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COMPETITION AS AN ELEMENT OF LEGAL STRUCTURE OF THE GROUND OF THE ARISING OF LABOUR RELATIONS WITH SCIENTISTS

The article is devoted to the procedure of competitive selection of scientific staff. The author emphasizes the gaps in legislation on the competition for researchers' vacancies in the research institutions. The article also analyzes the requirements for candidates for researchers and examines the procedure of the invalid competition's results determining.

Keywords: competition, researcher, vacancies, research institution, academic (scientific, scientific and technical, technical) council.

Problem setting. The complexity of scientific work determines the necessity of the staffing the university graduates skilled workers who are able to fulfill complex scientific tasks. Consequently, the vacancies in the research institutions traditionally fill by the competition.

Since 1962 the researchers vacancies filling procedure regulated by the Instruction on the procedure of filling the researchers' vacancies in the research institutions, approved by the Presidium of the USSR Academy of Sciences on December 14, 1962 № 982 (hereinafter – Instruction dated 1962) [1].

After the adoption of the Law of Ukraine «On the basis of the state policy in the science and scientific and technical activity field» in 1991 the competitive procedure in hiring (vacancies) was not used because p. 3. Art. 25 included the scientists employing under the contract.

And only after amending this law in 1998 the provision that provided the competition procedure of hiring the academic staff has been adopted (Articles 6, 10) [2]. Part 5 of Article 6 of the Law of Ukraine «On scientific and technical activity» dated November, 26, 2015 № 848-VIII [3] also provides that the employment of researchers conducts at the competitive basis, unless otherwise provided by law of Ukraine. The competition procedure on filling the vacancy of academic positions of the state research institutions approved by the Cabinet of Ministers of Ukraine in the Model Regulation; for research institutions of other ownership type – by their statutes (regulations) or other constituent documents. At present time, such Regulation hasn't been developed yet, and therefore, the questions about the provisions on competitive procedure conducting arises.

Target of research. The aim of the article is to analyze the procedure of competition of scientific staff.

Analysis of recent research and publications. The competitive procedure for personnel selection has been studied by many legal scholars, among them: H. O. Abramova, M. H. Alexandrov, E. I. Voylenko, V. L. Geikhman, M. V. Zhuravlev, L. I. Lazor, B. D. Lebi-na, R. Z. Lifshitz, A. Ju. Pasherstnyk, O. S. Pashkov, L. F. Petrenko, V. A. Rassudovskii, V. M. Smirnov, G. A. Tsypkin and others.

Article's main body. The interest to scientific issues related to the competition concerning with, firstly, the fact that the competitive staffing has a number of advantages compared with the employment under the general rules, secondly, the fact that in the case of competition conducting the labor relations arising from the actual legal components, thirdly, the need to determine the validity of a decision of the competitive bodies on applicant for post selection.

Competition procedure on filling the vacancy allows to provide: the possibility of selecting the best scientific staff from the number of people taking part in the competition that precludes the accepting for employment of «random people»; preliminary assessment of the individual qualities of the employee; openness and transparency of the candidates selection procedure; taking into account the objective criteria that confirm the appropriate level of academic qualifications and exclude the subjectivity in the staff selection. Compliance with the competitive procedure provides researchers' full rights. Without the compliance with these legal requirements the scholars' rights are limited.

Competition (lat. concursus) – it's the competition that aims to identify the best of the participants (candidates). Competition – is the special form of scientific staff selection. The main purpose of the competition is the selection that based on legislative criteria with the

greater number of applicants. It is a socio-legal method of estimating the business and moral qualities of candidates that is based on democratic principles of objectivity, transparency and competition.

The first attempts to implement the competitive selection of scientific staff in some research institutions refer to 1918, but it did not lead to expected results. In some research institutions competitive procedure for filling vacancies with the approval of major categories of scientists by higher authorities was introduced in 1925. And the jobs uniform nomenclature in research institutions has been confirmed in 1931, and it hasn't had the significant changes until now.

