

# *The Exercise of Discretion in Health Supervision: Takes the "Fushun City" Round Case as an Example*

Jianan Zhang<sup>1,\*</sup>, Lihua Zhang<sup>2</sup>

<sup>1</sup>Changchun University of Chinese Medicine, Boshuo Road, Changchun, China

<sup>2</sup>Changchun City Hospital of Traditional Chinese Medicine, Changchun University of Chinese Medicine, Changchun, China

\*Corresponding author

**Keywords:** Discretion; supervisor; law enforcement; judicial discretion

**Abstract:** Discretion is a kind of right to decide the punishment by oneself according to one's own judgment, which is an indispensable condition for administrative management by administrative organs, and it has the characteristics of flexibility and difficulty to grasp properly. Because the relevant laws are not perfect, the scope of discretionary power is difficult to define, although it can be adjusted according to the actual situation, but also because of this reason leads to the emergence of arbitrary law enforcement and power for personal gain, which can cause serious damage to the social order. In this regard, while improving the legal, social and procedural supervision system, the training of each supervisor should also be strengthened. Supervisors are the executors of the law and should have sufficient knowledge of the law, and should also establish a sense of principle in the process of law enforcement to ensure the correct implementation of discretionary power.

## **1. The Connotation and Manifestation of Discretionary Power**

Discretionary power, based on the explanatory materials of the 13th Five-Year Plan for National Economic and Social Development of the People's Republic of China 2016-2020, refers to the power of the subject of power to freely dispose of the power they enjoy within the scope of legal authorization, including administrative discretionary power and judicial discretionary power [1]. Administrative discretionary power is the power given by the state to administrative organs within the range and scope stipulated by laws and regulations. Administrative discretion is the power of disposal given by the state to the administrative organ within the range and scope stipulated by laws and regulations, covering administrative license, administrative punishment and other aspects. Judicial discretion refers to the power of judges or trial organizations to choose judicial acts and decide cases based on their own knowledge, experience, attitude, values and understanding of legal norms on the basis of correct factual findings. In layman's terms, it is the freedom of choice, in other words, it also means the ability to adopt the appropriate legal provisions according to one's own judgment. It is manifested in the ability of law enforcement officers to choose one of the provisions to be applied according to their own will when dealing with the lack of clear judicial interpretation, while the case can also apply multiple legal provisions or different provisions of the same article, and to impose reasonable and objective punishment on the offender within the scope

allowed by law. This is usually reflected in the four aspects of the scope of punishment, the nature of the facts, the circumstances found and the decision on whether to enforce them.

## 2. The Need for Exercise of Discretionary Power

In the process of health supervision practice, health supervision agencies to face the illegal behavior can be said to be disjointed, complex. As the subject of the violation of the natural persons, different identities, backgrounds lead them to have different illegal motives, may be out of helplessness, may be out of greed, the two in the subjective is completely different, but from the objective fact that the results they made to come is the same. Even so, out of subjective and objective considerations, the responsibility of the two violations are also different. In the theory of socialist legal construction with Chinese characteristics, we also emphasize that "specific analysis of specific situations", for the punishment of different illegal background, can not use a "one-size-fits-all" approach, the exercise of discretionary power should be combined with the actual situation. The sound laws and regulations cannot cover all the specific violations and punishments that should be given, and it is the best expression of the necessity of discretion in the handling of these vague legal boundaries.

## 3. Case Study

On June 15, 1991, the ship "Fushuncheng" arrived at the loading and unloading area of Zhenhai, Ningbo from Japan. On the same day, Ningbo Sanitary and Quarantine Institute implemented entry quarantine for the ship in Zhenhai port area. When quarantine, it was found that the ship had 3 employees who did not hold health certificates issued by the health and quarantine authorities, so the ship was requested to go through the procedures of issuing replacement certificates, but the captain refused to go through the procedures of issuing replacement certificates on the ground that the health certificates of seafarers held by the Ministry of Communications were valid. 3 days later, when the ship was out of quarantine, the ship was not corrected in the above problem, and the captain refused to handle the issuance of replacement certificates for "executed according to the notice of the superior for" reason, again . After that, the ship's three employees left the country with the ship. On the 24th of the same month, the Health and Quarantine Bureau fined the vessel "Fushuncheng" RMB 4,900 yuan.

