



THE PRINCIPLE OF CONGENERITY IN THE EX-OFFICIO TRANSFER OF PUBLIC SERVANTS: A CRITICAL ANALYSIS OF THE JURISPRUDENTIAL INTERPRETATION OF ADI 3.324-7 AND GENERAL REPERCUSSION THESIS 601580 AND ITS IMPACT ON EQUALITY IN ACCESS TO HIGHER EDUCATION

O PRINCÍPIO DA CONGENERIDADE NA TRANSFERÊNCIA EX-OFFICIO DE SERVIDORES PÚBLICOS: UMA ANÁLISE CRÍTICA DA INTERPRETAÇÃO JURISPRUDENCIAL DA ADI 3.324-7 E TESE DE REPERCUSSÃO GERAL 601580 E SEU IMPACTO NA ISONOMIA NO ACESSO AO ENSINO SUPERIOR

EL PRINCIPIO DE CONGENERIDAD EN EL TRASLADO EX OFFICIO DE FUNCIONARIOS PÚBLICOS: UN ANÁLISIS CRÍTICO DE LA INTERPRETACIÓN JURISPRUDENCIAL DE LA ADI 3.324-7 Y LA TESIS DE REPERCUSIÓN GENERAL 601580 Y SU IMPACTO EN LA IGUALDAD EN EL ACCESO A LA EDUCACIÓN SUPERIOR



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ABSTRACT

Ex officio transfer in higher education institutions in Brazil is a complex issue that involves the proper application of the rules established in Law No. 9,536/97 and the understanding of the Federal Supreme Court (STF) and the Superior Court of Justice (STJ). This legal provision aims to protect the right to education of civil or military public servants and their dependents when there is a removal or transfer that entails a change of domicile. However, the application of this rule has been the subject of debate, especially regarding its indiscriminate use and the possibility of obtaining undue advantages. This academic article aims to conduct a study through a bibliographic review and documentary research on the aforementioned topic within the Federal University of the São Francisco Valley (UNIVASF). It presents the concept of the institute, the analysis methods used by higher education institutions in light of the legislation and the consolidated position of case law, in particular, ADI 3324-7 and the General Repercussion Thesis 601580. It also addresses opposing positions in the Federal Regional Courts where UNIVASF is located (TRF 1st Region and TRF 5th Region), when analyzing requests of this nature in lawsuits. It highlights the problem of the misuse of this mechanism by public servants from various spheres of public administration to circumvent the competitive system for access to university places in highly competitive programs, such as the Undergraduate Program in Medicine.

Keywords: Ex-Officio Transfer. Congenerity. Public Servants. Equality. Higher Education. STF Case Law.

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RESUMO

A transferência ex officio em instituições de ensino superior no Brasil é um tema complexo que envolve o adequado uso das regras trazidas na Lei nº 9.536/97 e o entendimento do Supremo Tribunal Federal (STF) e do Superior Tribunal de Justiça (STJ). Este instituto jurídico visa proteger o direito à educação de servidores públicos civis ou militares e seus dependentes, quando há remoção ou transferência que acarrete mudança de domicílio. Contudo, a aplicação dessa regra tem sido objeto de debates, especialmente no que tange à sua utilização indiscriminada e à possibilidade de obtenção de vantagens indevidas. O presente artigo acadêmico pretende realizar um estudo através de revisão bibliográfica e pesquisa documental sobre o tema epígrafado no âmbito da Universidade Federal do Vale do São Francisco - UNIVASF, apresentando o conceito do instituto, as formas de análise realizadas pelas instituições de ensino superior à luz da legislação e posicionamento consolidado da jurisprudência, em especial, a ADI 3324-7 e a tese de Repercussão Geral 601580, bem como os posicionamentos contrários nos Tribunais Regionais Federais onde a UNIVASF está instalada – TRF 1ª Região e TRF 5ª Região, quando da análise de pedidos desta natureza em ações judiciais, destacando a problemática acerca do mau uso do dispositivo por parte de servidores públicos de diversas esferas das administrações públicas para a burla do sistema concorrencial para acesso às vagas universitárias, em cursos de alta concorrência, como o de Graduação em Medicina.

Palavras-chave: Transferência Ex-Officio. Congeneridade. Servidores Públicos. Isonomia. Ensino Superior. Jurisprudência STF.

RESUMEN

El traslado de oficio en las instituciones de educación superior de Brasil es un asunto complejo que implica la correcta aplicación de las normas establecidas en la Ley n.º 9.536/97 y la interpretación del Supremo Tribunal Federal (STF) y del Superior Tribunal de Justicia (STJ). Esta disposición legal busca proteger el derecho a la educación de los servidores públicos, civiles o militares, y sus dependientes cuando se produce una destitución o traslado que implique un cambio de domicilio. Sin embargo, la aplicación de esta norma ha sido objeto de debate, especialmente en lo que respecta a su uso indiscriminado y la posibilidad de obtener ventajas indevidas. Este artículo académico tiene como objetivo realizar un estudio mediante una revisión bibliográfica y una investigación documental sobre el tema mencionado en la Universidad Federal del Valle del São Francisco (UNIVASF). Presenta el concepto de instituto, los métodos de análisis empleados por las instituciones de educación superior a la luz de la legislación y la jurisprudencia consolidada, en particular, la ADI 3324-7 y la Tesis de Repercusión General 601580. También aborda las posturas opuestas en los Tribunales Regionales Federales donde se ubica la UNIVASF (TRF 1.ª Región y TRF 5.ª Región), al analizar solicitudes de esta naturaleza en litigios. Destaca el problema del uso indebido de este mecanismo por parte de servidores públicos de diversas esferas de la administración pública para eludir el sistema competitivo de acceso a plazas universitarias en programas altamente competitivos, como el Programa de Licenciatura en Medicina.