Then the practice of competitive selection of scientific staff in research institutions began to spread with the improving of the legislation on competition in high school. In some departments the competition procedure took place under the departmental orders and instructions. The beginning of the competitions conducting in research institutions of the USSR Academy of Sciences refers to 1947, when the competitive senior researchers' vacancies filling were established. Since 1962 the procedure of filling the vacancies regulates by Instruction on the procedure of filling the vacancies of the researchers of research institutions.

According to the Resolution of the Verkhovna Rada of Ukraine «On the order of the temporary validity of certain legislative acts of the USSR on the territory of Ukraine» dated September, 12, 1991 [4]. The Instruction dated 1962 is in force, because these issues are not regulated sufficiently by the legislation of Ukraine, it does not contradict the Constitution of Ukraine and Laws of Ukraine, although it was adopted in the non-existent state.

The instruction dated 1962 provides for a competitive procedure for filling the vacancies of researchers, among them: heads of academic departments, laboratories, sectors; senior and junior researchers at research institutions of the Academy of Sciences, the Academies of Sciences of the Union republics, specialized academies, universities, ministries and departments (the position of chief and leading researchers assigned in 1968).

Article 31 of the Law of Ukraine «On scientific and technical activity» establishes the posts of scientists in scientific institutions (in its branches and in other separate units), in scientific departments of public entities and in entities of other property forms, among them:

1) head (president, general director, chief designer, director, head);

2) deputy head (first vice president, vice president, deputy general director, deputy chief designer, deputy director and head) of scientific work;

3) scientific adviser to the directorate of the research institutions;

4) member of the National Academy of Sciences of Ukraine or the national academies of sciences;

5) advisor of the National Academy of Sciences of Ukraine or the national academies of sciences;

6) academician – the secretary of the sector (his deputies);

7) chief scientific secretary, scientific secretary (their deputies);

8) head (executive secretary, head editor) and deputy managers (executive secretary, head editor) of the research unit, scientific publisher, editors of scientific publications;

9) chief designer, chief engineer, chief engineer of the mainstream of scientific institutions, organizations and their deputies;

10) leading designer, senior engineer, senior engineer of the mainstream of scientific institutions, organizations;

11) leading editor of the scientific publishing house, of the periodic scientific publications;

12) chief scientific officer;

13) leading researcher;

14) senior researcher;

15) researcher;

16) researcher and consultant;

17) junior researcher;

18) PhD student.

The Law of Ukraine «On scientific and technical activity» and the Instruction dated 1962 don't contain the definition of the vacancy. We believe that the research institutions should use the definition contained in par. 4 p. 2 of Guidelines for the competitive selection of filling the vacancies of teaching staff and the conclusion of the employment agreements (contracts), approved by the Ministry of Education and Science of Ukraine dated October, 05, 2015 № 1005 [5]. According to the Guidelines the post considered as vacant after the dismissal of scientific and pedagogical employee on the grounds provided by law, as well as in the case of introduction of new post in the university in accordance with the schedule of positions and salaries.

The selection of a particular competition participant is the legal fact in the actual legal structure. The conditions for conclusion the employment contract arises only after the competitive selection. Solodovnyk L. V. noted that the sectorial specificity of labor law involves the need to take into account the different circumstances during the regulation of complex social relations. Most legal consequences are not established as a result of certain legal facts, but as a result of legal structure [6].

There are several legal facts and conditions concerning with the competitive procedure of filling the vacancies as the actual legal set of facts as the ground of arising labor relations with scientists, among them: application, its examination by the competition commission, the commission's decision on the selection, approval of the decision by the head of the scientific institution. Competition selection act and the employment contract are

the legal facts and the approval of the decision by the head and imposing of the order are the acts that accompany before mentioned legal facts. However, what legal act is the precedence to the employment relationship with the scientist – competition selecting act or an employment contract? Some authors consider the employment contract as the main legal fact because it's the act of the will of the two parties, and the competition takes the second place in the legal set of facts. We believe that the competition selection act is the main fact in the actual set of facts that generate the employment relationship with academic staff, because such decision makes by collegiate body composed of the most influential scientists of scientific institutions who are able to give a principled and fair estimate of the business and professional qualities of the candidate on a scientific post.

