



XXII PAN AMERICAN SANITARY CONFERENCE

XXXVIII REGIONAL COMMITTEE MEETING

WASHINGTON, D.C.

SEPTEMBER 1986

Provisional Agenda Item 6.3

CSP22/28 (Eng.)

1 August 1986

ORIGINAL: SPANISH

HIRING UNDER LOCAL CONDITIONS OF EMPLOYMENT FOR THE MOBILIZATION OF NATIONAL RESOURCES

The demand for the Organization's technical cooperation services creates a need for, among other things, new ways of hiring personnel both for professional and support posts. Under the Organization's rules and regulations as an agency of the United Nations system, the traditional status of personnel has been that of the international staff member, whether hired internationally or locally. Other arrangements permitted by the rules in effect are personal or temporary services, which do not create an employer-employee relationship.

However, the high cost of hiring international staff and the growing availability of local talent make it necessary to seek arrangements for the hiring of nationals that do set up an employer/employee relationship.

The Director presented to the Executive Committee Document CE97/23, Rev. 1 (annexed) on hiring under local conditions of employment for the mobilization of national resources, proposing a new hiring arrangement to be used in parallel with the hiring of international staff. This would make PAHO an international employer in respect of persons hired as international civil servants, and a national employer in respect of professional and supporting personnel hired subject to the labor laws and practices of the countries in which they serve. The latter would not be international civil servants.

The Committee discussed the Director's proposal at length and endorsed it as a useful and necessary response to the present situation in regard to international cooperation and the actual availability of funding. It was emphasized that this arrangement would enable the Organization to make greater use of national resources. It was made clear that there was no intention whatever of changing the international character of the Organization or of impairing the rights of personnel now serving as international civil servants.

The Executive Committee made changes in the proposed resolution presented in Document CE97/23, Rev. 1, and approved the following resolution for presentation to the XXII Pan American Sanitary Conference.

THE 97th MEETING OF THE EXECUTIVE COMMITTEE,

Having reviewed the Director's report on the local hiring of personnel (Document CE97/23, Rev. 1),

RESOLVES:

To recommend to the XXII Pan American Sanitary Conference the adoption of a resolution in the following terms:

THE XXII PAN AMERICAN SANITARY CONFERENCE,

Having reviewed the Director's report (Document CE97/23, Rev. 1) on the local hiring of personnel;

Considering that the Organization possesses, in its own right, the legal capacity needed to issue its own legally binding rules on the appointment, qualifications, rights and obligations of its employees, and further possesses within the territory of each of its Member Countries the juridical personality endowing it with the capacity to take legal actions and enter into agreements, of any nature; and

Mindful that these two capacities make it legally possible and fitting to establish two categories of personnel in the Organization, the first comprised of international staff members, whether internationally or locally recruited, who will continue to be governed, as hitherto, by the Staff Regulations and Staff Rules of PAHO, and the second, created by means of this resolution, consisting of national staff members appointed to such posts as the Director shall determine, who shall be governed in all their relations with the Organization by the labor laws and practices of the country in which they serve. This new category of personnel shall replace that of the present contractors and consultants in cases in which there actually exists an employer/employee relationship, and personnel in this category shall be referred to as national staff members because their conditions of employment shall be governed, in fact and in law, by the labor legislation and practices of the countries in which they serve,

RESOLVES:

1. That the Staff Regulations of PAHO are amended as follows:

The following text is added to Article I:

1.12 The Bureau may hire under local conditions of employment national staff members (nationals of the country and aliens, whether residents or not, who legally qualify for employment there), to whom the existing Staff Regulations and Rules shall not apply save in regard to the present Article I on Duties, Obligations and Privileges as national employees and not as international staff members. Respecting privileges, such employees shall be governed by the Basic Agreement on Privileges and Immunities between the Organization and the country in which they are employed.

1.13 The contracts of such national employees shall be governed in every aspect by the social security and labor laws and practices of the country concerned.

