[doc. web n. 9776406]

Injunction order against the Ministry of Defense - April 28, 2022

Record of measures

n. 146 of 28 April 2022

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

GIVEN the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, concerning the protection of individuals with regard to the processing of personal data, as well as the free circulation of such data and which repeals Directive 95/46 / CE, "General Data Protection Regulation" (hereinafter, "Regulation");

GIVEN the legislative decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national system to Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, relating to the protection of individuals with regard to 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");

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

Having seen the documentation in the deeds;

Given the observations made by the secretary general pursuant to art. 15 of the Guarantor Regulation n. 1/2000 on the organization and functioning of the office of the Guarantor for the protection of personal data, Doc. web n. 1098801;

Professor Ginevra Cerrina Feroni will be the speaker;

WHEREAS

1. Introduction.

With a complaint submitted pursuant to art. 77 of the Regulations, an employee of the Ministry of Defense (hereinafter, the "Ministry") represented that:

on XX, following an internal competition test, a report would have been drawn up, to which would have been attached a copy of an email sent by the Directorate General of Military Personnel (PERSOMIL) to the Competition Commission, containing a request for medico-legal investigations, indicating the diagnosis and calling for a medical examination;

the SDI Sud Battalion would have forwarded, from its institutional mailbox, an email from the Chancellery of the Military Court of Naples, containing an integral act of opposition proposed by the Public Prosecutor, relating to a military criminal sentence issued against the complainant, to a military who, according to what the complainant claimed, was not entitled to know such information.

2. The preliminary activity.

In response to a request for information formulated by the Guarantor (prot. No. XX of the XX), the Ministry, with note prot. n. XX of the XX, provided the documentation produced by its various divisions involved in the case, and the respective statements, in order to reconstruct the story that affected the complainant, declaring, in particular, that:

"With regard to the activity of the 1st Division, following the presentation by the complainant of" an application for participation in the extraordinary internal competition, for qualifications and exams, for the recruitment, among others, of Marshals of the Navy , announced with Decree no. 31 / ID of 14 December 2018 [...] [the interested party] was summoned to take the written test on XX ";

"Prior to that date, its Headquarters, the SDI Company of Brindisi, during the investigation of its application for participation in relation to the verification of the requirements for participation in the aforementioned competition, sent the 1st Division documentation from which it appeared that the himself was temporarily ineligible for unconditional military service and had been called to visit to ascertain the required suitability at the Hospital Medical Commission (CMO) of Taranto on day XX ";

“On the twentieth day [the complainant] presented himself to take the written test in civilian clothes and not in uniform, as foreseen by the competition announcement. The President of the examining commission asked for information on the behavior to be taken with regard to [PERSOMIL], who, by e-mail, authorized the interested party to take the aforementioned written test subject to ascertaining suitability for unconditional military service, as well as provided for in the competition notice ";

"To this e-mail was attached the request for medico-legal investigations to the competent CMO, coming from the Command to which the [complainant] belonged, which did not contain any diagnosis, and the call for a medical examination for the XXth".

With a note of the XX (prot. No. X), the Office, on the basis of the elements acquired, the checks carried out and the facts that

emerged as a result of the investigation, notified the Ministry, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the measures referred to in art. 58, par. 2, of the Regulation, concerning the alleged violations of articles 5, par. 1, lett. a), 6, 9 and 10 of the Regulation, as well as 2-ter, 2-sexies and 2-octies of the Code (in the text prior to the changes made by the Legislative Decree 8 October 2021, n. 139), inviting the aforementioned owner to produce to the Guarantor of defensive writings or documents 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 l. 24 November 1981, n. 689).