Palabras clave: Transferencia de Oficio. Congeneridad. Servidores Públicos. Igualdad. Educación Superior. Jurisprudencia del STF.



1 INTRODUCTION

The *ex-officio transfer*, regulated by Law No. 9,536/97, arises as a mechanism to protect the right to education of civil or military public servants and their dependents, in cases of compulsory removal that implies a change of domicile. However, its application has generated controversies, especially regarding the misuse for access to vacancies in public institutions of higher education, bypassing meritocratic selection processes. This article performs a critical analysis of the jurisprudential interpretation of the STF in ADI 3.324-7 and in the General Repercussion thesis of RE 601580, with emphasis on the principle of congenerity and its impacts on isonomy. Focused on UNIVASF, the study addresses observed distortions, such as massive transfers of military police officers to the Medicine course at the Paulo Afonso campus/BA, and proposes measures to mitigate abuses, in line with the constitutional principles of public administration (CRFB/1988, arts. 206 and 208), in view of the verification of indiscriminate use and the absence of clear criteria on the part of internal transfers within this public corporation have generated negative consequences, especially in highly competitive courses, and questions have been raised about respect for the principles of morality, impersonality and equality in the public service. The objectives include: (i) conceptualizing the institute; (ii) examine jurisprudential positions; (iii) identify problems in administrative practice; and (iv) suggest legislative reforms.

2 METHODOLOGY

This research adopts a qualitative approach, based on a literature review and documentary research, according to ABNT NBR 14724 standards. Primary sources were consulted, such as Law No. 9,536/97, Law No. 9,394/96 (LDB), decisions of the STF (ADI 3,324-7 and RE 601580) and judgments of Federal Regional Courts (1st and 5th Regions). Secondly, administrative doctrines (e.g., Carvalho Filho, 2024) and institutional documents of UNIVASF were analyzed, including the Pedagogical Project of the Medicine Course (PPC) and data from the Secretariat of Registration and Academic Control (SRCA) from 2018 to 2021. Data collection took place through access to official portals (UNIVASF, STF, STJ) and jurisprudence via platforms such as the PJe. The analysis was interpretative and systematic, identifying patterns of abuse in the institute of *ex-officio transfer*, without the involvement of human participants, without ethical approval.



3 GENERAL CONSIDERATIONS ABOUT THE INSTITUTE OF EX-OFFICIO TRANSFER

The *ex-officio transfer* emerged as a mechanism to protect the right to education of federal civil servants and their dependents, in the face of compulsory changes of domicile in the interest of the public administration. The central idea was to ensure the continuity of university studies, even in the face of the functional mobility imposed by the State.

Historically, the institute was conceived as an exception to the general rule of admission to higher education institutions, which takes place through a selection process. Over time, however, it has become the target of distortions and attempts at misuse, especially in highly competitive courses such as Medicine, generating concerns about isonomy and administrative morality.

Its normative basis is engraved in Law No. 9,536/97, which regulates the sole paragraph of article 49 of Law No. 9,394/96 (Law of Guidelines and Bases of Education – LDB), establishes that the *ex officio* transfer will be effective between institutions linked to any education system, at any time and regardless of the existence of a vacancy⁴, *in verbis*:

Law No. 9,394/96:

[...]

Article 49. Higher education institutions will accept the transfer of regular students to related courses, in the event of vacancies, and through a selection process.

Sole Paragraph. *Ex officio transfers* shall be made in accordance with the law.

Law No. 9,536/97:

Article 1 The *ex officio transfer* referred to in the sole paragraph of article 49 of Law No. 9394, of December 20, 1996, shall be effected, between **institutions linked to any education system, at any time of the year and regardless of the existence of a vacancy, in the case of a federal civil or military public servant student**, or their student dependent, if requested due to proven removal or transfer of office, which entails a change of domicile to the municipality where the receiving institution is located, or to a location closer to it.

Sole Paragraph. The rule of the *caput* does not apply when the person interested in the transfer moves to assume an effective position due to a public tender, commissioned position or position of trust.

Thus, through the proper interpretation of the rules contained in the rule governing the subject, the public servant needs to prove the following requirements for the *ex-officio* transfer, cumulatively, namely:

- the condition of civil or military student public servant, or their student dependent;
- the removal of office;
- as a result of the removal or transfer of office, the change of domicile to the municipality where the receiving institution is located, or to a location closer to it;



- the congenerity between the educational institutions, except in the case in which there is no similar institution that offers the course in the place of destination;
- the non-displacement of the civil servant to assume an effective position due to a public tender, commissioned position or position of trust.

Having made these initial considerations, the right of *ex-Officio* transfer aims to allow the public administration to carry out transfers of public servants from any of the spheres of the Federation, without any type of prejudice to this public, with regard to their intellectual and academic development, allowing them, in parallel with the transfer for the performance of functional attributions, continue their university studies, regardless of vacancy and at any time.

To this end, the legislation that deals with the subject has a cogent and applicable nature in scope, that is, aimed at any and all educational institutions in the national territory, guaranteeing this student-server conditions to maintain their studies.

