[doc. web no. 9543161]

Injunction order against the Municipality of Falconara Marittima - 14 January 2021

Register of measures

no. 23 of 14 January 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, components and the cons. Fabio Mattei, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, concerning the protection of natural persons with regard to the processing of personal data, as well as the free movement of such data and repealing Directive 95/46/ CE, “General Data Protection Regulation” (hereinafter, “Regulation”);

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national legal system to Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, relating to the protection of natural persons with regard to the processing of personal data, as well as to the free circulation of such data and which repeals Directive 95/46/EC (hereinafter, the "Code");

CONSIDERING the Regulation n. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor for the protection of personal data, approved with resolution no. 98 of 4/4/2019, published in the Official Gazette no. 106 of 8/5/2019 and in www.gpdp.it, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

Given the documentation in the deeds;

Given the observations made by the Secretary General pursuant to art. 15 of the Regulation of the Guarantor n. 1/2000 on the organization and functioning of the Guarantor's office for the protection of personal data, doc. web no. 1098801;

Supervisor Prof. Geneva Cerrina Feroni;

WHEREAS

1. The complaint.

With complaint of the XX, presented pursuant to art. 77 of the Regulations, as subsequently integrated, Mr. XX, an employee of the Municipality of Falconara Marittima in service with the Local Police, complained that, with e-mail from XX, the

Commander of the Local Police would have sent to all members of the body a note (prot. n. XX) of the "Single Guarantee Committee for equal opportunities, the enhancement of the well-being of those who work and against discrimination" (hereinafter, "XX"), containing, as an attachment, the minutes of the session of the XX of the XX and an anonymous letter, received in the XX (prot. n. XX of the XX), with which non-identifying colleagues of the complainant would have expressed negative judgments about his behavior in the workplace. A questionnaire was also attached to the e-mail in question, with which the recipients were asked whether or not they shared the opinions reported in that anonymous letter, with particular reference to the "great state of discomfort deriving from the attitudes and behaviors towards colleagues by the [complainant] which create clear disturbance to the well-being at work".

2. The preliminary investigation.

With a note of the XX (prot. n. XX), the Municipality, responding to the request for information from the Guarantor (prot. n. XX of the XX), declared, among other things, that:

- the purpose pursued [...] in communicating the document which is the subject of the complaint in question was [...] to carry out the dutiful acknowledgment and verification of what was found" by the XX "[...] in fulfillment of the duties that the law (Art 21 of Law No. 183/10 and subsequent amendments) charges the public employer party to which [the XX] addressed [o] with a specific report as well as, secondly, in equal fulfillment of the duties of disciplinary initiative, as established by Articles 55 ff. of Legislative Decree 165/01 and subsequent amendments and even assisted by a specific sanction for the hypothesis of failure to initiate the investigations and therefore of the disciplinary initiative according to the specific provision of Art. 55 sexies paragraph 3 of Legislative Decree no. 165/01 and subsequent amendments same";

- "the recipients of the letter [have] been carefully identified and selected by the Commander, [who has] selectively limited the communication to interested parties only (precisely the "Local Police Officers"), [...] with the exclusion, however, of employees who carry out administrative activities within the Headquarters as well as four new recruits";

- "the content of the communication was drawn up in a strictly proportionate and continental sense according to the duties of verification [...] of what was reported by [the XX], when one considers that this activity is absolutely necessary, in a preliminary sense and prodromal to the possible exercise of disciplinary action, which, in the case in question, was not exercised [...]";

- "as regards the concrete methods with which the acknowledgment and verification activities of what was reported to the Commander of the Local Police were carried out, [...] these consisted of the following activities ordered in a logical and

chronological sequence: [...] [in sending of] specific e-mail communication (precisely the one subject to complaint) requesting feedback information" [and] "in the subsequent conduct of confidential and protected interviews - with respect to some of the individual personnel units exposed to service contacts with the [complainant] [...] for the purpose of further and more precise verification and confirmation of what has been reported".

With a note of the XX (prot. n. XX), the Office, on the basis of the elements acquired from the checks carried out and the facts that emerged following the preliminary investigation, notified the Municipality, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the provisions pursuant to art. 58, par. 2, of the Regulation, concerning the alleged violations of articles 5, par. 1, lit. a) and c), 6 and 2-ter, paragraphs 1 and 3, of the Code. Based on what emerged in the preliminary investigation, the start of the proceeding was also notified in relation to the alleged violation of art. 37, par. 7 of the Regulation, since the Municipality has not communicated the contact details of its data protection officer to the Guarantor.