With a note of the XX (prot.n.XX), the Ministry presented its defense statement, declaring, in particular, in relation to the first profile of the complaint, that:

"With regard to [PERSOMIL], no communication and / or dissemination of personal data to unauthorized subjects seems to have taken place as the members of the selection board can be considered, on the basis of the requirements of the competition announcement, as organs of the same Defense Division ";

"In the communication to the President of the Competition Commission [have been indicated] the details of a sentence of the G.A. in order to integrate the motivation for the decision to admit the interested party to competition [...;] this communication was made to authorized subjects and contained only the number of the sentence of the G.A. and not explicit health information. Therefore, the attachments to the e-mail in question, only indirectly, could have led to the abstract knowledge of the data subject's health data contained in the sentence itself ";

"[...] this sentence is published on the Justice website, with the applicant's personal details obscured and with the health data in clear text. This, despite the G.A. has explicitly ordered the clerk, in the operative part of the sentence, to obscure in addition to the general information also any data suitable for detecting the state of health of the parties or persons in any case mentioned therein ";

the communication was made "to the President and a Member of the Examining Commission / Supervisory Committee who were" authorized ", pursuant to article 15, paragraph 2, of the relevant notice of competition, due to the role they performed and the tasks assigned to them; in the presence of the recognized existence of a suitable legal basis legitimizing the communication itself, in compliance with the current legislation on the recruitment of military personnel and, in particular, that provided for by article 1055 of Presidential Decree no. 90/2010 [, which] constitutes the legal basis for the communication of personal data also relating to the state of health of the Complainant, [providing for the processing of personal data, also

relating to particular categories,] in relation to the relevant public interest purpose of the establishment of the employment / service relationship ";

"the members of the Examining Commission and the Supervisory Committee [...] act to carry out the assignment received under the direct authority of PERSOMIL and, in this capacity, were not considered" third parties ";

"The communication including data relating to the state of health, albeit" indirectly and by relationem ", was necessary to allow the conditional admission of the Complainant who, in default, would have been excluded from the competition and subjected to disciplinary sanction, as expressly provided for by article 7, paragraph 5, of the aforementioned announcement;

"The aforementioned announcement [...] provided that candidates had to present themselves to take the exam in uniform, but the Complainant - waiting to be subjected to a fitness / non-suitability visit for unconditional military service by the competent Medical Commission - he had presented himself in civilian clothes; this circumstance gave rise to a completely unforeseen event that had never happened in the past which, however, required an immediate solution from PERSOMIL ";

"the decision, in the urgent need to provide, necessarily had to reconcile the public interest aimed at ensuring the full legitimacy of the selection procedure, with the private interest of the Complainant candidate and other competitors";

"The admission with reserve, as a precautionary and derogatory measure with respect to the provisions of the announcement, therefore required adequate motivation, in terms of factual / legal conditions and, in this context, the email of the XX - together with the documentation attached to it containing the references to the Judgment of the Regional Administrative Court XX n. XX of the XX, as well as the calling for a medical examination - was aimed precisely at demonstrating that action was being taken in execution of a judgment ";

"The execution of the final judgment, in fact, constituted the indispensable element of the motivational paradigm of the admission measure in derogation, which the Examining Commission / Supervisory Committee necessarily had to acquire to justify the admission to the competition of the candidate who presented himself in civilian clothes (Complainant). Said procedural process was then incorporated in Minutes no. 9 of the Examining Commission ";

"Only in the face of such an articulated motivational system was it possible to combine favor participationis with the principles of good administrative performance, impartiality and transparency of the entire selection procedure [...]";

“It was […] a completely isolated case that had no precedent in the context of the massive recruitment of military personnel. By way of example, consider that in 2018 […] PERSOMIL issued 50 competition notices, for a total of 29,730 places, with 242,783

applications submitted and 19,743 candidates declared winners ";

"The aforementioned email of the twentieth must also be contextualized in the urgency of defining the situation, as shown by the time it was sent at 07.06 (completely" unusual "time in public offices) as a demonstration, by a on the one hand, of the absolute urgency to take action and, on the other, of the sense of high responsibility demonstrated […] ";

"Since this is a completely isolated case, which had no precedents in the context of the" massive "recruitment of military personnel described above, there was no" good practice "to refer to";

therefore "the conduct […] should be completely free from profiles of willful misconduct or gross negligence";

"The competent Division has taken steps to obscure, from the annex to Minutes no. 9 kept in the original documents, the references to the Judgment of the Regional Administrative Court XX n. XX, in order to prevent any further communication ";

"To avoid the repetition of the fact in question, albeit of an exceptional nature, PERSOMIL will review the internal procedures relating to the admission / non-admission of candidates who, for whatever reason, are temporarily lacking the requirements set out in the competition announcement. This review will be carried out in such a way as to provide that all the documentation underlying the individual decision-making process remains within the General Management and is kept in the records of the relative proceedings, with an express prohibition of communication. Likewise, specific indications will be provided to the Examining Commissions / Supervisory Committees, aimed at recording the admission / non-admission operations on the basis of PERSOMIL's consent / refusal only, without direct / indirect references to the sensitive data of the candidates ".