Advancing in the studies on the subject, in the context of systematic interpretation, the rule under study also guarantees the legal dependents of the public servant the same right to maintain the studies. To understand the concept of legal dependent, administrative practice allows the use of the Income Tax regulation, which indicates the list of dependents admitted:

Spouse or partner with whom the employee has a child or has lived for more than 5 (five) years: copy of the Marriage Certificate or Declaration of Stable Union;

Child or stepchild until completing 21 (twenty-one) years of age: copy of the CPF and Birth Certificate of the child or stepchild;

Child or stepchild who is a university student or attending a 2nd degree technical school, until he or she turns 24 (twenty-four) years old: copy of the CPF and Birth Certificate of the child or stepchild and copy of proof of enrollment;

Child or stepchild at any age, when physically and mentally incapacitated for work: copy of the child's or stepchild's Birth Certificate and medical report indicating the incapacity;

Parents, grandparents and great-grandparents who in 2016, receive monthly income, taxable or not up to R\$ 1,903.98: copy of Identity Card and CPF;

Sibling, grandchild, great-grandchild, without parental support, of whom the public servant holds legal custody, until he/she turns 21 (twenty-one) years old or, at any age, when physically and mentally incapacitated for work: copy of the Birth Certificate, copy of the term of legal custody and medical report (when incapable);

Sibling, grandchild, great-grandchild, without parental support, of whom the public servant holds legal custody, until he/she turns 24 (twenty-four) years old, if he/she is still attending a higher education establishment or 2nd degree technical school or, at any age, when physically and mentally incapacitated for work: copy of the Birth Certificate, copy of the term of judicial custody; copy of proof of enrollment and medical report (when incapable) and other personal documents;



Minor, until completing 21 (twenty-one) years of age, that the public servant raises and educates and of which he or she holds judicial custody: copy of the Birth Certificate, copy of the term of judicial custody and other personal documents;
Absolutely incapable person, of whom the public servant is a guardian or curator: copy of the Birth Certificate, copy of the term of guardianship or curatorship and other personal documents;

Therefore, the right of ex-Officio transfer can be summarized as being *"the right that every public servant transferred for the sake of the public service starts to hold together with his legal dependents to, at any time and regardless of vacancy, be enrolled in an institution of higher education"*.

4 THE UNDERSTANDINGS ON THE SUBJECT BEFORE THE SUPREME COURT, SUPERIOR COURT OF JUSTICE AND THE DIVERGENCE OF POSITION BETWEEN THE FEDERAL REGIONAL COURTS OF THE 1ST REGION AND THE 5TH REGION

Notwithstanding the creation of all this construction for the administrative analysis of the requests that are made within the scope of the Public Universities in the country, there are still numerous normative gaps that the aforementioned provisions present, especially when it comes to public servants from private institutions and seeking university vacancies in public institutions, through the expedient of transfers, the STF and, later, the STJ were urged to manifest themselves.

The uproar involved the constitutionality of the release of university vacancies for public servants who were not primarily approved in entrance exams of public institutions, which, as a rule, have much higher levels of competition than public institutions, given the free higher education.

In other words, the discussion involves the democratic and meritocratic character of access to university vacancies when using the right to transfer *ex-Officio*.

In this sense, the Federal Supreme Court ruled on the scope of the provision in ADI No. 3,324-7, basing the unconstitutionality of article 1 of Law No. 9,536/97, without reducing the text, in that it lends it the scope of allowing transfer between non-similar universities. **The constitutional court understood that the transfer between institutions of different natures, especially from private to public, given the size of education, the very gratuity and the scarcity of vacancies offered by the latter, circumvents the principles of isonomy, impersonality and morality of the Public Administration, of equal conditions for access and permanence in HEIs (CRFB, art. 206, I and 208, V).**

In addition, in order to clarify situations not provided for in the legislation governing the subject, the STF reinterpreted article 1 of Law No. 9,536/97, without reducing the text, in that



it lends itself the scope of allowing transfer between non-similar universities in exceptional situations. Later, in the context of RE 601580, in a thesis of general repercussion, the Supreme Court determined that state public servants, transferred *ex-officio* and coming from a private institution of higher education, may enter an institution of a public nature due to the non-existence, in the place of destination, of an institution similar to the one of origin.

Despite the evolution in the treatment of the issue involving the ex-Officio transfers of public servants and legal dependents from private educational institutions, unfortunately, the Supreme Court did not provide details regarding the concept of congenerity and its respective scope. Thus, it is necessary to interpret whether the thesis of general repercussion was generated in order to confirm whether the congenerity indicated by the STF should be linked, exclusively, to the analysis of the legal nature of the institution, or broadly, whether the same congenerity would encompass the need to link the course that the applicant studies and the legal nature of the same institution. This interpretation is justified, in view of the peculiarities that some municipalities in the country, such as the municipality of Paulo Afonso/BA, with regard to the offer of higher education, notably the scarce offer of public courses, so that the Federal University of Vale do São Francisco – UNIVASF is the only HEI located in this geographic region with the offer of the Medicine course on its *campus*, a situation that attracts an atypical number of public servants, especially from the category of Military Police Officers of the State of Bahia, from private educational institutions, routinely postulating requests for *ex-Officio transfers*, in an attempt to support the thesis exposed in RE 601580, indicating that it is the only public higher education institution in the region to offer the Medicine course.