The Office has also invited the aforesaid owner to produce written defenses or documents to the Guarantor or to ask to be heard by the Authority (art. 166, paragraphs 6 and 7, of the Code, as well as art. 18, paragraph 1, of the law November 24, 1981, n. 689).

The Municipality sent its defense briefs with a note of the XX (prot. n. XX), representing, among other things, that:

- "the law imposes [the] Service Manager [the] exercise of disciplinary action in any case of recurrence of the conditions - so much so as to subject the same Service Manager to a severe penalty for the hypothesis of any failure to exercise or forfeiture of such action (cf. Art. 55 sexies of Legislative Decree no. 165/01 and subsequent amendments) - and precisely this disciplinary action includes (and indeed presupposes) the completion of any preliminary investigation activity aimed at ascertaining the existence (or otherwise) of relevant facts for the purpose of formulating the charge against the employee";
- "the Commander of the Municipal Police [...] acted in observance of his duty - that set forth in Article 55 sexies of Legislative Decree No. 165/01 and subsequent amendments – and also acted in a manner proportionate to the aims that this duty of disciplinary action set in terms of preliminary investigation";
- "the Commander of the Municipal Police - already from the interviews with individual collaborators that he held in the first days following his installation at the Headquarters (XX) - had found, on the part of at least 22 personnel (out of a total of n° 25) [...] expressed manifestations of unease, albeit of different intensity, with respect to working relationships with the [complainant]";

- "during [...] the session of the XX [of the XX], a member [of the same] [had pointed out] "that he had received some [similar] reports from employees of the Local Police against an employee";

- "this finding [...] required the Commander of the Municipal Police [...] to start the specific and dedicated preliminary investigation aimed at verifying the effectiveness and consistency of conduct of disciplinary relevance";

- this "exploration and investigation activity, [in the context of which many significant indications were] collected, [on the basis of statements made by the complainant's colleagues], [...] was not followed by any disciplinary dispute [...]";

- "a few days after the previous session of the XX of the XX, the anonymously signed letter [...] object of the [...] complaint was received and registered by the Municipality, with the addressees being the members and directors of the XX";

- "this letter was sent, together with the minutes of the XX, to the Commander of the Local Police Corps on the XX, so that he would provide for what was within his competence, since [, as stated by the XX], "although anonymous and therefore probably devoid of any foundation, [this letter] could also, on the contrary, be a sign of the existence of an effective criticality and/or a malaise within the Local Police Corps, of which the Chief Executive must be made aware, for the measures that it may deem to be within its competence"";

- "upon receipt of this correspondence, [...] unlike what happened for the first survey of the XX, the Commander decided to carry out the verification activity via computer communication [...]. This tool [...] allowed the agents to express their opinion in the absence of any influences deriving from the presence of the Captain";

- and this "verification activity could not be carried out in the absence of the name of the subject indicated in the letter, received by the XX", since "a further anonymous verification would not have had any further or different response to what has already been carried out";

- at the end of the investigation, "n. 8 operators did not express any observations, however n. 6 operators shared what was indicated, n. 7 operators shared what was indicated and made further observations and no. 1 declared not to share";

- "since there are no rules governing in detail [the preliminary activities to a possible disciplinary action], the methods [of the assessment activities] are left to the subjects who have the burden of acquiring all the information necessary to qualify a mere finding in a event that may be assessed from a disciplinary point of view" [, and assess whether the conditions exist for the initiation of the proceeding];

- "the jurisprudence [...] has specified that [...] those preliminary investigations that the employer may carry out in order to

acquire the necessary elements of judgment to verify the configurability, or otherwise, of a disciplinary offense against the latter [Civil cassation section work - 12/18/1986, no. 7724; Civil cassation section work - 08/08/2003, no. 12027 - Civil cassation section work - 11/27/2018, no. 30679];

- "[the] art. 2087 of the civil code [...] establishes that the entrepreneur is required to adopt all the measures necessary to guarantee the physical and moral integrity of the workers";

- “there are also further provisions which allow the Captain to carry out the aforementioned activity [Law no. 65 of 1986; L.R. Brands no. 1/2014; National collective labor agreement relating to personnel in the local functions sector; Municipal Regulation]; this also in consideration of the fact that the Commander is required to "carry out compatibility checks of his subordinates to keep weapons";

- “the regulatory premise that justifies the processing of personal data can be found in the art. 6 lett. c) GDPR, [...] in compliance with the provisions of art. 2-ter paragraph 1 of the Code”;

- "regarding the failure to notify the Guarantor of the contact data of the DPO, it was actually found that the Body, probably due to a mere oversight, had not proceeded [...], having, however, "publication of the contact, [...] so as to allow them to be easily identified on the institutional website, in the specific GDPR section" [and, it being understood that] the Data Controller has taken steps to do so [with a note] protocol no. XX".