In relation to the second profile of the complaint, the Ministry, with the aforementioned note, stated, in particular, that:

the employee of the Command Secretariat of the BTG SDI SUD, at the request of the Chancellery of the Military Court of Naples, forwarded a certified e-mail message to the SDI Brindisi Company, concerning the notification of judicial documents relating to the complainant;

"On XX [this employee], having understood the importance of the communication concerning judicial data, despite being free from the service, he did his utmost to check the institutional e-mail (PEI) from the personal PC and proceeded to forward the message via PEI, by mistakenly inserting among the recipients the 1st Lgt [surname of the soldier] in force at the Headquarters of the B.M.S.M., which, having no reason to receive such communication, proceeded to inform the sender of the incorrect sending ";

"[...] the same e-mail, erroneously sent, was extended to the knowledge of the interested party. This behavior highlights the

good faith and, at the same time, the transparency with which the subjects authorized by the [Defense Staff] in various capacities to process institutional e-mail within the Marina San Marco Brigade have operated ";

“The communication was sent by mistake and without any intention. The insertion of the 1st Lgt. [military surname] in the distribution list must be traced back to the so-called "Predictive function" of Qutlook, as the name of the 1st [surname of the soldier] was among the most frequent recipients of e-mails, having served at the SDI Brindisi Company until a few months earlier ";

"The event concerns [...] data [...] contained in a judicial act, that is, an act of opposition proposed by the P.M. relating to a criminal sentence concerning the complainant ";

"The error was the subject of a special" internal investigation "which revealed the causes of the incident and which gave rise to specific recommendations [to the staff who process personal data]".

At the hearing, requested by the Ministry pursuant to art. 166, paragraph 6, of the Code and held on XX, the Ministry substantially confirmed and reiterated the arguments already detailed in its defense brief.

3. Outcome of the preliminary investigation.

On the basis of the personal data protection discipline, public subjects, in the context of work, may process the personal data of the interested parties, also relating to particular categories, if the processing is necessary, in general, for the management of the work and to fulfill specific obligations or tasks provided for by the law or the law of the Union or of the Member States (art. 6, par. 1, lett. c), 9, par. 2, lett. b) and 4 and 88 of the Regulation). The processing is also lawful when it is "necessary for the performance of a task of public interest or connected to the exercise of public authority vested in the data controller" (Article 6, paragraph 1, letter e), 2 and 3, and art. 9, par. 2, lett. g), of the Regulations; articles 2-ter and 2-sexies of the Code, in the text prior to the changes made by the legislative decree 8 October 2021, n. 139).

European legislation provides that "Member States may maintain or introduce more specific provisions to adapt the application of the rules of the [...] Regulation with regard to processing, in accordance with paragraph 1, letters c) and e), determining more precisely specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing […] ”(Article 6, par. 2, of the Regulation). In this regard, it should be noted that the communication of personal data to third parties by public entities is permitted only when provided for by a law or, in the cases provided for by law, by regulation (see Article 2- ter, paragraphs 1 and 3, of the Code, in the text prior to the amendments made by Legislative Decree 8 October

2021, n.139; in the event that the data subject to communication belong to particular categories, see articles 9 of the Regulation and 2- sexies of the Code).

With specific regard to the processing of data relating to criminal convictions and offenses or related security measures, it should be noted that it can only take place under the control of the public authority or if the processing is authorized by the law of the Union or of the Member States which provides appropriate guarantees for the rights and freedoms of the data subjects (Article 10 of the Regulation), or only if the processing is authorized by a law or, in the cases provided for by law, by regulation (Article 2-octies, paragraphs 1 and 5, of the Code).

The data controller is required, in any case, to comply with the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "data minimization", on the basis of which personal data must be "processed in a lawful, correct and transparent manner towards the data subject" and must be "adequate, relevant and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letter a) and c), of the Regulation).