In terms of administrative positioning, UNIVASF interprets the thesis of general repercussion, in the sense that the congenerity requirement outlined by the Supreme Court is linked, exclusively, **to the legal nature of the higher education institution**, and it is not given to the federal public administration to expand the scope of the repercussion thesis presented, so that requests for *ex-officio* transfers are accepted from students from the Medicine course in private HEIs to the Medicine course in a public and free institution, when there is no private Medicine course in the region.

In this vein, the justification adopted is that the expansion of the interpretation of the General Repercussion thesis discussed here would have the power to generate ex-Officio transfer of students from private institutions, based only on the undergraduate course in Medicine, and fitting it into the jurisprudential hypothesis outlined in the thesis of RE 601580 would be equivalent to creating a true "Joy Train" for the circumvention of the meritocratic system of access to university vacancies in regions with scarce offer of free courses and great competition, such as, for example, in Medicine. This same scenario was even exposed



in the judgment of ADI 3324-7, reinterpreting article 1 of Law 9,536/97, in which the constitutional court understood that the **transfer without criteria between institutions of different natures, especially from private to public**, given the scope of education, the very gratuity and the scarcity of vacancies offered by the latter, it circumvents the principles of isonomy, impersonality and morality of the Public Administration, of equal conditions for access and permanence in HEIs (CRFB, art. 206, I and 208, V).

Thus, the interpretation that best meets the exegesis of the special provision set forth here is that, in the absence of higher education institutions of the same legal nature as the origin of the public servant, exceptionally, the public and free HEI is given an opening for the public and free HEI to receive the public servant from private HEIs.

Unfortunately, there is still no consolidated position within the scope of the Federal Regional Courts, so that both the 5th Region (encompassing the state of Pernambuco – UNIVASF Headquarters) and the 1st Region (where the Paulo Afonso campus is located) diverge diametrically on the topic discussed here, in case of evident legal uncertainty and breach of the principle of isonomy, as in the attached jurisprudence grafts:

ADMINISTRATIVE. WRIT OF MANDAMUS. HIGHER EDUCATION. STUDENT TRANSFER. PRIVATE ESTABLISHMENT FOR THE PUBLIC. IMPOSSIBILITY. EXISTENCE OF A SIMILAR INSTITUTION IN THE SAME LOCALITY. APPEAL DISMISSED. 1. Appeal against a judgment that denied security; ordered the plaintiff to pay the procedural costs, with the exception of article 98, paragraph 3, of the Code of Civil Procedure, in view of the free legal aid granted; no condemnation of attorney's fees (article 25 of Law No. 12,016/2009); without mandatory double jurisdiction. 2. The private appellant aims to enroll in the Medicine course, in the academic year 2020.2, located in the District of Paulo Afonso - BA, at UNIVASF, with the support of Law No. 9,536/11, article 1, as well as in the understanding of the STF in the decision of ADIN 3324-7, alleging that his Parent, Military Police Officer of the State of Bahia, was transferred *ex officio* to the City of Paulo Afonso - BA, a situation that generated the need to transfer the Applicant's original course, located in the City of Juazeiro-BA, to the City of Paulo Afonso - BA. To this end, it states that there is no Nursing course in the public network, thus, according to Law No. 9,536/1997, article 1, the plaintiff should have her enrollment accepted in a similar course, but, *in casu*, the only course available was Medicine, located in the City of Paulo Afonso - BA; however, the plaintiff was denied the administrative request for *ex officio* transfer. 3. **It so happens that there is a private educational institution (Unirios) similar to the institution of origin of the petitioner, according to the information of the petitioner, not rejected by the appellant, which offers the same course already started by her, that is, Nursing, a situation that prevents her transfer to any other course in a public educational institution, such as UNIVASF, since the *ex officio* transfer between non-similar educational institutions is only admitted when it does not exist in the place of destination: institution of the same kind as the place of origin.** 4. Based on article 1 of Law 9.536/97, article 49, sole paragraph, of Law 9394/96, and on the judgment of ADI 3324-DF, since the Nursing course is not offered by UNIVASF, that there is no congenerity between the applicant's educational institution and the Respondent University, and that there is a higher education



institution in the city of Paulo Afonso - BA that offers a vacancy for the Nursing course (the applicant's course of origin), It is concluded that there is no liquid and certain right to be protected by means of this mandamus. 5. Appeal dismissed. /aadfl (TRF-5 - Ap: 08003966920204058308, Rapporteur: FEDERAL JUDGE MANOEL DE OLIVEIRA ERHARDT, Judgment Date: 10/06/2020, 4th PANEL) (emphasis and bold added) ADMINISTRATIVE. COMMON ACTION. HIGHER EDUCATION. EX OFFICIO REMOVAL. TRANSFER BETWEEN UNIVERSITIES. ABSENCE OF CONGENERITY. INEXISTENCE OF A SIMILAR INSTITUTION. POSSIBILITY. GENERAL REPERCUSSION. SENTENCE UPHeld. 1. The Federal Supreme Court, in the judgment of RE 601580/RS, published on 02/20/2020, in the context of general repercussion, established an understanding in the sense that "The transfer of a federal civil or military student public servant, or his dependent, provided for in article 49, sole paragraph, of Law 9,394/96, and regulated by Law 9,356/97, may be effected between institutions belonging to any education system, in the absence of a university similar to the one of origin." Precedents of this Court. **2. In the case of the present case, it was proven that, in the place of destination of the ex officio removal of the plaintiff's partner (Paulo Afonso/BA), there is no institution of a similar nature to the one of origin (private). Thus, the sentence that ensured the enrollment of the dependent of the removed civil servant in the Medicine Course of the Federal University of Vale do São Francisco, Paulo Afonso campus, must be maintained.** 3. If the judgment is upheld at the appellate level, it is necessary to increase the fees, pursuant to the provisions of paragraph 11 of article 85 of the CPC, by 2% (two) percent, thus setting the fees for loss at 12% (twelve) percent of the amount attributed to the case. 4. Appeal dismissed. (AC 1000972-26.2021.4.01.3306, FEDERAL JUDGE CARLOS AUGUSTO PIRES BRANDÃO, TRF1 - FIFTH PANEL, PJe 08/28/2024 PAG.)