According to the Instruction dated 1962 announcement of competition hosted by the head of scientific institutions in periodic mass media within one month to the day of the competition conducting, but there is no deadline for documents submission. We consider the necessity to establish a rule that the applicants are eligible to apply for one month from the date of announcement of the competition. Resulting from the absence of such standards research institutions publish the different information about the competition, and it leads to narrowing of researchers' guaranties on the right to labor realization.

The feature of the procedure of the arising the employment relationship with scientists is the need to provide various supporting documents, such as a list of scientific works and (or) inventions, copies of university degree documents, documents on awarding the scientific degree and (or) awarding academic status, employment reference letter, personal data sheet with photo frame that corresponds attained age and others. Such requirements are due to qualifying characteristics that apply to the scientists in the case of vacancies filling, and due to the need for correct assessment of professional and business skills of the applicant.

As for the employment reference of the scholar's labor (as a document), the literature expressed different views about the need for the existence of such document at all. Employment reference – a document that provides assessment of business and moral qualities of the employee, his strengths and weaknesses, the qualifications, compliance with labor discipline, progress indicators, behavior at home, the presence of state awards and incentives and so on. Thus, A. M. Omarov analyzed a number of the employment references and found that many of them are formalistic. They can serve as a model of unscrupulousness and liberalism, because their contents cannot make the right impression about the employee. Many of them resemble the portraits of twins that do not reflect the individual characteristics of employees. The

author opposed the granting of such employment reference and defends the opinion about the necessity to increase their role and credibility by displaying the objective information on each person in such employment reference [7].

We believe that during the hiring of the scientists the employment reference from previous job should be required. It will provide to scientific institution, firstly, the additional information about the business, professional and moral skills of the applicant. Secondly, the requirement to give the employment reference will increase the scientist's responsibility for the attitude to the studies, for the behavior in the team. And, thirdly, the work of some scientists become the national importance, therefore, such result of scientific work go outside the bounds of the particular scientific institution.

We should note that the regulations of recent years resolve the issue of documents required in hiring in statutes, by the local order. For example p. 10 Art. 55 of the Law of Ukraine «On Higher Education» [8] provides that, according to the legislation, the statute of the university can set the additional requirements to persons who may occupy the teaching staff posts (such as foreign language skills, computer skills etc.).

The applicant for participation in the competition in addition to the professional skills should have high moral qualities. Under such qualities we should understood a system of views and beliefs about society life that encourage serving for human being benefits as the highest social value of the state. This requirement for researchers should be recognized as fair and reasonable, because according to the Law of Ukraine «On scientific and technical activity» during the exercise of scientific, technical and educational activities scientific employee shouldn't harm human health, life and environment; should comply with ethical norms of the scientific community, should respect the intellectual property rights. Scientific employee is entitled to a reasoned refusal to participate in research (science and technology) activities that could have negative results for human, society or environment. He can't be compelled to conduct the researches that may cause the harm to human health, life and environmental, and can't be bringing to responsibility for refusing to participate in such researches.

In modern globalization conditions the results of the research can be used not only in the public interest, but also it can be harmful to the state and public in general. Acquire new knowledge should be used in positive purposes, according to human values and morality. History knows the terrible examples of scientific achievements abusing. Genetics, Darwin's works and Mendel's discoveries used for self-interested aims of politicians and ideologues for the purposes of confirmation of the theories of racism, violence and genocide. Next in turn are the new threats and abuses: eugenics, discrimination on

the grounds of genetic heritage, Internet selling of gametes over, the services of surrogate motherhood, trafficking in human organs, the emergence of clinics dealing with euthanasia, medical experiments that are contrary to human dignity and so on. Now they are a real threat that accompanied by low morality, greed or even madness.

Ukraine has a Law «On protection of public morals» dated November, 20, 2003 № 1296-IV [9] that provides for the need to ban products that promote war, national or religious hatred, fanaticism, blasphemy and other negative actions. This prohibition shall fully apply to the researches.