According to the Law of the People's Republic of China on Sanitary and Quarantine of the State Border, a warning or a fine may be imposed on the organization or individual who has violated the law, depending on the severity of the circumstances. In the above case, the Ningbo Health Quarantine Bureau did not punish the Fushuncheng after discovering its violation, and allowed it to enter and leave the country freely, which was an abuse of discretion. Although an administrative penalty was imposed a few days later, it still neglected its responsibility for safety and failed to achieve reasonable administration.

## 4. The Dilemma of Discretionary Exercise

Discretion is formed by the subjective consciousness of law enforcement officers, health administrative laws and regulations as the basis, mixed with unknown objective factors. It is ambiguity and uncertainty, which raises a serious problem. That is to say, defects in any one element will lead to defects in the exercise of power, and in serious cases will lead to the misuse and abuse of power [2].

#### 4.1. The Scope of Discretionary Power is Difficult to Define

On the one hand, the excessive discretionary power is easy for law enforcement officers to abuse their discretionary power. Generally speaking, "basing on facts and taking the law as the criterion" is the basic principle that every administrative law enforcement officer should follow. In the process of law enforcement, factors that have nothing to do with the fact of violation, whether subjective or objective, should be ignored to avoid interference with the punishment result. However, in the actual law enforcement process, when the law enforcement officers judge the violations of the supervised person, these factors will inevitably influence the subjective consciousness of the law enforcement officers, leading to the abuse of discretionary power. The punishment was not made until a week later. On the other hand, overly compressing the space for the exercise of discretionary power can prevent law enforcement officers from responding effectively to violations. For example, by setting harsher minimums, the majority of judges are focused on the case level and perceive that mandatory minimums often strip away the flexibility they need to craft appropriate sentences in individual cases, leading to punishments that are unduly harsh, some judges experience moral dilemmas and guilt feelings during this process [3]. At the same time, it is difficult to deter some violations after a decrease in flexibility of enforcement. After all, laws and regulations cannot be exhaustive, and loopholes inevitably appear, and some lawbreakers try to avoid punishment by exploiting loopholes in the law. The law enforcement officers are restricted to watch him get away with it, which will reduce the motivation of law enforcement officers and eventually lead to the choice of turning a blind eye to the corresponding treatment of illegal acts.

#### 4.2. Relevant Legal Provisions are not yet Perfect

China's legislative development is relatively late, although in recent years with the awareness of the rule of law, many laws have become more and more perfect, but there are still many shortcomings. In addition, the legislator mostly from the perspective of unified management to develop rules, less from the perspective of law enforcement practice, inevitably, the regulations can not fully cover the health administrative law enforcement problems. So the quality of control regulations in china, despite the enactment of more laws, has been compromised by the State's laxity in the legislative spheres, which has led to a regulatory stagnation that runs counter to the principles of good regulation [4].

First, the determination of the circumstances of the violation is relatively vague. For example, in Jiangsu Province in 2009, there was a case of using another person's tobacco monopoly retail license to wholesale tobacco, the focus of the case is whether it constitutes illegal operation, the first trial and the second trial were sentenced to illegal operation, the court believed that the borrowing of another person's license belongs to illegal operation, and involves a large amount of serious circumstances, and disrupt the market order. In the end, the Jiangsu Provincial High Court ruled that the borrowing of another person's license was a legal act, but it was beyond the scope of operation, that is, beyond the scope of the license. And the defendant's behavior does not disrupt the market management order, so it can not be characterized as illegal business income from the operation beyond the scope of the amount, and can not be used to determine the seriousness of its behavior. It is because of the vague determination of illegal operation, which eventually led to the opposite result.

Secondly, some of the penalties are not strong enough, the relevant laws on some violations of the law to make the penalty is only a fine, and will not confiscate the illegal income, and the fine compared to the income from illegal income is just a dime, can not play a sufficient deterrent effect. For example, a company not in accordance with the registered technical requirements of the product organization production of medical devices, the production of unlicensed medical devices were

investigated, but the fine is only half of the value of unlicensed medical devices, such penalties are not only insufficient deterrence, but to a certain extent on other companies to play a role in encouraging.

Finally, the criteria for determining the circumstances are vague, and there is no clear specification of how to classify the severity of the circumstances, resulting in difficulties in the exercise of discretion.

### **4.3. The Quality of Law Enforcement Officers Needs to be Improved**

As a law enforcement officer, knowing the law is the most basic requirement. However, a large number of law enforcement officers are not familiar with the relevant legal provisions, nor do they understand the scope of application of the law to rely solely on their own subjective sense of judgment, which greatly reduces the efficiency of law enforcement work, and even leads to errors in law enforcement work.