Notwithstanding the scenario presented, when faced with concrete cases for the purpose of analyzing the administrative request for transfer under this modality, UNIVASF and the Dean of Education follow the restrictive interpretation contained in the *decision* of the Federal Supreme Court, given the tribute to the core principles of public administration, and avoid the emergence of the so-called "Joy Train", by allowing the indiscriminate entry of public servants who use private educational institutions as a springboard to access university vacancies of a public nature.

5 PROBLEMS OBSERVED AT UNIVASF WITH *EX-OFFICIO* TRANSFERS

From the existence of the right of *ex-officio transfer*, and the creation of the Medicine course on the Paulo Afonso campus, as of 2018, UNIVASF became the target of a growing number of transfer requests of this nature.

Some particular characteristics of the Paulo Afonso campus make us believe that this is the ideal environment for the explosion of transfers of this nature. Initially, the municipality of Paulo Afonso has a scarce offer of university courses, especially of a public nature. The *multi-campus* character of UNIVASF itself, allowing a regional action, and not only local, also favors the congruence of interests of public administrations of other federative entities, such



as the public administration of the State of Bahia, despite the administrative headquarters of UNIVASF being the municipality of Petrolina-PE.

From this scenario, and observing data obtained from the Secretariat of Registration and Academic Control – SRCA of UNIVASF, between 2018 and 2021, only the Paulo Afonso/BA campus received a total of 36 (thirty-six) out of a total of 48 (forty-eight) ex-Officio transfer requests.

Another fact that attracts attention is the fact that, of the 36 (thirty-six) requests made for the transfer of civil servants and legal dependents to the Paulo Afonso campus, 33 (thirty-three) of these civil servants come from the Military Police of the State of Bahia.

In parallel to this situation, and only for comparative purposes, the Medicine course in Petrolina-PE, obtained only 11 (eleven) requests for transfers in the same period, indicating that there is a pattern of behavior for transfers in this volume to the municipality of Paulo Afonso-BA, which has just over 112 thousand inhabitants (IBGE-2022), while Petrolina-PE has more than 4 times the number of inhabitants - 414 thousand inhabitants (IBGE-2022).

In terms of administrative control, UNIVASF raised strong suspicions about the legitimacy of the administrative acts of transfer of this category of public servants, through questions:

- What justifies an almost 4 times greater volume of *ex officio* transfers to a municipality 4 times smaller than Petrolina-PE?
- Is it normal for such a small municipality to receive such a large contribution of personnel transfers, especially because there is a public tender with specific vacancies for the region where the city of Paulo Afonso is located?
- Is there any type of special action or intervention to combat crime in an ostensive way that justifies so many transfers?
- If the first statement is true, what is the reason for transferring only military servants who appear as university students?

Thus, in view of the situation presented and the explosion of transfer cases, always involving the same category of public servants, UNIVASF began to carry out even stricter administrative control of the requests made by applicants interested in their university courses, using the institute of *ex-Officio transfer*.

6 EX-OFFICIO TRANSFERS AND THE ABSENCE OF DECISIVE REASONS

The theory of administrative acts, consolidated in the classical doctrine of Administrative Law, establishes that every act issued by the Public Administration must



observe five essential elements for its validity: competence, purpose, form, motive and object. These elements function as structuring pillars of administrative legality, and the absence or defect in any of them may lead to the nullity of the act. In a quick summary, competence refers to the authority legally vested to perform the act; the purpose, the public interest that should guide state action; the form, the way in which the act is externalized; the reason, the circumstances of fact and law that justify its practice; and the object, to the legal content produced. In the context of ex-officio transfers, especially when they are generically justified as being carried out "for the good of the service", without the proper exposition of the determining reasons and the concrete public purpose, a weakness is revealed that compromises the perfectibility of the administrative act. Such omission may constitute a deviation of purpose, a serious defect that, according to jurisprudence and the dominant doctrine, makes the act subject to invalidation by the Administration itself or by judicial control.

Regarding the foundation, as an element for legal subsumption, when collating the documents attached by the aspirants to the vacancies arising from the *ex-Officio* transfer, roughly speaking, it was found that all the requests made always have a spartan mention of transfer "for the good of the service", without further justification as to why the change of personnel.

In relation to the Military Police of the State of Bahia, it was found that the procedure for approving the transfer of a military police officer consists of the mere attachment of the Internal Bulletin of the Corporation, without any detail of the factual reasons for the change of personnel, only indicating that the military servant was transferred to another location, giving the appearance that there is no type of control with such transfers.

Even though it has attached documents that prove the transfer for the benefit of the public service, such administrative acts need to meet a series of basic requirements, so that they do not have their nullity decreed by the Public Administration itself, in the context of self-supervision or by the Judiciary, in the mainstay of legality control.

