"1. They are covered by letters g), h), i) and j) of article 9.2 of the Regulation

(EU) 2016/679 the processing of data related to health and genetic data that

are regulated in the following laws and their development provisions:

a) Law 14/1986, of April 25, General Health.

c) Law 41/2002, of November 14, regulating basic patient autonomy and

of rights and obligations regarding information and clinical documentation.

d) Law 16/2003, of May 28, on the cohesion and quality of the National Health System.

e) Law 44/2003, of November 21, on the organization of health professions.

g) Law 33/2011, of October 4, General Public Health."

In principle, the prohibition of processing personal data governs

related to health, so the exceptions should be interpreted restrictively.

The use of health data is prohibited, except with the consent

expressed by the affected party or if any of the circumstances of article 9.2 b) and ss.

In this sense, for the case at hand, intended for the purpose of managing

personnel of the Center in which the claimed person renders services, there is no cause for

that the aforementioned health diagnoses of the processes by which

is treated for the preparation of a medical certificate, for times that do not imply sick leave

doctor, nor in the temporary consultation of the day.

The RESOLUTION of the Secretary of State for Public Administration of

02/28/2019 (11.4 to .6), only allows what its literal states, "justify in a

immediate concurrence of the cause of disease. , and considering the range

normative and the framework that regulates, it does not follow that it has to be interpreted as

should be the diagnosis or the possibility of it being the diagnosis

The RGPD establishes legitimizing bases for the treatment of data

in its article 6.1 and specificities in 9, so that when starting activities that

involve the processing of personal data, the data controller must

always take time to consider what would be the appropriate legal ground for the

planned treatment.

The legitimate basis

the claimed advocates based on the

RESOLUTION and the Instruction, which are associated with articles 6 c) and 6 e) of the RGPD.

Although it is not necessary for both to be present, it is sufficient that one be

applicable. The RGPD indicates:

6.1 “The treatment will only be lawful if at least one of the following is met

conditions:

“c) the treatment is necessary for the fulfillment of an applicable legal obligation

to the data controller;”

There is compliance with the legal obligation as regards the development of the

personnel functions by the administration, justification of absences, but not

covers the treatment of health data. There is no legal cause of those provided for in

Article 9 of the RGPD, neither consent of the affected party nor regulation with the force of law that

allow, to justify absences from the job, without issuing sick leave

that you have to provide the diagnosis for which you go to the doctor to

justify up to three days, nor for a medical consultation. The absence is justified by

Issuance of proof by the doctor without the need or requirement that it be

contain the diagnosis or treatment. It is also excessive for the purpose.

specify what is intended.

“e) the treatment is necessary for the fulfillment of a mission carried out in

public interest or in the exercise of public powers vested in the person responsible for the

treatment;"

In this case, the data controller exercises public powers in

regarding the custody of persons deprived of liberty, their rights and

freedoms. The regulations governing officials in penitentiary centers

is the general of any official with, among others, specificities of his center in

regarding the provision of the service, without being required to justify the

absence from work but as determined by the general regime applicable to the rest of the

officials, not with diagnoses for the intended purpose of, according to the

claimed to prevent fraud.

On the other hand, there was a second medical certificate to which it would not be applicable

the requirement of diagnosis but to complete the hours that he attends or that he had an appointment

doctor and leaves the consultation, understanding that in this way the eventual

abuses.

III

The RGPD establishes that personal data may only be collected

for their treatment, as well as subjecting them to said treatment, when it is with some

specific legitimate purposes, explicit and legitimate, adequate, pertinent and not

excessive in relation to the area for which they have been obtained and are going to be processed.

There is no evidence that the health diagnosis data of the assistance to medical consultation is

have collected or are collected to justify the time away from work but for

the provision of health care to the patient. The purpose of justifying absences

It does not derive from any norm.

A mention to the necessary documentation to justify the absences will be

foreseen in law 41/2002 of 11/14, basic regulation of patient autonomy and

rights and obligations regarding information and clinical documentation, which

contemplates the right of the patient to be provided with the certificates accrediting

your state of health and the physician the obligation to issue it. These supporting documents

Physicians may also appear in other settings as they expand their scope of

operation when they are required, for example, to enjoy permits that

permitted by labor laws or the basic Statute of public employees, such as

example hospitalization, childbirth etc. of the person with whom you live. That's what it's about

the Instruction of the CCAA of Madrid Other examples on permits or licenses are

contained in the aforementioned instruction, which although referred to the LOPD, is applicable

by analogy since what is intended is to adapt the data to the needs

minimum and precise to justify the lack of attendance.