1.14 The Director shall determine the posts to be subject to these rules and shall establish scales of salaries and allowances, in conformity with competitive conditions of employment of the locality in the type of work performed or related to the functions of the office.

1.15 National employees shall have access to arbitration or labor tribunals of the countries in which they are employed for the settlement of disputes, in accordance with their respective contracts, and shall therefore have no access to the Administrative Tribunal of the International Labor Organization, whose competence is not recognized in respect of national employees.

2. To request the Director to propose such rules as he may deem appropriate to regulate contracts of this type for national personnel, subject to confirmation by the Executive Committee pursuant to Staff Rule 015.2, and to incorporate them into the Staff Rules as a separate category.



*executive committee of
the directing council*

PAN AMERICAN
HEALTH
ORGANIZATION

*working party of
the regional committee*

WORLD
HEALTH
ORGANIZATION

CSP22/28 (Eng.)
ANNEX



97th Meeting
Washington, D.C.
June 1986

Provisional Agenda Item 5.5

CE97/23, Rev. 1 (Eng.)
19 June 1986
ORIGINAL: SPANISH

HIRING UNDER LOCAL CONDITIONS OF EMPLOYMENT FOR THE MOBILIZATION OF
NATIONAL RESOURCES

The present needs for technical cooperation between PAHO and its Member Countries require greater efficiency and effectiveness in the use of the financial resources available to the Organization. This new economic, technical and administrative situation calls for fresh approaches that will permit the Organization to secure the qualified personnel it needs.

Agencies of international cooperation have traditionally hired their personnel, that is, those with whom an employment (employer/employee) relationship is established, under rules that the agency has enacted for the purpose, which generally characterize an international civil service.

Owing to (a) the high cost of such international employment, and (b) the existence in most Member Countries of highly qualified manpower, it is becoming necessary, in the interest as much of the Member Governments as of the Organization, to increase the national hiring of professional, as well as of general service personnel.

The purpose of the present document is to present and justify the alternative of engaging professional and general service personnel under local conditions of employment as a legal basis for employment together with international employment, and to institutionalize this legal basis through its inclusion in the PAHO's Staff Regulations and Staff Rules.

This would make PAHO (a) an international employer in respect of persons hired as international civil servants and, as such, subject to the Staff Regulations and Rules, and (b) a national employer in respect of persons hired as national personnel, subject to the labor laws and practices of the country in which they serve. National employees or staff members would be defined as both nationals of the country and foreigners, whether residents or not, who are legally qualified for employment. Both types of personnel would be PAHO employees, each subject to the appropriate regulatory system. This proposal would give PAHO the legal mechanisms necessary to enable it to hire the human resources it needs under the system it considers most appropriate in light of its resources and the specific situation involved.

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HIRING UNDER LOCAL CONDITIONS OF EMPLOYMENT FOR
THE MOBILIZATION OF NATIONAL RESOURCES

I. INTRODUCTION

The present needs for technical cooperation between PAHO and its Member Countries require greater efficiency and effectiveness in the use of the financial resources available to the Organization. This new economic, technical and administrative situation calls for fresh approaches that will permit the Organization to hire the qualified personnel it needs. Particularly required is the availability of a variety of legal mechanisms to enable PAHO to accomplish its mission in circumstances which are constantly evolving.

International cooperation agencies have traditionally hired their personnel, that is, those with whom an employment (employer/employee) relationship is established, under rules that the agency has enacted for the purpose, and which generally characterize an international civil service. International hiring has been used for personnel in both the professional and the general services (secretarial, custodial and others) categories even though the rules generally allow people in the latter category to be hired locally instead.

Owing to (a) the high cost of such international employment, and (b) the existence in most Member Countries of highly qualified manpower, it is becoming necessary, in the interest as much of the Member Governments as of the Organization, to increase the national hiring of professional as well as of general service personnel. In the quest for efficiency in the use of the scarce funds available, and of effectiveness in the provision of services to the countries in the context of international cooperation, resort has been had to a variety of arrangements for the provision of those temporary services, chiefly by leasing of services or personal service contracts.