Professor José dos Santos Carvalho Filho (2024) teaches that administrative acts are composed of the classic elements of competence, purpose, form, motive, and object.

In this demand, the central point of the present stir revolves around its internal elements, which are the purpose and the motive. Analyzing the documents that indicate the transfers of the applicants from their current work environments, there is no purpose or reason justifying their transfer, leading us to the conclusion that such acts are the result of a deviation of purpose with an ulterior interest in gaining only the transfer to the university course.



This doubt becomes even more evident when one observes requests for transfer of civil servants and/or dependents who enroll in the medical course itself from private institutions with monthly fees that far exceed the salaries of that civil servant or the family's monthly income.

In this sense, it is even possible to map a pattern for the practice of this nefarious administrative act, namely:

- Civil servant of any federative or military entity of the police forces of Bahia (or dependent on someone with this functional status);
- Enrollment in Medicine in a private educational institution* with study only in the 1st academic semester or enrollment in a public institution of very low competition;
- Carrying out an internal transfer with the public administration without any mention of the supposed public interest that justifies the measure, in the case of UNIVASF – the *Paulo Afonso/BA* campus;
- Request for transfer "*ex Officio*" at the end of the academic semester to a municipality or close to that municipality that has the Medicine course in a public institution, such as Paulo Afonso/BA.

Also of concern is a new model for misuse of the institute of *ex-Officio* transfer, in which the public servant carries out a selection process in public HEIs of low competition, to enter the criterion of congenerity indicated by the STF.

7 THE FACTUAL INCOMPATIBILITY BETWEEN THE STUDY SCHEDULE OF THE MEDICAL COURSE AND THE WORK SCHEDULE

The Pedagogical Project of the Course – PPC of Medicine in Paulo Afonso indicates that it will be carried out full-time, according to the following transcript:

PEDAGOGICAL PLAN OF THE COURSE (MEDICINE – PAULO AFONSO)

7.1 IDENTIFICATION

1.1 TYPE OF COURSE: Bachelor's degree.

1.2 QUALIFICATION: Physician.

1.3 MODALITY: Face-to-face.

1.4 LEGAL BASIS: National Curriculum Guidelines (DCN) for undergraduate courses in Medicine (Resolution CNE/CES No. 3, of June 20, 2014); Decision No. 79/2012 of the University Council of UNIVASF. Authorization: June 2012 (Ordinance No. 109 – SESU/MEC, of June 5, 2012).

1.5 PLACE OF OFFER: Federal University of Vale do São Francisco – UNIVASF, Paulo Afonso Campus (BA).

1.6 OPERATING SHIFT : Full-time.

1.7 NUMBER OF VACANCIES: 40 per year.



1.8 MODALITIES OF ADMISSION: Same modality adopted for admission to other undergraduate courses at UNIVASF, that is, the Unified Simplified Selection System (SISU), until otherwise decided by the University Council.

1.9 MAXIMUM AND MINIMUM DURATION: Maximum of 18 semesters (nine years) and minimum of 12 semesters (six years).

1.10 ACADEMIC REGIME OF COURSE OFFER: Annual. Available at: <https://portais.univasf.edu.br/medicina-pa/medicina-pa/documentos-e-normas/ppc-medicina-univasf-campus-paulo-afonso-ba.pdf>. Accessed on 05/17/2025) (emphasis added)

Despite the existence of requests for *ex-officio* transfers, due to the existence of a full-time university course, it is evident that there is no compatibility of schedules between work activities and university studies.

Most of the time, the transferred public servants work in shifts that vary between 30 and 40 hours per week, or, in shift regimes that do not allow the reconciliation of studies and work, a fact that causes damage to the public interest, since the transferred public servant performs a service of lower quality than expected to meet the public interest.

Based, for example, on the cases of the military police of the State of Bahia, making another intellectual effort to try to verify if there is a legal permissive for eventual compensation of schedules, the Statute of the PM/BA is clear and peremptory in reserving the compatibility of schedules, provided that the weekly working hours are respected and there is the possibility of compensation of schedules:

STATE LAW NO. 7,990 OF DECEMBER 27, 2001

Provides for the Statute of the Military Police of the State of Bahia and provides for other provisions.

THE GOVERNOR OF THE STATE OF BAHIA, I hereby inform you that the Legislative Assembly decrees and I sanction the following Law:

[...]

Article 141 - Subject to the legal and regulatory provisions, the military police officer is also entitled to the following periods of total absence from service without any prejudice, due to:

[...]

Paragraph 3 - **Preserving the interest of the service and workload to which the military police officer is obliged**, special hours may be granted to the student military police officer, when the incompatibility of the school schedule with that of the Unit is proven, **without prejudice to the exercise of the position and respecting the weekly duration of work, conditioned to the compensation of schedules.** (emphasis added)

The exegesis of paragraph 3 of article 141 of State Law No. 7,990/2001 leads us to the inevitable conclusion that the student-civil servant has the right to make his working day



compatible with his studies in higher education, however, respecting the weekly duration of work and with the adequate compensation of schedules.

In this sense, it is important to observe the potential losses to the public service with constant absences to be able to carry out their studies in a reasonable way, or, alternatively, to study in a precarious way, since they need to fulfill working hours and meet the demands that will be routinely presented in their activities.