On the occasion of the hearing requested by the Municipality, held at the Guarantor on the XX date, the Municipality, in reiterating what was already represented during the preliminary investigation, specified that:

- "Following the Commander's report, the XX, in a subsequent session (XX), proposed to the Board to organize courses for the resolution of conflicts in the workplace [...] [and, therefore,] the in-depth analysis served for the start of the administrative procedure aimed at protecting the psycho-physical health of the employees.

- As regards compliance with the minimization principle, [...] the Captain could not have investigated without revealing who the employee was and the alleged facts, in the light of the principles of specificity and non-modifiability of the disciplinary dispute [...];

- The complainant brought the facts to the attention of the Public Prosecutor for alleged defamation, but the investigating judge closed the case, recalling the exculpatory of the exercise of one's right, i.e. that of assuming information with respect to a report received. This is also for the purposes of the good performance of the public administration and the efficiency of the

public service, as well as to ensure transparency in the procedures for reporting offences. Therefore, the Court of Ancona has already assessed the same facts, deeming that the Municipality had the right to investigate what was reported and that the methods of investigation adopted were correct.

- The municipal mail server is internal, not in the "cloud" and is used not through "client". All employees access mail in "web mail" mode. Only a few people can read mail via smartphone. So the communication remained in a narrow scope.”.

In support of what was stated during the hearing, the Municipality filed a note (Prot.XX), as part of a proceeding initiated on the same matter by the Department of Public Administration of the Presidency of the Council of Ministers, which had invited the Municipality to verify the existence of the prerequisites for initiating disciplinary initiatives against the Commander, pursuant to articles 13, paragraphs 7, 5 and 9 of the "Code of conduct for civil servants" referred to in Presidential Decree 16 April 2013, no. 62, as a result of which it emerged that "there are no profiles of disciplinary responsibility for [the Captain]" (see note from the Disciplinary Procedures Office for managerial staff, Prot.XX).

3. Outcome of the preliminary investigation.

The personal data protection regulations provide that public entities, even if they operate in the performance of their duties as employers, can process the personal data (art. 4, n. 1, of the Regulation) of employees, if the treatment is necessary "to fulfill a legal obligation to which the data controller is subject" (i.e. the specific obligations or tasks established by law for the purpose of managing the employment relationship; see art. 88 of the Regulation) or "for the execution of a task of public interest or connected to the exercise of public powers vested in the data controller” (Article 6, paragraph 1, letters c) and e) of the Regulation).

Furthermore, the data controller is required to respect the principles regarding data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", according to which personal data must be "processed in lawful, correct and transparent manner in relation to the data subject" and must be "adequate, pertinent and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letters a) and c), of the regulation).

From the documentation in the documents it emerges that the Commander of the Local Police of the Municipality sent via e-mail to the staff of the local Police Corps (with the exception of employees who carry out administrative activities within the Command and four newly hired employees) documentation containing personal data relating to the complainant (i.e. the

minutes of the session of the XX of the XX and an anonymous letter received by the XX) as well as a questionnaire, with which such personnel were asked to express their evaluations with reference to the negative judgments reported in the report regarding the behavior held by the complainant at the workplace.

Contrary to what is represented by the Municipality, this communication of personal data is not provided for by art. 57 of Legislative Decree 30 March 2001, n. 165 (as amended by art. 21 of law 4 November 2010, n. 183, referred to in the note of the XX of the Municipality, cit.). In fact, the provision in question limits itself to regulating the establishment, functioning and duties of the XX, without regulating the actions that the employer must take to follow up on any report made by the same. In the present case, moreover, XX himself had highlighted the generic nature of the anonymous report received and the likelihood that it was "without any foundation" (see page 2 of the minutes of the XX meeting), deeming, however, to send in any case, a copy of this anonymous letter to the Municipality, in order to highlight "critical issues and/or a malaise within the Local Police Corps of which the Chief Executive must be brought to the attention, for the measures that he may deem to be within his competence" .

Likewise, the communication of personal data in question cannot be considered due pursuant to articles 55 et seq. of Legislative Decree 30 March 2001, n. 165, which govern the forms and terms of the disciplinary procedure in the public sphere, also invoked by the Municipality in its defense briefs. Both due to the fact that the communication of the complainant's personal data took place in a merely prodromal phase with respect to a possible initiation of the disciplinary procedure (by contesting the objections to the employee), and because these rules do not provide for the possibility, for the proceeding administration, to communicate personal data processed in this context to other personnel not authorized for processing and, therefore, unrelated to the disciplinary procedure, such as, in this case, the complainant's colleagues.