In this context, as stated on many occasions by the Guarantor, the personal data of employees, processed for the purpose of managing the employment relationship, cannot, as a rule, be made known to subjects other than those who are part of the specific relationship of work (see definitions of "personal data" and "data subject", contained in art. 4, par. 1, no. 1), of the Regulation), or of those who - also taking into account the definition of "third party" contained in art. 4, par. 1, no. 10), of the Regulations - are not entitled to process them, due to the tasks assigned and the organizational choices of the data controller. This is due to the fact that the data is made available to subjects who, even though they are part of the data controller's organization, cannot be considered "authorized" for processing (see articles 4, no. 10, 28, par 3, lett. . b), 29 and 32, par. 4, of the Regulations, as well as art. 2-quaterdecies of the Code), due to the role they perform and the functions exercised within said organization, may give rise to a communication of personal data in the absence of a legal basis (see points 2, 4, 5.1 and 5.3 of the "Guidelines on the processing of personal data of workers for the purpose of managing the employment relationship in the public sphere", of June 14, 2007, published in the Official Gazette of July 13, 2007, no. 161, and in www.garanteprivacy.it, web doc. no. 1417809).

Having said this, with regard to the first profile of the complaint, it is noted that the President and the member of the Commission examining the insolvency procedure in question, who have become aware of the personal data of the complainant

(details of a sentence of the TAR relating to events related to to the employment relationship, also containing data relating to health; request for medico-legal investigations; summoning of the interested party to a medical examination), could not be considered as authorized subjects for the treatment of the same. More precisely, although, in fact, these subjects, by virtue of the role they hold and the functions they perform on the basis of the sector regulations referred to by the Ministry, must certainly be able to process the personal data of those taking part in the insolvency proceedings in order to manage and bring them to a conclusion, they cannot, on the other hand, be considered authorized to process, as in the present case, the personal data of the participants in the insolvency procedure that are not necessary and relevant for the purposes of carrying out the same.

On the other hand, to satisfy the legitimate need, represented by the Ministry, to formalize the decision taken, as a matter of urgency, regarding the conditional admission of the interested party to participate in the competition test in question, it would have been sufficient to adopt a internal document of the Directorate General of Military Personnel, communicating to the Examining Commission / Guarantee Committee only the content of this document (i.e. the admission with reservation), without disclosing the reasons underlying the decision and the personal data of the interested party not necessary. In this regard, it is favorably acknowledged that the Ministry, in the face of what emerged during the investigation, adopting this approach, has adopted new procedures to manage similar situations that may arise in the future.

With regard, however, to the second complaint profile, it is ascertained from the statements made by the Ministry that, due to the incorrect compilation of the "recipients" field of an e-mail message, some personal data of the complainant, also relating to criminal convictions and crimes (see Article 10 of the Regulation), have been mistakenly brought to the attention of a person who could not be considered authorized to deal with them.

The making available of the complainant's personal data, also relating to health, as well as criminal convictions and offenses, to subjects not authorized to process the processing, has therefore given rise, in both episodes, to a communication of personal data to third parties , in the absence of a suitable legal basis, in violation of articles 5, par. 1, lett. a), 6, 9 and 10 of the Regulations, as well as 2-ter, 2-sexies and 2-octies of the Code (in the text prior to the changes made by Legislative Decree 8 October 2021, n.139).

4. Conclusions.

In light of the aforementioned assessments, it is noted that the statements made by the data controller during the investigation

the truthfulness of which one may be called to respond pursuant to art. 168 of the Code □, although worthy of consideration, do not allow to overcome the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the dismissal of this proceeding, since none of the cases provided for by the 'art. 11 of the Guarantor Regulation n. 1/2019.

Therefore, the preliminary assessments of the Office are confirmed and the unlawfulness of the processing of personal data carried out by the Ministry is noted, for having communicated the complainant's personal data to third parties, also relating to health, as well as criminal convictions and offenses, in violation of articles 5, par. 1, lett. a), 6, 9 and 10 of the Regulations, as well as 2-ter, 2-sexies and 2-octies of the Code (in the text prior to the changes made by Legislative Decree 8 October 2021, n.139).

The violation of the aforementioned provisions makes the administrative sanction provided for by art. 83, par. 5, of the Regulation, pursuant to art. 58, par. 2, lett. i), and 83, par. 3, of the same Regulation, as also referred to by art. 166, paragraph 2, of the Code.