8 ON THE THEORY OF THE RESERVE OF THE POSSIBLE AND THE MATERIAL AND BUDGETARY LIMITS FOR THE RECEPTION OF *EX-OFFICIO* CIVIL SERVANTS

Another point of attention involves the financial and budgetary limits for meeting the legal provision of unrestricted *ex-officio* transfer, since the Medicine course in Paulo Afonso-BA was planned based on a pedagogical project based on Active Methodologies and having as its flagship the use of "problem-based learning", with intense use of academic practices, techniques and professionals as a means to reach learning.

It is important to note that this pedagogical model has a high cost of implementation, and a limited number of students that allow the adequate achievement of their academic results.

Allowing the unrestricted transfer of transferred servers would end up distorting the pedagogical project of this course, having the potential to put in check the academic quality desired by the Collegiate of Medicine in Paulo Afonso-BA.

At this point, we bring to light the basic lessons of the concept of the theory of the reserve of the possible, which, in general terms, regulates the possibility and scope of the State's action with regard to the fulfillment of some rights, such as social rights, subordinating the existence of available public resources to the State's action. Consequently, the realization of social rights is linked to the financial possibilities of the State.

The maintenance of *ex-officio transfers* without the proper justification of administrative acts can cause the academic, financial and structural collapse of the Medicine course in Paulo Afonso-BA, causing the institutional bankruptcy of this course in its main objective of materializing the policy of interiorization of higher education, which requires even more attention from the public manager.

Just for the sake of information, the pedagogical project that serves as a pedagogical compass for the development of the Medicine course – UNIVASF, Paulo Afonso campus is covered by a different principle from those of the other so-called "traditional" Medicine courses, so that it requires a different level of material investment, infrastructure and pedagogical treatment, generating a gap in relation to the forms of teaching so far perceived



by the applicants. In this comparison, in consultation with the UNIVASF website, it is easy to see that the Medicine course – Paulo Afonso/BA is guided by the application of the principle of "Active Methodologies", which are described, *ipsis litteris*, in the Pedagogical Project of the course with the following words:

"According to Cotta (2012, p.788), "active methodologies are based on teaching strategies based on the critical-reflective pedagogical conception, which allow a reading and intervention among the various actors and valuing the collective construction of knowledge and its different knowledge and learning scenarios". Therefore, the medical course in Paulo Afonso aims at a training that is focused on the development of competencies (knowledge, skills and attitudes). To this end, it uses Active Methodologies, listed below, with the objective of providing students with greater autonomy in the pursuit of their learning, based on reflection on their own practice and committing to their training process." (Available at: <https://portais.univasf.edu.br/medicina-pa/medicina-pa/documentos-e-normas/ppc-medicina-univasf-campus-paulo-afonso-ba.pdf>. p. 21)

Among the various possibilities offered for the search for the model of competence formation (knowledge, skills and attitudes), the PPC Medicina Paulo Afonso-BA indicates the priority use of learning based on teaching-service-society integration practices (PIESS), which is translated as follows:

However, in addition to learning based on this community, the student remains inserted throughout the education in a dynamic process of integration practices between teaching, services and society, in which, at the same time that he uses the practice scenario for learning, he produces knowledge and health services for the population. (Available at: <https://portais.univasf.edu.br/medicina-pa/medicina-pa/documentos-e-normas/ppc-medicina-univasf-campus-paulo-afonso-ba.pdf>. p. 23)

"The training process adopted by UNIVASF, Paulo Afonso campus, includes a curriculum built on the principle of social responsibility". (Available at: <https://portais.univasf.edu.br/medicina-pa/medicina-pa/documentos-e-normas/ppc-medicina-univasf-campus-paulo-afonso-ba.pdf>. p. 25)

"For this to happen, during the course of the medical course, students will be gradually inserted into the political, social and cultural reality and, later, into clinical practice, through their immersion in the social and health equipment of the selected communities. This participation seeks to provide experiences that enable the development of the competencies expected of a medical professional." (Available at: <https://portais.univasf.edu.br/medicina-pa/medicina-pa/documentos-e-normas/ppc-medicina-univasf-campus-paulo-afonso-ba.pdf>. p. 25)

It so happens that this model of pedagogical treatment of competence training has a logical limit of execution, either with material resources or with qualified personnel for the model of competence development, and why not say, budget limitation. On this occasion, the



possibility of granting *an ex officio* transfer of a postulant is impracticable, who, despite approval in a private institution based on the traditional teaching model, now, through the use of the institute of *ex-officio transfer*, tries to receive some type of unreasonable benefit, such as, for example, enrollment in a higher education course of very high demand, which has a different methodology of pedagogical work when compared to its educational institution of origin.

Thus, because the adequate motivation and purpose of the administrative acts of transfer are not verified, it is that the administrative control has its *raison d'être* for the case that is presented here and has been understanding, as a good thing, to reject the *ex-officio transfer requests*.

9 SUGGESTIONS AND PROPOSALS FOR THE PROPER APPLICATION OF THE INSTITUTE OF *EX-OFFICIO TRANSFER*

For all the above, it is essential that the institute of *ex-officio transfer* be remodeled, in order to avoid its unreasonable use and possible deviations from purpose.

Although there are several Bills that deal with the subject, such as Bill No. 198-A/2025, authored by Deputy Luiza Canziani, which seeks to regulate so-called humanitarian transfers, the subject of this academic article still needs broad debate and direct confrontation, since it is a possible focus of corruptive practices in the mainstay of public service, being potential generators of financial, structural and academic losses, in addition to the evident circumvention of the system of access to university vacancies through the respective selection process.