The distinctive feature of these arrangements, which are considered in detail further on, is that they establish a non-employment relationship, that is, they do not set up--in a legal sense--an employer/employee relationship, if properly used in keeping with their juridical purpose. Otherwise, they lead to an employer/employee relationship, with all the attendant legal and financial implications.

However, the present need of the Centers and other units of PAHO is for manpower who are hired locally under conditions that do constitute a labor relationship, that is, that of employer and employee.

The purpose of this document is to present and justify the alternative of hiring professional as well as general service personnel under local conditions of employment as a basis for employment by PAHO

together with international employment, and to institutionalize this alternative by including it in PAHO's Staff Regulations and Staff Rules.

This would make PAHO (a) an international employer in respect of persons hired as international civil servants and as such subject to the Staff Regulations and Rules, and (b) a national employer in respect of persons hired as national personnel subject to the labor laws and practices of the country in which they serve. National employees or staff members would be defined as both nationals of the country and as foreigners, whether residents or not, who are legally qualified for employment. Both types of personnel would be PAHO employees, each subject to the appropriate regulatory system. This proposal would give PAHO the legal mechanisms required to enable the Organization to hire the manpower it needs under the system it considers most appropriate in light of its resources and the specific situation involved.

II. DESCRIPTION OF THE PROBLEM

A. PAHO, as an entity with juridical personality, and also as a component part, i.e., Regional Office of the World Health Organization (WHO), has the authority to issue its own rules and regulations to govern, with legally binding force, the employment relationships between the Organization and its staff members.

In the exercise of this authority, PAHO has issued the internal rules that govern its employment relationships with its personnel who, in general, are international civil servants with the rights and obligations that attach to that status. Staff members fall into two main categories: staff members recruited internationally, and those recruited locally. With a few exceptions, such as the method of determining their remuneration, education grants and home leave travel, the provisions of the Staff Regulations and Staff Rules are equally applicable to staff members in both categories.

B. Section 13 of PAHO's Staff Rules, "Special Employment Conditions," contains some rules that apply only to locally recruited staff. The last two Staff Rules (1320 and 1330) authorize the Director to appoint short-term staff needed for conference and other short-term service, as well as to appoint consultants. Those Rules also state that the provisions of the other Staff Rules shall not apply to such staff.

The WHO Manual (VI.7) provides the rules for what is referred to as the "contractual service agreement" valid for PAHO, which authorizes the hiring of individuals to perform specific tasks, normally of short duration, without supervision by the Organization, and for which payment is normally made in a lump sum (190). The next paragraph (200) adds that in such cases the contractor undertakes to carry out a definite piece of work in a specified period of time and normally not on the premises of the Organization. The writing of a computer program is cited as a typical example of services of this kind. And paragraph 210 of the Manual notes that the "contractual service agreement" should not be used for work which would typically be done under a short-term employment contract.

Finally, paragraph 200 of the PAHO/WHO Manual* (pink pages) states a number of exceptions to the principle enunciated in aforementioned WHO Manual paragraph 200. It says that the "contractual service agreement" may also be used for:

- General services such as secretarial and clerical help in support of specific projects or activities for periods of less than three months and with payment and other terms and conditions set in accordance with local labor practices, provided that wherever possible such services should be obtained through an agency that specializes in providing secretarial and clerical help. These contracts shall not be renewable and may be extended on very exceptional circumstances only with the approval of Personnel (APL).
- General services such as building maintenance, janitorial and security services provided that contracts shall include terms and conditions required under local laws and practices. These contracts may not exceed a period of one year of performance but may be renewed after an annual review and revision as appropriate of contract terms and conditions.