Given that the claimed party has approved and in operation some

instructions that it applies, demanding data processing, means for the

justification for absence from work, and that has been applied to the claimant

with consequences on their rights, and that is not considered in accordance with the regulations

of data protection, it is estimated that the facts constitute an infringement,

attributable to the claimed, for violation of the principle established in article 5.1.c)

of the GDPR:

"1. The personal data will be:

c) adequate, relevant and limited to what is necessary in relation to the purposes

for which they are processed (“data minimization”)”.

For our constitutional jurisprudence, if the right to privacy acts
as a barrier against interference or meddling by others (STC 142/1993, of 22/04),
The right to data protection «consists of a power of disposition and control
on personal data» (SSTC 290 and 292/2000, of 11/30); if the right to
privacy prohibits the knowledge by third parties of certain aspects of the person
(intimate aspects or aspects related to their private and family life), the right to protection of
data provides guarantees of disposal and control regarding personal data that
may or may not belong to the sphere of intimacy and may be subject to
knowledge and management by others; If the right to privacy is the right to
abstention of others with respect to our personal sphere, the right to the protection of
data implies above all self-determination on our data.
In this case, the medical data is generated by and for the patient, and has
a series of purposes, the most important being healthcare, diagnosis
doctor, without prejudice to the documentary justification that corresponds to the doctors. In
In this case, diagnoses are required to justify the absence of the affected person's working day.
on two occasions, the second occasion being special on the occasion of a medical visit. I know
concludes that health data of the affected person is treated when the non-
reduction of remuneration for the time of the absences to which said
medical diagnosis, harming their right not to provide something that the norm does not
establishes and that is contrary to the rules of treatment of health data that are
gives twice. In this case, the claimant declares that he suffered the reduction of
remuneration for not providing the supporting document. Therefore, since the treatment was
established in this sense with some consequences, it must be considered committed the
infringement.
IV
It means that the personnel departments can treat the data of autho-

justified attendance of its employees, albeit with certain limits, among which

rre the non-need or obligation to consign diagnosis or medical treatment,

not necessary, proportional for said purposes, and invasive of the privacy and rights of the

used, excessive for the purposes intended.

Undoubtedly, there can be certain problems and difficulties when

They develop rotating shift services such as that of penitentiary centers. These will

have to cover normally and given the difficulties caused in cases

as the one analyzed in which the lack of attendance occurs from ***DATE.1 to ***FE-

CHA.3, and it is not communicated neither on the first day nor on those days, but on the 16th. However,

Apart from detecting the situation as soon as possible, implementing measures, this disruption

in the service does not allow interference in the rights of employees, being able to

coordinate existing regulations with other complementary measures.

For the justification of absence due to medical consultation, the mere

mention of the doctor expressing date and time and generic allusion, without going into

diagnoses, always remembering that the personal data reflected in the

supporting documents must be adequate, relevant and not excessive. To facilitate the

respect and compliance with said adequacy, the following is valued:

1) It is not advisable to use clinical or administrative documents that

may be designed for use for purposes other than the

issuance of supporting documents, by the mere fact of containing them, with

general, direct or indirect references to the specific health problem of the

patient or user.

two)

In the issuance of supporting documents for the sick worker himself, no

will consider appropriate the inclusion in the supporting document, among other possible

data, of those related to the diagnosis, test performed or name of the

service that treated the patient. For these purposes, the receipt issued

should be limited to verifying that there is a health problem that is the cause

of the incapacity for work in which the patient or user finds himself.

It is also considered adjusted to data protection regulations, which

if the doctor considers it convenient, in case of impossibility of

assistance on successive days, without issuing medical leave, can

indicate the necessary days of rest, with the considerations before

cited.

3) In the medical consultation part, it could only be required that the

times of the appointment of the consultation, entry and exit, which is appropriate

and proportional to justify that interruption of service.

v

The infringement of article 5.1c) of the RGPD refers to article 83.5.a) of the

RGPD that indicates:

“Infractions of the following provisions will be sanctioned, in accordance

with paragraph 2, with administrative fines of a maximum of EUR 20,000,000 or,

in the case of a company, an amount equivalent to a maximum of 4% of the

global total annual turnover of the previous financial year, opting for

the largest amount:

the basic principles for the treatment, including the conditions for the

a)

consent under articles 5, 6, 7 and 9;"

Article 83.7 of the RGPD indicates:

"Without prejudice to the corrective powers of the control authorities in

Under Article 58(2), each Member State may lay down rules

on whether it is possible, and to what extent, to impose administrative fines on authorities and

public bodies established in that Member State.

