76 - SUSPENSION CAUTELAR OF THE PROFESSIONAL EXERCISE IN PHYSICAL EDUCATION: UNILATERAL MEASURE OF PROTECTION TO THE SOCIETY AND CONCEPT OF THE PROFESSION.

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1 INTRODUCTION

Our Magna Carta, promulgated by the National Constituent Assembly on October 3, 1988, brought in its wake the constitutional provision in which every individual, subject to an Administrative or Judicial Process, guaranteed to him, is the institute of ample defense and contradictory:

Ample defense is understood as the assurance given to the defendant of conditions that enable him to bring to the proceedings all the elements tending to clarify the truth or even omit or shut himself off, if necessary, while the contradictory is the actual exalteration of the ample defense, imposing the dialectical conduct of the process (for conditio), because to any act produced by the prosecution, it will have equal right of defense to oppose him or to give him the version that best suits him or, to provide a legal interpretation different from that made by the author. (Moraes, 2011, p. 113)

In a sealed summary of the above quotation, we find that the Constituent Legislator sought, with the inclusion of the text, to remove Injustice, well persecuted by the Law and by the men who have the competence to conduct the process, and its term to whom, that is, the Sentence, issued by competent persons, under the title in question, the Process Ethics Commission¹, obeying the Principle of the Natural Judge, according to the guidance of subsections LIII of art. (Moraes, 2011, p. 93), which states that “no one shall be prosecuted or sentenced except by the competent authority.” (Moraes, 2011, p. 93)

It should be noted that in the face of constitutional forecasts in order to guarantee the ample defense and the contradictory, different situations of this context are foreseen in the Procedural Codes of Ethics. Based on this document, the company, through its class organs, applies to the Professional of the regulated category, the precautionary suspension of the professional exercise, without there being the final assessment by the Process Commission, without it characterizing defense restraint, the aim of safeguarding the collective interest. An example of this recent application was that of former Federal Prosecutor Marcelo Miller, who was part of the Lava Jato Investigation team, had his OAB Portfolio suspended for ninety (90) days, and may be subject to a cassation. (Conjur, 2017)

In the same situation, then-physician Roger Abelmassih, who gained fame by making artificial inseminations, was also cautioned by his class organ because the time of the commencement of the police investigations to his disfavor was suspected of committing fifty-two and fifty rapes during their professional interventions. (O Globo, 2017).

1 It is the responsibility of the Professional Ethics Committee of the Regional Councils of Physical Education to establish and carry out the acts related to the Disciplinary Ethical Processes to which the Destinat

Common to both, weigh heavy accusations that put at risk to the society by its conducts that hurt the ethical precepts, and for that reason, they compromise the premises that sustain the professional exercise, bringing to discredit a whole category, needing the immediate intervention of their respective Advice for Restoring Social Peace

In the light of the initial and retroactive considerations in the examples of other professions, we examine the existence of this Institute in the Procedural Code of Ethics of the Federal Council and the Regional Councils of Physical Education and their respective applicability in the Confe/ CREF’s System. (2017), in cash, in CREF-12, while its jurisdiction covered the states of Pernambuco and Alagoas (2016 fiscal year), seeking to identify the existence of the use of this Cautelar Institute by the System and if its application in teleological constitutional premises.

Therefore, it is possible to observe that this is a research that intends to carry out a search in the various Procedures Initiated, of an exploratory, argumentative character, using the homeland bibliography, to be able to prove the final application, of such an extreme measure.

2 PREVIOUS SUSPENSION OF PROFESSIONAL EXERCISE IN PHYSICAL EDUCATION

Considering the limitations made in the methodology, we look at the procedures established by CREF12/PE in the year 2016 and we find the following scenario regarding the establishment of Procedures:

Important is the registration that the Procedures of Sindicância instituting, the values call attention, but the justification is due to the existence of Courses considered inidôneos, offered in disagreement with the native legislation.