C. The provisions of the foregoing paragraph are legally unclear. In the first place, in Staff Rules 1320 and 1330 the provisions of other sections of the Staff Rules are not applied, and it appears natural to conclude that those that do apply are the pertinent provisions of the local laws. Secondly, the provisions of paragraphs 190, 200 and 210 of the WHO Manual are concerned with the "contractual service agreement," which conform, under current rules in all Latin American labor legislation, to the "leasing of services." However, when paragraph 200 of the PAHO/WHO Manual states, or purports to state, exceptions to WHO Manual paragraph 190, it widens the application of the "contractual service agreement" to embrace situations that in Latin American legislation do not correspond to the "leasing of services" or, as in the Manual, to a "contractual service agreement," but are governed by the rules of contract of employment. The statement that, in those cases, the contract "should include terms and conditions required under local laws and practices" does not dispel the confusion that the text creates.

The confusion derives from the fact that a contract which, juridically, is for the lease of services can never be used to serve as an employment contract. The two contracts differ in their juridical nature and substance and cannot and must not be confused. If there is any duration to the functions, for however short a time, subordination of employee to employer, and other features proper to the employment contract, the contractual relationship will always have the characteristics of employment, even if called a lease of services or a contractual service agreement. In law, the juridical nature, and not the name, is controlling of the legal consequences.

* The PAHO/WHO Manual here means the body of rules of PAHO exceptions to the WHO Manual, applicable only in PAHO.

Important, for the same reason, is the rule contained in WHO Manual paragraph 230 directing the inclusion in contractual service agreements of a clause stating that the contract "does not create any employer/employee relationship." As explained above, this clause is completely without effect, and a contract containing it will remain an employment contract if it possesses the features of an employment contract, despite the attempt to deny the creation of an employment relationship.

It must also be noted that the "United Nations Contract" is being used with increasing frequency even though it has never been approved by WHO, and there is only a proposal adopted at a meeting of Directors of Support Programs (Geneva, 21-25 October 1985) for the incorporation of this type of contract into the WHO Manual. It has in fact become part of the Organization's contractual practice, and is essentially no more than a variation on the previously mentioned "contractual service agreement," but applied to professionals recruited locally for some specific project organized or sponsored by PAHO. As in the previous case, the intent is to hire professionals for permanent employment under this arrangement, which is given a short-term character (not longer than one year), and in which the professional explicitly states his understanding that he is only contracting to render services, which does not create an employer/employee relationship between the parties. In addition, another clause is included in which the government of the country in which the hiring is done accepts the validity of this type of contract.

For the legal reasons just adduced, these statements do not alter the fact that the documents constitute employment contracts. To this may be added that the opinion given by the government on the matter is of no importance whatever if, as is generally the case, the country's legislation sanctions the existence of the employment contract as of overriding public interest, that is, unalterable by agreement by the of the parties, even if a governmental authority rules otherwise. The effects of such a contract can only be modified by the enactment of legislation.

III. THE PRESENT SITUATION AND ITS SIGNIFICANCE

PAHO currently has a sizable number of "contractors" and "consultants," who are treated as such in their relations with the Organization.

Judgment No. 701 of November 14 1985, of the Administrative Tribunal of the International Labor Organization, handed down in an appeal brought against PAHO in a situation that arose at the beginning of the previous decade, clearly established that no legal effect will be given to a declaration by the parties that no employer-employee relationship is established by the contract, when in fact such a relationship is established. In consequence, the Tribunal accepted an appeal in which the plaintiff requested to be declared to be a regular staff member of the Organization. However, the Tribunal calculated the

indemnity to be paid to the plaintiff in accordance with the law of the country in which the case arose, instead of in accordance with the provisions of PAHO's Staff Rules. It gave no reasons for its application of that law and not PAHO's Staff Rules and Regulations, but the judgment had enough explanation to convey that the Organization was being given a warning.

One way to solve the problem quickly is to make proper use of the legal powers that the Organization possesses.

Aware of this situation, the PAHO Administration has studied this issue matter, in a general and specific manner. The Offices of Legal Affairs and of Administration and, within the latter, the Personnel Office, have discussed at length the options available, and particularly that of PAHO's becoming a national employer, without prejudice to its status as an international organization or to its authority to hire as an international employer.