## **5. Suggestions for Countermeasures**

To ensure the correct use of discretionary power is the primary premise of health supervision, is an important guarantee of supervision in accordance with the law, is a key part of the law enforcement process. The regulation of power, in supervision and management itself is also necessary. Discretionary powers are provided by law and are protected by law. This is all the more important for health supervision agencies in the exercise of discretionary powers, should have a clear understanding of their own positioning: supervision agencies as the law enforcement, can not exceed the law. Without any restraint of power will only invite chaos and corruption, so the "freedom" of discretion is limited, ignoring the law, unrestrained abuse of power will only bring more injustice.

### **5.1. Compliance Principles**

Discretionary power is exercised under the following conditions: (1) seeking truth from facts and acting in accordance with the law. You cannot make things up out of thin air and do exactly what you think, let alone use your power for personal gain and disregard laws and regulations. (2) Discretion needs to be exercised within the scope allowed by law [5]. From the Constitution down to local regulations, the applicable punishment for violations of the law is only described in principle, and the content of the punishment needs to be based on objective facts and the specific circumstances of the person concerned, and decided by the supervisors themselves without violating the principles. As long as the scope is crossed, it is in the abuse of power. To achieve the above two points, the key is to act in strict accordance with the provisions of the "Health Administrative Punishment Procedures" and strengthen the system of summation and approval to prevent deviations.

### **5.2. Judicial Supervision**

Discretionary power is granted by law, and the law also has the responsibility to supervise it. Article 5 of the Administrative Litigation Law of the People's Republic of China stipulates the principle of the people's court reviewing the legality and reasonableness of discretionary power, and the principle of reviewing the legality and reasonableness of specific administrative acts, indicating the limited judicial review power of the people's court. For the person concerned, he also has the right to plead and request a hearing to the health supervision agency that imposed the penalty on

him in accordance with the law, the occasion of disagreement with the penalty results, the person concerned has the right to request reconsideration, but also to file a lawsuit in the People's Court. At the same time, for the discretionary results submitted up, the higher administrative organs or the people's court will review its reasonableness and legality, which reflects the responsibility of supervision, but also to ensure that the discretionary power will not be abused.

Through a large number of law enforcement practice has proved that the law is effective in restraining discretionary power. Through the improvement of the details related to health supervision laws and regulations, such as the severity of the circumstances, the scope of application and other provisions, to a certain extent, regulate the exercise of discretionary power by health supervision law enforcement officers. It is because of the ability to more clearly and explicitly define the severity of violations and the scope of application of various types of penalties, compressing the "room for maneuver" of health supervision law enforcement officers in the process of law enforcement for personal reasons, improving the credibility of health supervision agencies' penalties, thus achieving effective regulation of discretionary power and locking the power into the the system's cage.

### **5.3. Social Monitoring**

The public speaks freely in the relatively relaxed virtual space, and the network has become a convergence [6]. In the Internet age, the traditional discourse system has changed greatly, and is with a large transformation from the official media to official media and self-media coexistence. The changes in public discourse systems also make the discourse power structure reassigned [7]. In the past, the situation where the outcome of punishment was based on the "word" of the supervisory body no longer exists, and more and more supervised units have a clearer understanding of public opinion. This is not only reflected in the reduction of violations, but also in the fact that when the supervisory body gives a penalty that does not convince the public, people will question it through various media, putting pressure on the supervisory body and forcing them to rethink the appropriateness of their actions. We are a society where the people are in charge and need to fully mobilize the people to express their opinions, emphasis on public opinion impact, giving full play to the role of public opinion leaders [8]. Rely on the supervision of the people to promote the occurrence of administrative supervision or judicial supervision. The combination of social opinion and state coercive power, the two together to supervise and regulate power in all aspects, will be able to better restrain discretionary power and promote the construction of China's health.

### **5.4. Limiting Discretion through Process and Management**

The concentration of power tends to lead to the abuse of power. Procedural justice is of pivotal importance as it aids in clarifying the rules and policies and the current study strives to contribute to literature by highlighting its importance [9]. Therefore, we need to refine the process of using discretionary power, implement the accountability system, and regularly rotate the positions to avoid the situation of ganging up for personal gain. For example, the collegial system we implement in law enforcement is to determine whether this penalty decision is legal and reasonable through collegiality when using discretionary power.