Regarding only the Disciplinary Ethical Procedures (PEDs), of the 133 (one hundred and thirty-three) established in 2016, only 03 (three), in their bulge, had the request for Suspension of Care for the Professional Exercise requested by the Professional Ethics Committee (CEP/ CREF12/PE), presented and approved by the Plenary of the respective Regional Council of Physical Education, satisfying the provisions of Resolution 264/2017:

Art. 81 - After establishing the PED, the CEP may suggest to the Plenary of the CREF the precautionary suspension of
the activities of the Denounced, provided there is evidence of materiality of the unethical conduct and sufficient proof of its attribution, cumulated with the presence of well-founded fear of irreparable damage or difficult repair in the continuity of their professional practice.  

Article 82 - The decision to suspend the professional exercise of the Complainant shall rest with the Plenary, based on a reasoned opinion of the Rapporteur appointed for the PED, stating clearly and precisely the reasons for his conviction. (CONFEF, 2017)  

The following graph, well represents the ratio between the PEDs established by CREF12/PE, in 2016 and the requests for precautionary suspension of the professional exercise:

By applying a simple mathematical account, applying the percentages, of the universe of PEDs established only 2.26% (two point twenty-six percent) were suggested and authorized the application of the precautionary suspension of the professional exercise, which decision does not offer opportunity to denounced to exercise the original defense, ample defense and contradictory, but it allows him, pursuant to Article 85 of Resolution 264 / CONFEF, to bring an Appeal against the decision that determined its suspension.  

Article 85 - An appeal may be filed against a decision that determines the provisional suspension of the professional exercise, within a period of 15 (fifteen) days, to the TRE, when it is rendered by the CREF Plenary, or before the TSE, when the decision is examined by TER or by the CONFEF Plenary. (CONFEF, 2017).  

Let us then analyze the presuppositions that motivate its application, in form and matter, in the quest to prove the purpose for which it is intended, the safeguarding of society, even because the great holder of Power is the people, and timely is the memory of the of our Democratic State of Law, in kind, to which the sole paragraph of art. 1 of the Federal Constitution of 1988, stating that "all power emanates from the people, who exercise it through elected representatives or directly, under the terms of this Constitution." (PLANALTO, 2017).  

The material premise of Article 81 of Resolution Conf. 264/2013, authorizing the proposition and application of the Measure of Protection, states that there must be "evidence of materiality of unethical conduct and sufficient proof of its authorization, cumulated with the presence of a well-founded fear of irreparable harm or difficult to repair in the continuity of their professional practice. " (CONFEF, 2017).  

It is opportune to register that the class organ, member of the CONFEF / CREFs system, acts in the name of the company (Beneficiary) and Physical Education Professionals (Recipient) (CONFEF, 2017), and as such, is Administration, thus possessing the (ARAUJO, 2007), in such Agents, include in the object under analysis, the members of the Inspection Sector and the Members of the Professional Ethics Commission, who, in the name of the public interest, for the fulfillment of social peace.  

In this sense, all the PEDs established could be instructed by the request for precautionary suspension of the professional exercise, however, it is not, due to the final phase of article 81 of Resolution CONFEF 264/2013, since the unethical conduct (against ethics) and the proof of its attribution by itself, are not fundamental elements for its requisition, but the end of the premises yes, since there being materiality and attribution, it is necessary that the action practiced by the Recipient has one of the elements: irreparable damage or (CONFEF, 2017), and in this sense, the classic cases of Prosecutor Marcelo Miller and former physician Roger Abelmassih, fit well with the precautionary measure applied to them, safeguarding society, which is protected by the class organ of her Professions.  

The three (03) cases in which the institute foreseen in article 81 and following of Resolution CONFEF 264/2013 by CREF12 / PE were applied, were the following:  

a) Case A - Professional of Physical Education that allowed Leigo to act as such, and together with a Physiotherapist (who hired the Denounced to give legality to their criminal actions, compromising the concept of the Profession in society), arranging for circumventing the supervision of CREF12 / PE, including allowing the businessman to lodge a criminal complaint against the Public Prosecutor;  
b) Case B - Physical Education Professional that on the Web, burned the Ticket of payment of the CONFEF / CREFs system annuity, in a social network, encouraging disastrous and harmful comments to the good Physical Education Professionals registered in the System;  
c) Case C - Professional of Physical Education, which uses a Web page (Social Media), prescribes physical activities without the reliability of data, compromising the professional concept, and putting society at risk, contrary to the norms of the System CONFEF / CREFs.  