To this end, to the extent that it does not seem possible to suggest *accountability* tools for the correct analysis of transfers in the most diverse entities that make up the country's public administration, the proposal for legislative change, with the intensification of the analysis in *the ex-Officio* transfer request, would have the power to drastically reduce the number of transfers with signs of fraud, without also disregarding the basic right that the public servant has to continue his university studies.

Thus, the propositions indicated here act on 4 fronts of potential fraud and that can be restricted in the legal rule:

1. Full application of the principle of congenerity between educational institutions;
2. Application of the principle of congenerity of the courses that are intended to be transferred;
3. Mandatory studies at the institution that obtained the transfer, under penalty of loss of vacancy in future voluntary transfer;

4. Existence of compatibility of schedules that reconciles work and university studies.

Draft Bill

Article 1 The ex officio transfer referred to in the sole paragraph of article 49 of Law No. 9394, of December 20, 1996, shall be effected, between **institutions linked to any educational system, at any time of the year and regardless of the existence of a vacancy, provided that there is congenerity between the educational institutions and congener as to the desired course, in the case of a federal civil or military public servant student**, or his/her student dependent, if requested due to proven removal or transfer of office, which entails a change of domicile to the municipality where the receiving institution is located, or to a location closer to it.

Paragraph 1 - The rule of the caput does not apply when the person interested in the transfer moves to assume an effective position due to a public tender, commissioned position or position of trust.

Paragraph 2 - The civil or military student public servant is prohibited from voluntarily transferring to another HEI, after the approval of the ex-officio transfer request.

Paragraph 3 - The ex-Officio transfer does not require proof of compatibility of schedules between studies and working hours. (emphasis added)

The concern with the indiscriminate use of the institute of *ex officio* transfer to obtain undue advantages is central to legal discussions. The possibility of circumventing the system of admission to free public universities, which have a high demand and limited vacancies, represents a threat to the constitutional principles that govern education and public administration.

10 RESULTS

The analysis revealed that, between 2018 and 2021, UNIVASF registered 48 *ex-officio transfer requests*, with 36 directed to the Paulo Afonso/BA campus, of which 33 involved military police officers from Bahia. Comparatively, the Petrolina/PE campus, with a population four times larger, received only 11 requests. Jurisprudentially, the STF limited transfers to similar institutions, allowing exceptions only in the absence of similar options (RE 601580), but without defining congenerity beyond the legal nature. Divergences between TRFs: the 5th Region denies transfers if there is a congener private HEI, as seen in process 0800396-69.2020.4.05.8308, while the 1st Region allows it in the absence of counterparts, as seen in process 1000972-26.2021.4.01.3306. In addition, it was found that the administrative acts of transfer lack motivation, with generic mentions of changes of police officers with a spartan indication of transfer "for the good of the service". The existence of clashes and/or incompatibilities between the working hours of the public servant and the indication of time for studies in the Medicine course was also configured, according to the reading extracted from the Pedagogical Project of the Course, in view of the confirmation that the Medicine



course is offered in the full-time shift, incompatible with working hours of 30-40 hours per week. Finally, due to the number of transfers made, at any time, and without being bound by a limit of vacancies, there is the potential for exceeding the budget limits for the maintenance of a course of this nature, with the need to invoke the principle of the reservation of the possible, with the need to restrict the unrestricted expansions of the number of students, threatening the pedagogical quality based on active methodologies.

11 DISCUSSION

The results corroborate the concern with the misuse of *ex-officio* transfer as a "joy train" to cheat entrance exams in competitive courses, violating principles of isonomy and morality (CRFB/1988, art. 37). The restrictive interpretation of congenerity by the STF (ADI 3.324-7) prioritizes the legal nature of HEIs, but fails to cover curricular congenerity, allowing abuses in regions with scarce public supply, such as Paulo Afonso/BA. The jurisprudential divergence between TRFs generates legal uncertainty, while the absence of motivation in administrative acts suggests a possible deviation of purpose (Carvalho Filho, 2024) within the scope of public corporations. Hourly incompatibilities and budget limitations reinforce the need for strict control, aligning with the theory of the reserve of the possible to preserve state resources. Comparatively, there are patterns identified by the internal control sector of UNIVASF, such as enrollment in private HEIs of low competition followed by transfer in the public service, a scenario suggestive of the existence of systematic fraud, requiring reforms to balance individual rights and public interest.

The results also indicate that the institute of *ex-officio* transfer needs more precise regulation, under penalty of compromising fundamental constitutional principles such as isonomy, impersonality and administrative morality. In this sense, it is suggested that the restrictive application of the principle of congenerity is essential to avoid fraud and distortions in access to public higher education, especially in highly competitive courses. The practice observed at UNIVASF illustrates the negative effects of misuse of the institute, with academic, financial and institutional losses.

12 CONCLUSION

The *ex-officio* transfer, although protective, requires judicious application to avoid distortions that compromise meritocracy in higher education. The jurisprudential and administrative analysis at UNIVASF demonstrates that the principle of congenerity, as interpreted by the STF, is insufficient to curb abuses, generating inequalities and institutional losses. Changes to Law No. 9,536/97 are proposed, including institutional and curricular



congenerity, prohibition of subsequent voluntary transfers, and proof of time compatibility, to reinforce *accountability* and preserve constitutional principles. Future research could assess quantitative impacts on other HEIs, contributing to more equitable educational policies.

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