### **5.5. Strengthen the Study of Laws and Regulations**

Health supervisors must understand and abide by the law in order to properly enforce the law . For this aspect, business training is a very necessary and important way. Increase the number of training sessions, develop suitable training programs, and constantly innovate in training, while

expanding the coverage of the training ground to achieve comprehensive coverage of health supervisors and to comprehensively improve the capacity of supervisory and law enforcement personnel. To address the shortcomings of the supervisors' lack of capacity, a detailed training plan should be formulated and talent training goals should be proposed. The training of supervisory law enforcement personnel should also be incorporated into the government's annual plan as a key task to ensure that the plan can be carried out smoothly, and be guaranteed in all aspects such as personnel organization, teacher hiring, teaching design, and funding budget to establish a planned, targeted, designed, and effective training mechanism.

## 5.6. Establishing a Team of Excellent Supervisors

The key to play the role of discretionary power should be in the people, to create a supervision team can correctly exercise the power is to enhance the administrative level of the premise and guarantee. China's health supervision system started late, the system is not yet perfect, the construction of the team needs to invest more energy, and the team structure is not an overnight improvement can be achieved, it is a gradual process. There should be a clear plan on how to build the team and what kind of team to build. From staffing, to the work environment and other aspects, are required to think about. Modern society has a higher degree of secrecy and professionalism than in the past, which requires the supervision of the post to work on the composition of the staff, to select different professional talents in a targeted manner, to further optimize the team specialization, with experienced veterans to take the lack of work experience, but has more professional knowledge of new employees, experience and knowledge complement each other to form a virtuous circle In order to continuously improve the overall quality of the supervision team [10]. At the same time, for the grass-roots positions in the poor working environment, the problem of lower treatment, but also the relevant government departments to develop relevant supporting policies, so as to better retain talent, in order to absorb more fresh blood into the supervision agencies, in order to create a professional, scientific, quality law enforcement team.

## 6. Conclusion

Discretionary power should be exercised within the scope given by laws and regulations, and it comes from the people's trust in the supervisory body, thus it cannot act according to personal likes and dislikes, and it cannot do whatever it wants and does whatever it wants. It should be statutory and fixed, not arbitrary, vague, fantasy, and it must be exercised within the limits imposed. Therefore, in the process of law enforcement, the supervisory body should always bear in mind the facts as the basis, the law as the criterion, and truly just and fair.

## References

- [1] T. R. S. Allan. *Discretionary Powers: A Legal Study of Official Discretion*. *The Cambridge Law Journal*, 1987, 46 (3).
- [2] Avraham Giller Shahar. *The court's discretionary power to enforce valid jurisdiction clauses: time for a change?* *Journal of Private International Law*, 2022, 18 (2).
- [3] Nir Esther, Liu Siyu. *The Challenge of Imposing Just Sentences Under Mandatory Minimum Statutes: A Qualitative Study of Judicial Perceptions*. *Criminal Justice Policy Review*, 2022, 33 (2).
- [4] Feliu Ariadna, Martínez Cristina, Fernández Esteve. *[Lights and shadows for public health: A critical analysis of the tobacco legislation in Spain]*. *Gaceta sanitaria*, 2021, 36 (1).
- [5] Gilson Lucy, Schneider Helen, Orgill Marsha. *Practice and power: a review and interpretive synthesis focused on the exercise of discretionary power in policy implementation by front-line providers and managers*. *Health policy and planning*, 2014, 29 Suppl 3.
- [6] Xinyu Ren. *Research on the Guidance Strategy of Internet Public Opinion under the Background of New Media*

*Empowerment--Taking the "Child Model Abuse" Incident as an Example// Proceedings of 6th International Symposium on Social Science (ISSS 2020), 2020: 168-174.*

[7] *Yongguang Yu. The Quality and Strategy of Leading Cadres to Deal with the Pressure of Network Public Opinion// Proceedings of 2021 6th International Conference on Education Reform and Modern Management (ERMM2021). 2021: 317-320.*

[8] *Anning Liu. The Crowd: Study on the Guidance Strategies of University Network Public Opinions--Taking "Management Through Zhihu" as an Example// Proceedings of 4th International Symposium on Social Science and Management Innovation (SSMI 2022). 2022: 378-385.*

[9] *Raza Muhammad Ali, Ul Hadi Noor, Mujtaba Bahaudin G. Impact of procedural justice on employee turnover intention: assessing the moderating role of Islamic work ethics and trust in leader. SN Business & Economics, 2022, 2 (11).*

[10] *Casey LaFrance, Jennifer M. Allen. An Exploration of the Juxtaposition of Professional and Political Accountability in Local Law Enforcement Management. International Journal of Police Science & Management, 2010, 12 (1).*