In the 02 (two) first cases, after the completion of the Cautelar Measure, the Professional Ethics Committee of CREF12 / PE, has already appraised the merit and made it final to the penalty, in accordance with Article 12 of CONFEF Resolution 307/2015, in the third, they are still in the stage of diligence, fulfilling the formal requirements.  

In the cases in which it was applied, the Members of the Ethics Committee considered the precautionary measure applied in favor of the benefit to society and the CONFEF / CREF System to be effective, since it stopped, corrected and educated the Denounced persons who practiced such harmful actions.  

It is very important to observe the retro paragraph, because they will be constituted in remedial actions, through the application of the precautionary measure of Cautelar Suspension of the Professional Exercise, because in the cases in question, applied incidentally, that is, in the Body of the Disciplinary Ethical Process (this is the legal prediction, when the PED was established), guaranteed the future of the final allocation (GRINOVER, 2010)  

The authorizing links to this precautionary measure are based on the assumption that the definitive decision will benefit the author, in this case, the company, of which the CONFEF / CREFs System is its member, and its urgency is the guarantee that its non-application will frustrate its effects, ie the essential elements of such an exercise: fumus boni júris and pericullum in mora. (GRINOVER, 2010).  

3 CONCLUSION  
From the analysis of the above in the body of this article, and to what was proposed in its exordium, because we try to
verify if the Suspension of Care of the Professional Exercise, an assuratory measure applied in an unprecedented way changes pars, proposed by the Commissions of Ethics of the CONFEF / CREF System in disfavor of Denounced in Disciplinary Ethical Process, meets the precepts of the purpose (telos) provided in the premises of our Constitution-Citizen, we can discuss the following:

a) That it is a measure applied on an exceptional basis, only admitted in cases of conduct practiced by Physical Education Professionals, classified as unethical, and there is a well founded fear of irreparable damage or difficult reparation in the continuity of their professional practice "(CONFEF , 2017), not only materiality and authorship, but rather the small percentage of 2.26% (two point twenty six percent) of the total number of developing countries, the number would be alarming, which allows us to state that this institution is not a rule, but a situation of exceptionality, and the responsibility for implementation will be the CONFEF / CREFs System, not the Professional Ethics Committee, which is only the proponent, and the authorization, in plenary, of the Counselors, dignified Representatives of Physical Education Professionals, who are obliged and must be a satisfaction, enforce the norms in force in our country; the plurality of the knowledge and experience of each Director shall be taken into consideration when expressing his vote. It is appropriate to note that Article 82 does not provide a minimum quorum to ensure the application of an exceptional measure.

b) That following the constitutional premise that all Power emanates from the People and exercised in its name and for him, conduct that is discretionary (but grounded) are sent to the Council Plenary (Federal or Regional) for the application of this preventive measure, for (the people, represented by the Ethics Committee, which is its natural judge, to prosecute and prosecute Physical Education Professionals), as well as it operates as an emergency which can be frustrated in its effects (GRINOVER, 2010: 345), it is seen that the applied institute does not violate the constitutional premise of ample defense and contradictory, neither formally nor materially, because, later on, it allows the Denounced appeal to the TRE or TSE and may be modified.

In the terms discussed here, we conclude that the preventive suspension of the professional practice does not violate the constitutional premises of the Respondent, quite the contrary, it consists of the assuratory instrument that the CONFEF / CREF System applying, observes the exceptionality of this institute, is put "in the service of the subsequent judicial activity, which should definitely restore the observance of law: it is intended not only to do justice, as to allow time for justice to be done" (GRINOVER, 2010, p.345).