In this context, considering the assurances provided by the owner, the conditions for the adoption of corrective measures pursuant to art. 58, par. 2, of the Regulation.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and ancillary sanctions (articles 58, par. 2, lett. I and 83 of the Regulation; art. 166, paragraph 7, of the Code).

The Guarantor, pursuant to art. 58, par. 2, lett. i) and 83 of the Regulations as well as art. 166 of the Code, has the power to "inflict an administrative pecuniary sanction pursuant to Article 83, in addition to the [other] [corrective] measures referred to in this paragraph, or instead of such measures, depending on the circumstances of each single case "and, in this context," the College [of the Guarantor] adopts the injunction order, with which it also disposes with regard to the application of the ancillary administrative sanction of its publication, in whole or in excerpt, on the website of the Guarantor pursuant to Article 166, paragraph 7, of the Code "(Article 16, paragraph 1, of the Guarantor Regulation no. 1/2019).

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

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

In relation to the aforementioned elements, it was considered that the detected conduct had as its object the processing of

particularly delicate personal data, such as those relating to the state of health, as well as criminal convictions and offenses.

On the other hand, it was favorably taken into consideration that the provision of the complainant's personal data to some members of the Examining Commission in the context of an insolvency procedure was carried out by the Ministry for the sole purpose of justifying the conditional admission to an exam. , which had to be adopted promptly in the interest of the complainant; it was a completely isolated case; the personal data relating to the complainant's pathologies were not directly reported in the clear text in the aforementioned documentation, but were potentially obtainable only indirectly, through the sentence of the TAR, in which, moreover, the data relating to health, as required by the judicial authority, they should have been included (see Article 52, paragraphs 1, 2, 3 and 4, of the Code); the making available of the complainant's personal data, also relating to criminal convictions and offenses, to a person not authorized to process the processing depended on mere human error. Furthermore, there are no previous relevant violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulation, adopted against the same owner, which can be considered specific precedents "relating to the same object" (Article 83, paragraph 2, letter i) of the Regulation) with respect to the conduct in question. Finally, the data controller fully collaborated with the Authority during the investigation and provided assurances regarding the ways in which cases similar to those subject to the complaint will be handled in the future, adapting, for this purpose, the own internal procedures.

Taking into account that the processing of the personal data in question took place in the workplace and concerned particularly sensitive personal data, it is also believed that the ancillary sanction of the publication on the website of the Guarantor of this provision, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Guarantor Regulation n. 1/2019

Finally, it is noted that the conditions set out in art. 17 of regulation no. 1/2019 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

WHEREAS, THE GUARANTOR

declares, pursuant to art. 57, par. 1, lett. f), of the Regulations, the unlawfulness of the processing carried out by the Ministry of Defense, for violation of Articles 5, par. 1, lett. a), 6, 9 and 10 of the Regulation, as well as 2-ter, 2-sexies and 2-octies of the Code, in the terms set out in the motivation;

ORDER

pursuant to art. 58, par. 2, lett. i) and 83 of the Regulations, as well as art. 166 of the Code, to the Ministry of Defense, with

headquarters in Via XX Settembre, 8 - 00187 Rome (RM), C.F. 80234710582, to pay the sum of € 10,000 (ten thousand) as a pecuniary administrative sanction for the violations indicated in the motivation. 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 sanction imposed;

INJUNCES

to the Ministry of Defense, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of € 10,000 (ten thousand) according to the methods indicated in the annex, within 30 days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the l. n. 689/1981;

HAS

the publication of this provision on the website of the Guarantor pursuant to art. 166, paragraph 7, of the Code (see Article 16 of the Guarantor Regulation No. 1/2019);

the annotation of this provision in the internal register of the Authority, provided for by art. 57, par. 1, lett. u), of the Regulations, violations and measures adopted in compliance with art. 58, par. 2, of the Regulation (see art.17 of the Guarantor's Regulation no. 1/2019).

Pursuant to art. 78 of the Regulation, 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision, it is possible to 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 applicant resides abroad.

Rome, April 28, 2022

THE VICE-PRESIDENT

Cerrina Feroni

THE RAPPORTEUR

Cerrina Feroni

THE SECRETARY GENERAL

Mattei