In relation to the Pan American Centers, the Director appointed a Working Group to study the situation of CEPANZO, as reported in Document CD31/10. The Directing Council then approved Resolution CD31.R24 asking the Director to continue to take appropriate actions to improve the cost-effectiveness and efficiency of the Centers in the use of available resources, including the establishment of new administrative and personnel systems.

In compliance with this resolution, studies were done to identify the features of a legally viable personnel hiring system. In all cases it was concluded that the establishment of a system for hiring under national conditions of employment is the appropriate course which best meets the criteria established by the Governing Bodies and the Administration. The new hiring system is expected to go into operation at CEPANZO, ECO, CLAP and CFNI in the course of 1986.

Moreover, the solution found for the Centers is a universal arrangement, suitable and useful for all situations in which PAHO needs to hire national personnel. Hence, the proposal made to amend PAHO's Staff Regulations and Rules is of general application, and not confined to the Centers.

IV. PROPOSED SOLUTION

The solution lies in establishing two different legal systems for the hiring of the Organization's staff members:

- a) On the one hand, international staff members, whether recruited internationally or locally, who are subject to PAHO's Staff Regulations and Rules, as they are today; and

- b) On the other hand, national staff members, whose employment relationship is formally subject to the labor laws and practices of the Member Country concerned.

To accomplish this purpose, an amendment to PAHO's Staff Rules and Regulations will suffice. Section 13 of the present Rules contains provisions on "special employment conditions." If the proposal were implemented, this heading would be retained, but with provisions added for the basic regulation of the second category of staff members, that is, the provisions needed to make them subject to national labor laws.

It is enough to provide that, in the PAHO Centers and Field Offices, the Organization will have national staff members whose contracts are governed by the labor laws of the country concerned; to determine the types of contracts that may be placed in this category; to establish that work-related accidents and the social security coverage of those staff members, as well as all matters relating to life and health insurance, are to be governed by the national laws; and to authorize the Director to decide which specific posts are to be subject to this system and to issue the requisite implementing instructions. This would make these national employees of the Organization regular staff members subject to a different legal system.

In this new approach, the Organization would retain the right to hire "consultants" and other personnel whose services it may occasionally require and who, owing to the nature of their services, do not become permanent staff members but are governed by a "lease of services" contract, which is universally applicable and provided for in the legislations of all Latin American countries, in keeping with the Staff Rules and Regulations. This would put an end to the hiring of permanent staff as "contractors" subject to a "contractual service agreement" or a "United Nations contract."

V. SITUATION IN OTHER INTERNATIONAL AGENCIES

The situation described is not confined to this Organization. There are other international agencies that have dealt with the same situation, and the course they have adopted coincides generally with the one here proposed.

In 1976, the Inter-American Development Bank (IDB) established the status of "local employee." The Manual of the IDB's Field Offices defines a local employee as a person of any nationality who provides services to a Field Office whose remuneration is paid in the local currency of the country in which the Field Office operates. The Local Personnel Regulations of each of the Bank's Field Offices contain the provisions established in the labor laws of its host country.

In the Organization of American States (OAS) the problem is minimal because its offices in the various Member Countries have very few staff and, therefore, there are even fewer local staff members (referred to as "local locals") in each country office.

No special regulations exist, from which it follows, theoretically, that the OAS has only international staff members. In practice, however, not all of the international provisions are applied to "local locals" personnel.

In the Inter-American Institute for Cooperation on Agriculture (IICA) a very clear distinction is made between international and local personnel. Established first as an internal measure in 1977, it was subsequently institutionalized in 1981, by incorporation into the Rules of the General Directorate by decision of the Inter-American Board of Agriculture.

In IICA, International Personnel are defined essentially as persons of high academic achievement and extensive professional experience who have been appointed or engaged as international civil servants to perform services in any Member Country; they include Regular International Personnel, with appointments of indefinite duration, subject to review every two years; Temporary International Personnel, appointed for fixed terms of up to two years; Associate International Personnel, appointed to perform professional, technical or scientific functions in accordance with agreements or contracts entered into with other institutions participating in programs of common interest, or to provide services ad honorem, with the authorization of the institution that employs them.