Due to the higher moral requirements for a person who is engaged in scientific activities, the question arises: is it possible to allow to the research activities the persons who have been arraigned on a criminal charge? According to Article 55 of the Criminal Code of Ukraine [10] disqualification to hold certain positions or engage in certain activities can be assigned as the main punishment for a term of two to five years or as additional punishment for a term of one to three years upon conviction. As a general rule, it's impossible to refuse the applicant on the grounds that in the past such person has committed a crime. In our opinion, the application of the person who held the scientific post and committed a crime related to his professional activities can be refused on the basis of moral considerations (for example, illegal experiments on humans (Art. 142 of the Criminal Code), violation of the law on transplantation of human organs or tissue (Art. 143 of the Criminal Code), etc.), unless the conviction for the crime won't be cleared or canceled in accordance with the law. The decision to refuse in such cases should make the scientific (academic, scientific, technical, technical) council of scientific institution similar to the deprivation of scientific degree or academic rank based on the materials submitted by the competition commission.

The legislation of Ukraine (including the Instruction dated 1962 and others legal regulations) don't establish the provision on the minimum number of persons participating in the contest. In practice, there are cases where competition has just one participant, but there are different opinions on this issues expressed in the literature. Some scientists believe that the participation of one candidate doesn't detract the value of the competition, doesn't contrary to the law and the purpose of the competition is still achieved. Also it is important to ensure and maintain the proper level of requirements for competitive vacancies filling [11; 12]. This position supporting by S. O. Ivanov, he said that in the case of one application the competition with its procedure is present, despite the fact that the essence of competition is absent [13]. Others believe that the participation of one candidate is not a competition, because the basic principles of

competition aren't adhering. Geikhman V. L. proposes to recognize the competition with one participant failed [14]. He shares the position of E. I. Voylenka, who believes that the competition with one candidate is not carried out [15]. R. Z. Livshits notes that the competition take place if it's possible to choose the most worthy of several candidates. In other cases, we can speak about the selection on the vacant position [16]. Moreover, some authors believe that in the case of vacancy filling by the competition with one participant, it should be considered as a violation of law and the competition conducting under such conditions should be recognized invalid [17].

Of course, this position is right, because competition provides competitiveness. But this order of selection is a rule that could have exceptions. First, the legislation does not provide for a minimum number of people taking part in the competition. Secondly, we should consider the intension level of scientific staff in region. Furthermore, we should take into account the situations when from the one side – very authoritative person preferred by all members of academic (scientific, scientific and technical, technical) council, and from the other side – contenders that did not even dare to compete with him. In case when the applicant is famous scientist, the founder of scientific schools, he has authority in the scientific community. And the invention of other contender for the creation of a competitive environment is in appropriate.

We believe that in the case of competition with one participant, the competition should be considered as accomplished, because the publishing of announcement of competitive selection in the media created competitive environment.

According to the Instructions in 1962 the competition committee of 5–7 people should be created after the announcement of the competition. It consists of the chairman of the commission appointed by the head of the institution, 2–4 research workers elected by the academic (scientific, scientific and technical, technical) council and representatives of social organization. The chairman of the competition commission is the deputy head of the research institution or another leading specialist. Sometimes the head of the scientific and research institute becomes the chairman of the competition commission. On our opinion, this practice should be recognized unlawful.

Competition commission considers materials received from the participants, makes a writing reasoned decision on each candidate and provides its decisions to the council of scientific institution. The decision is taken by open vote by simple majority. Then the council by the secret ballot selects the candidate for the vacant position. The openness of the competition committee and the academic council is the obligatory condition of the activity. The consideration of the documents and announce-

ment of the winner may conduct in the presence of television and other media.

Thus, the researchers' vacancy filling conduct in two stages: consideration of materials by the competition committee and by the academic (scientific, scientific and technical, technical) council. This procedure of researchers' selection is correct, because the competition commission studying the materials and providing substantial assistance to the academic council.

The members of the competition committee should understand what business and professional qualities the candidates for the position should have in possession. The skills level of participants could be determined by the review of scientific papers and interviews on the content of researches. This analysis helps to select the best candidates, who can fulfil the tasks assigned to the scientific institution, and also helps to reject the candidacy of the people who does not meet the requirements to of the scientific staff.