In this regard, the Guarantor has clarified, in general terms, that employers must eliminate any opportunity for superfluous knowledge of workers' personal data, adopting special precautions to avoid the undue circulation of personal information, not only towards externally, but also within working contexts, by unauthorized subjects (see points 2, 4, 5.1 and 5.3, Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship in the field of 14 June 2007, published in the Official Journal of 13 July 2007, n. 161 and in www.garanteprivacy.it, web doc. n. 1417809). In the present case, the complainant's colleagues, recipients of the Captain's e-mail, have become aware of the personal data of the interested party, although they cannot be considered persons authorized to know such data due to their specific role. This has

therefore led to a communication of personal data by the Municipality to third parties (Article 4, No. 10), of the Regulation) in the absence of an appropriate legal basis.

The references, made by the Municipality, to l. 7 March 1986, no. 65, to the regional law Marche Region of 17 February 2014, n. 1, to the "National collective labor agreement relating to personnel in the local functions sector" and to the "Municipal Regulation of the Municipal Police Corps", given that these sources generally regulate the tasks and functions of the Municipal Police and do not expressly provide for the possibility for the Municipality to put in place a communication of personal data such as that which is the subject of the complaint. The same considerations also apply to the aforementioned art. 2087 of the Civil Code, which establishes a general obligation for the employer to protect the physical integrity and moral personality of the workers.

It is also noted that, in compliance with the principle of data minimization (Article 5, paragraph 1, letter c) of the Regulation), the communication of the complainant's data to the employees of the Municipal Police force was not, in any case, necessary for the pursuit of the purposes proposed by the Municipality. This in consideration of the fact that the Commander of the Local Police Corps could have informed the members of the corps about the anonymous report received, without mentioning the name of the complainant, inviting them to spontaneously bring out any conduct of specific colleagues relevant for disciplinary purposes . Therefore, although the jurisprudence referred to by the Municipality recognizes the legitimacy of certain activities prodromal to the disciplinary dispute phase, these activities must in any case be carried out in compliance with the legislation on the protection of personal data and, in particular, with the principles of referred to in art. 5 of the Regulation, with regard to lawfulness and minimisation. Moreover, for the purpose of assessing the proportionality of the treatment, it also notes that the investigations ordered by the Municipality were carried out after about a year from the date on which the anonymous report was received.

Nor does it matter, to this end, the fact that the criminal proceeding for alleged defamation, relating to the matter under complaint, has been filed by the judicial authority, given that the latter's assessment concerned profiles other than data protection personal.

In consideration of the above, the sending of the XX e-mail to most of the personnel belonging to the local Police Corps, accompanied by the anonymous report and the minutes of the XX session, as well as the administration of the questionnaire and the consequent treatment responses provided by colleagues regarding the work of the interested party, resulted in the

processing of personal data, in the absence of a suitable regulatory prerequisite, moreover in violation of the principle of minimization (articles 5, paragraph 1, letter a) and c), 6 of the Regulation).

With reference, on the other hand, to the failure to communicate the contact details of the data protection officer to the Guarantor, in violation of art. 37, par. 7 of the Regulation, the Municipality admitted, in its defense writings, that it had not fulfilled this obligation "by mere oversight", having made this communication only on 31 January 2020.

4. Conclusions.

In the light of the assessments referred to above, it should be noted that the statements made by the data controller during the preliminary investigation □ the truthfulness of which may be called upon to answer pursuant to art. 168 of the Code □, although worthy of consideration, do not allow overcoming the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the closure of the present procedure, since none of the cases provided for by the 'art. 11 of the Regulation of the Guarantor n. 1/2019.

It is also represented that the violation object of the investigation, by the Municipality, occurred in full force of the provisions of the Regulation, and that, therefore, for the purpose of determining the regulatory framework applicable in terms of time (Article 1, paragraph 2 of Law No. 689 of 24 November 1981), these constitute the provisions in force at the time of the committed violation, which in the present case took place on the XX date, the date on which the Regulation was fully effective.

Therefore, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Municipality of Falconara Marittima is noted, for having failed to communicate to the Guarantor the contact details of its data protection officer, in violation of the art. 37, par. 7, of the Regulation, as well as for having carried out a processing of personal data, in the absence of a suitable regulatory prerequisite, moreover in violation of the principle of minimization (articles 5, paragraph 1, letters a) and c), 6 of the Regulation (however, having to order the archiving of the administrative sanctioning procedure in relation to Article 2-ter of the Code, which was not yet in force at the time of communication of the data).