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SUMMARY

The purpose of this article is to offer Physical Education Professionals an understanding of the importance of the preventive suspension of the Professional Exercise, its constitutionality and the purpose of such an extreme and exceptional measure to safeguard society and the CONFEF / CREF System. based on the analysis of data collected in the Office of Professional Ethics Committee of the Regional Council of Physical Education of the 12th Region / FPE, in 2016 and with the support collected, legally prove that the measure complies with the dictates of Broad Defense and Contradictory, foreseen in our Magna Carta, because due to the robustness of the evidence and authorship, associated with the well-founded fear of irreparable damage or difficult reparation, this measure finds space in the legal world to not only do justice but to give time for justice be done. It consists of an exploratory, argumentative work that alerts the Recipients about how good it is to be ethical.

Keywords: Ethics, Precautionary Suspension, Justice.

SOMMAIRE

Cet article vise à offrir aux professionnels de l'éducation physique une compréhension de l'importance de la suspension de précaution de la pratique professionnelle, sa constitutionnalité et la fin qui est conçue de manière extrême et mesure exceptionnelle pour protéger la société et le système CONFEF / CREF, et était construit sur la base de l'analyse des données recueillies dans le registre professionnel du Conseil régional de l'éducation physique 12e Région / PE, et retenir recueilli des scores, prouver légalement que la mesure répond aux exigences de la défense large et contradictoires, énoncées dans notre Constitution, car en raison de la force de la preuve et l'auteur associé à la crainte fondée d'un préjudice irréparable ou difficile à réparer, cette mesure trouve une place dans le monde juridique non seulement la justice, mais ils offrent le temps de la justice être fait. Il s'agit d'un travail exploratoire et argumentatif qui alerte les bénéficiaires sur la qualité de l'éthique.

Mots-clés: Éthique, Suspension de précaution, Justice.

RESUMEN

El presente artículo tiene por objetivo ofrecer a los Profesionales de Educación Física una comprensión sobre la importancia de la suspensión cautelar del Ejercicio Profesional, su constitucionalidad y al fin que se destina tan extremada y excepcional medida para salvaguardar la sociedad y el Sistema CONFEF / CREFs, y fue que se basó en el análisis de datos recogidos en el Notario de la Comisión de Ética Profesional del Consejo Regional de Educación Física de la 12ª Región / PE-AL, en el año 2016 y con el apoyo de los escasos recogidos, comprobar jurídicamente que dicha medida atiende a los dictados de la
Amplia Defensa y contradictorio, previstos en nuestra Magna Carta, pues debido a la robustez de las pruebas y autoría, asociada al fundado temor de daño irreparable o de difícil reparación, esa medida encuentra espacio en el mundo jurídico para no sólo hacer justicia, sino ofrecer tiempo para que la justicia se haga. Consiste en un trabajo exploratorio, argumentativo que alerta a los destinatarios sobre lo bueno que es ser ético.

Palabras clave: Ética, Suspensión cautelar, Justicia.

RESUMO

O presente artigo tem por objetivo ofertar aos Profissionais de Educação Física uma compreensão sobre a importância da suspensão cautelar do Exercício Profissional, sua constitucionalidade e ao fim que se destina tão extremada e excepcional medida para salvaguardar a sociedade e o Sistema CONFED/CREFs, e foi construído baseado na análise de dados coletados no Cartório da Comissão de Ética Profissional do Conselho Regional de Educação Física da 12ª Região/PE-AL, no ano de 2016 e com arrimo escores coletados, comprovar juridicamente que a referida medida atende aos ditames da Ampla Defesa e Contraditório, previstos em nossa Magna Carta, pois debido a robustez das pruebas e autoría, asociada ao fundado receio de dano irreparable ou de difícil reparación, essa medida encontra espaço no mundo jurídico para não só fazer justiça, mas ofertar tempo para que a justiça seja feita. Consiste num trabalho exploratório, argumentativo que alerta os Destinatários sobre o quão bom é ser ético.

Palavras-chave: Ética, Suspensão cautelar, Justiça.