Local Professional Personnel are defined as specialists with professional degrees, bound to the Institute by contracts of employment, conforming to the labor laws and practices in the country where the services are to be performed, and in conformity with the regulations of the Institute which do not contravene those laws and practices. General Service Personnel are defined as persons performing tasks for which specific technical training may be required but a professional degree is not essential, and who are hired locally to perform administrative functions or secretarial or auxiliary services. They are hired in accordance with the labor laws and practices of the country in which they are to be employed and with the relevant provisions of the Institute that do not conflict with those laws and practices (Art. 12, Rules of the General Directorate of IICA) (In February 1986, IICA had 800 local staff, 166 professionals and 634 general service staff).

The following proposed resolution spells out the details of the rules that would have to be amended and rescinded:

Proposed Resolution

HIRING UNDER LOCAL CONDITIONS OF EMPLOYMENT FOR
THE MOBILIZATION OF NATIONAL RESOURCES

THE 97th MEETING OF THE EXECUTIVE COMMITTEE,

Having reviewed the Director's report on the local hiring of personnel (Document CE97/23, Rev. 1),

RESOLVES:

To recommend to the XXII Pan American Sanitary Conference the adoption of a resolution in the following terms:

THE XXII PAN AMERICAN SANITARY CONFERENCE,

Having reviewed the Director's report (Document CE97/23, Rev. 1) on the local hiring of personnel;

Considering that the Organization possesses, in its own right and as a specialized agency of the United Nations, the legal capacity needed to issue its own legally binding rules on the appointment, qualifications, rights and obligations of its employees, and further possesses within the territory of each of its Member Countries the juridical personality endowing it with the capacity to take legal actions and enter into agreements, of any nature; and

Mindful that these two capacities make it legally possible and fitting to establish two categories of personnel in the Organization, the first comprised of international staff members, whether internationally or locally recruited, who will continue to be governed, as hitherto, by the Staff Regulations and Staff Rules of PAHO, and the second, created by means of this resolution, consisting of national staff members appointed to such posts as the Director shall determine, who shall be governed in all their relations with the Organization by the labor laws and practices of the country in which they serve. This second category of personnel shall replace that of the present contractors and consultants in cases in which there actually exists an employer/employee relationship, and personnel in this category shall be referred to as national staff members because their conditions of employment shall be governed, in fact and in law, by the labor legislation and practices of the countries in which they serve,

RESOLVES:

1. That the Staff Regulations of PAHO are amended as follows:
 - A. The following text is added to Article I:
 - 1.12 The Bureau may hire under local conditions of employment national staff members (nationals of the country and aliens, whether residents or not, who legally qualify for employment there), to whom the Staff Regulations and Rules shall not apply save in regard to the present Article I on Duties, Obligations and Privileges. Respecting privileges, such employees shall be governed by the Basic Agreement on Privileges and Immunities between the Organization and the country in which they are employed.
 - 1.13 The contracts of such national employees shall be governed in every aspect, including those of work-related accidents, social security and pensions, by the labor laws and practices of the country concerned.
 - 1.14 The Director shall determine the posts to be subject to these rules and shall establish scales of salaries and allowances, in conformity with competitive conditions of employment of the locality in the type of work performed or related to the functions of the office.
 - 1.15 National employees shall have access to arbitration or labor tribunals of the countries in which they are employed for the settlement of disputes, in accordance with their respective contracts, and shall therefore have no access to the Administrative Tribunal of the International Labor Organization, whose competence is not recognized in respect of national employees.
2. To request the Director to issue such rules as he may deem appropriate to regulate contracts of this type for national personnel, subject to confirmation by the Executive Committee pursuant to Staff Rule 015.2, and to incorporate them into the Staff Rules.