The violation of the aforementioned provisions makes the administrative sanction envisaged by art. 83, par. 5, of the Regulation, pursuant to articles 58, par. 2, lit. i), and 83, par. 5 of the same Regulation and art. 166, paragraph 2, of the Code.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and accessory sanctions (articles 58, paragraph 2, letter i and 83 of the Regulation; article 166, paragraph 7, of the Code).

The Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation as well as art. 166 of the Code, has the power to "impose a pecuniary administrative sanction pursuant to article 83, in addition to the [other] [corrective] measures referred to in this paragraph, or instead of such measures, according to the circumstances of each single case" and, in this context, "the Board [of the Guarantor] adopts the injunction order, with which it also orders the application of the ancillary administrative sanction of its publication, in whole or in part, on the website of the Guarantor pursuant to article 166, paragraph 7, of the Code" (art. 16, paragraph 1, of the Guarantor's Regulation no. 1/2019).

In this regard, taking into account the art. 83, par. 3, of the Regulation, in the present case, the violation of the aforementioned provisions is subject to the application of the same pecuniary administrative sanction provided for by art. 83, par. 5, of the Regulation.

The aforementioned pecuniary administrative sanction imposed, depending on the circumstances of each individual case, must be determined in the amount taking into due account the elements provided for by art. 83, par. 2, of the Regulation.

In relation to the aforementioned elements, it was also considered that in the note of the U.P.D. (Prot.XX), deposited by the Municipality, it is stated that “in the note of the XX prot. XX" the Municipality gave an account of the "existence of a previous similar case, in which reports had been presented against another employee of the Local Police and the [Commander] had adopted the same procedure followed in the case in question by administering a questionnaire to the personnel of the Local Police Headquarters”, since it cannot therefore be assumed that the facts which are the subject of the complaint constitute an isolated case within the Entity.

On the other hand, it was favorably noted that the Municipality, after becoming aware of the violation, promptly proceeded to communicate the contact data of the person responsible for the protection of personal data to the Guarantor and that there are no previous relevant violations committed by the owner of the treatment or previous provisions pursuant to art. 58 of the Regulation.

Based on the aforementioned elements, evaluated as a whole, it is decided to determine the amount of the pecuniary sanction, also taking into account the phase of first application of the sanctioning provisions pursuant to art. 22, paragraph 13, of Legislative Decree 101/2018, in the amount of 10,000.00 (ten thousand) euros for the violation of articles 5, par. 1, lit. a) and c), 6, 37, par. 7 of the Regulation, as a pecuniary administrative sanction deemed, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the delicacy of the personal data in question, with particular reference to the information that the interested party had been the subject of a report which, although anonymous, had content harmful to his or her reputation, it is also believed that the accessory sanction of publication should be applied on the website of the Guarantor of this provision, provided for by art. 166, paragraph 7, of the Code and art. 16 of the Regulation of the Guarantor n. 1/2019.

Finally, it should be noted that the conditions pursuant to art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

ALL THIS CONSIDERING THE GUARANTOR

declares, pursuant to art. 57, par. 1, lit. f), of the Regulation, the illegality of the treatment carried out by the Municipality of Falconara Marittima Enna for violation of the articles 5, par. 1, lit. a) and c), 6, 37, par. 7, of the Regulation, in the terms referred to in the justification;

ORDER

to the Municipality of Falconara Marittima, in the person of its pro tempore legal representative, with registered office in Piazza Carducci 4 - 60015 Falconara Marittima (AN), Tax Code 00343140422, pursuant to articles 58, par. 2, lit. i), and 83, par. 5, of the Regulation, to pay the sum of 10,000.00 (ten thousand) euros as an administrative fine for the violations indicated in the justification. It is represented that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute by paying, within 30 days, an amount equal to half of the fine imposed;

ENJOYS

to the aforementioned Municipality, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of Euro 10,000.00 (ten thousand) according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the law no. 689/1981;

HAS

pursuant to art. 166, paragraph 7, of the Code, the publication of this provision on the website of the Guarantor, believing that the conditions set out in art. 17 of the Regulation of the Guarantor n. 1/2019.

Pursuant to articles 78 of the Regulation, 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision it is possible to lodge an appeal before the ordinary judicial authority, under penalty of inadmissibility, within thirty days from the

date of communication of the provision itself or within sixty days if the appellant resides abroad.

Rome, 14 January 2021

PRESIDENT

Station

THE SPEAKER

Cerrina Feroni

THE SECRETARY GENERAL

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