The Spanish legal system has chosen not to sanction with a fine those

public entities, as indicated in article 77.1. c) and 2. 4. 5. and 6. of the

LOPDDG: "1. The regime established in this article will be applicable to

treatments for which they are responsible or in charge:

c) The General Administration of the State, the Administrations of the communities

autonomous and the entities that make up the Local Administration.

2. When those responsible or in charge listed in section 1 committed

any of the infractions referred to in articles 72 to 74 of this law

organic, the data protection authority that is competent will dictate

resolution sanctioning them with a warning. The resolution will establish

also the measures that should be adopted to stop the behavior or correct it.

the effects of the infraction that had been committed.

The resolution will be notified to the person in charge or in charge of the treatment, to the body of the

that depends hierarchically, where appropriate, and to those affected who had the condition

interested party, if any.

3. Without prejudice to what is established in the previous section, the protection authority of data will also propose the initiation of disciplinary actions when there are sufficient evidence for it. In this case, the procedure and the sanctions to be applied will be those established in the legislation on disciplinary or sanctioning regime that result of application.

Likewise, when the infractions are attributable to authorities and managers, and proves the existence of technical reports or recommendations for the treatment that had not been duly attended to, in the resolution imposing the The sanction will include a reprimand with the name of the responsible position and will order the publication in the Official State or Autonomous Gazette that correspond.

4. The data protection authority must be notified of the resolutions that fall in relation to the measures and actions referred to in the sections previous.

5. They will be communicated to the Ombudsman or, where appropriate, to similar institutions

of the autonomous communities the actions carried out and the resolutions issued under this article.

6. When the competent authority is the Spanish Agency for the Protection of Data, it will publish on its website with due separation the resolutions referred to the entities of section 1 of this article, with express indication of the identity of the person in charge or in charge of the treatment that would have committed the

infringement."

The distinction between data controller and employee is derived from the GDPR.

this, for example when referring to the Data Protection Delegate, in its recital

97: "... Such data protection delegates, whether or not they are employees of the controller

of the treatment", and its functions in article 39 of the RGPD "a) inform and

advising the person in charge or the person in charge of the treatment and the employees who

dealing with the treatment of the obligations incumbent upon them by virtue of this

Regulation and other data protection provisions of the Union or of the

Member states;".

By this, it is meant that the positions or employees of the person responsible for the

treatment, when carrying out personal data processing in the

performance of their duties, are under his power of direction, and that they should be

instruct and direct guidelines on the matter so that an application is achieved

uniform in its field.

Therefore, in accordance with the applicable legislation

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE THE GENERAL SECRETARIAT OF INSTITUTIONS

PENITENTIARY, with NIF S2813060G, for an infraction of article 5.1.c) of the

RGPD, in accordance with article 83.5 b) of the RGPD, a penalty of

warning.

SECOND: NOTIFY this resolution to the GENERAL SECRETARIAT OF

PENITENTIARY INSTITUTIONS.

THIRD: COMMUNICATE this resolution to the OMBUDSMAN, of

in accordance with the provisions of article 77.5 of the LOPDGDD.

FOURTH: In accordance with the provisions of article 50 of the LOPDGDD, the

This Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the LOPDGDD, and in accordance with the provisions of article 123 of the LPACAP, the Interested parties may optionally file an appeal for reconsideration before the Director of the Spanish Agency for Data Protection within a month from counting from the day following the notification of this resolution or directly

contentious-administrative appeal before the Contentious-Administrative Chamber of the National Court, in accordance with the provisions of article 25 and section 5 of the fourth additional provision of Law 29/1998, of 13/07, regulating the Contentious-administrative jurisdiction, within a period of two months from the day following the notification of this act, as provided in article 46.1 of the aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP, may provisionally suspend the firm resolution in administrative proceedings if the The interested party expresses his intention to file a contentious-administrative appeal. If this is the case, the interested party must formally communicate this fact by writing addressed to the Spanish Agency for Data Protection, presenting it through Electronic Register of the Agency [https://sedeagpd.gob.es/sede-electronica-web/], or through any of the other registers provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the documentation proving the effective filing of the contentious appeal-administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative within a period of two months from the day following the

notification of this resolution would end the precautionary suspension.

Sea Spain Marti

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