The commission's recommendation on the selection or non-selection the candidate sent to academic (scientific, scientific and technical, technical) council. Academic (scientific, scientific and technical, technical) council should select the candidate by secret ballot. If the council divided into sections, such sections hear the decisions of the competition committee on the vacancy filling and make the decision by secret ballot. The decision of the section on selecting the senior researchers approves by the council's decision by an open ballot.

The winner is the candidate received the most votes of the council members who took part in the vote. If no candidate received a specified number of votes, the contest is failed. The research institution gives notice on the competition results in paper form. Council's decision approves by the head of research institution.

Approval – is a special way of the document certification after its signing that authorizes the extension of the document force at the defined range of institutions, officials and citizens. The document (that should be approved) comes into force only after its approval. Approval of the document conducting in two ways: by the stamp of approval or by the issuance of relevant administrative documents (decisions, order). Both methods are equally authoritative. The elements of the state of ap-

proval are: the word «Approved», job title, signature and name of the person who approves the document, the date of approval.

The Instruction dated 1962 doesn't provide the order of the approval the council's decision by the head of institution. So, the approval conducting in any way that accepted in the scientific establishment. If the council's decision is approved by the order, it is desirable to add the copy of this order to the decision.

According to the Art. 19 of the Instruction dated 1962 in case of head's disagreement with the academic council's decision the issue is submitted for review. This approval procedure was typical for the command and administrative governance. In modern conditions of the social life democratization the academic council's decision should be mandatory for the head. Art. 46 of the Law of Ukraine «On scientific and technical activity» points to the need for the combination of managing centralization and decentralization concerning with scientific activities. Art.10 of mentioned Law stipulates that academic (scientific, scientific and technical, technical) council of scientific institution is a collegial managing body of scientific and scientific-technical activities of the institution. Such council performs consultative and advisory functions. The issue of the approving the results of a competition on researchers vacancy filling is the exclusive competence of academic (scientific, scientific and technical, technical) council of scientific institution. According to the S. M. Chernova's opinion [18], we believe that the head of the scientific institution has the right to cancel the results of the competition only in the case of procedural violations.

Thus, we can **conclude** that it is necessary to adopt the Regulation on procedure for filling vacancies of scientists of research institutions, and such procedure should correspond to the today realities. It will give the opportunity to fill the gaps in the legal regulations of the labor relations with scholars arising. Such provisions should include the conditions of the competition (the order of the competition announcement, documents receiving, the procedure of candidates' selection, etc.), the rights and obligations of participants and the procedure of the recognition of the competition's results as invalid.

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КОНКУРС ЯК ЕЛЕМЕНТ ЮРИДИЧНОГО СКЛАДУ ПІДСТАВИ ВИНИКНЕННЯ ТРУДОВИХ ВІДНОСИН З НАУКОВЦЯМИ

Стаття присвячена порядку проведення конкурсного відбору наукових кадрів. Авторкою наголошується на прогалинах у законодавстві з питань проведення конкурсу на заміщення вакантних посад наукових працівників наукових установ, аналізуються вимоги, що пред'являються до кандидатів на посади науковців, розглядається порядок визнання результатів конкурсу недійсними.

Ключові слова: конкурс, науковий працівник, заміщення вакантних посад, наукова установа, вчена (наукова, науково-технічна, технічна) рада.

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КОНКУРС КАК ЭЛЕМЕНТ СЛОЖНОГО ЮРИДИЧЕСКОГО СОСТАВА ОСНОВАНИЯ ВОЗНИКНОВЕНИЯ ТРУДОВЫХ ПРАВООТНОШЕНИЙ С НАУЧНЫМИ РАБОТНИКАМИ

Статья посвящена порядку проведения конкурсного отбора научных кадров. Автором акцентируется внимание на существовании пробелов в законодательном регулировании вопросов проведения конкурса на замещение вакантных должностей научных работников научных учреждений, анализируются требования, которые предъявляются к кандидатам на должности научных работников, рассматривается порядок признания результатов конкурса недействительными.

Ключевые слова: конкурс, научный работник, замещение вакантных должностей, научное учреждение, ученый (научный, научно-технический, технический) совет.