



**SOCIAL SCIENCE OF PUBLIC ADMINISTRATION: AN APPROACH TO THE LEGAL
IMPLICATIONS OF HIRING WITHOUT TENDERING**

**CIÊNCIA SOCIAL DA ADMINISTRAÇÃO PÚBLICA: UMA ABORDAGEM ÀS IMPLICAÇÕES
JURÍDICAS DA CONTRATAÇÃO SEM CONCURSO PÚBLICO**

**CIENCIAS SOCIALES DE LA ADMINISTRACIÓN PÚBLICA: UNA APROXIMACIÓN A LAS
IMPLICACIONES JURÍDICAS DE LA CONTRATACIÓN SIN LICITACIÓN**

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ABSTRACT

From the Federal Constitution of 1988, the investiture in public employment goes through approval in a public contest and this prediction, in addition to moralizing, requires planning by the Public Administration. In this perspective, the problem of the study presents the question: What are the administrative consequences for the investiture in public positions without public tender? This article aimed to identify the legal implications for the public administration of contracting without tender. It was intended to analyze issues such as nepotism and clientelism, cultural heritage of public administration; to situate the questions related to the constitutional precepts of hiring public servants. The presuppositions of the study point out that the hiring of civil servants has as a precept the realization of a public tender, foreseen as regulatory principles of morality and legality. In order to respond to the objectives of the study and the identified problem, a bibliographic research was carried out based on the theoretical foundations of authors. The results showed the legal implications of hiring without a public tender, showing that the constitutional precepts provide for the realization of a public tender, based on the right of competition and opportunity for the citizen to be invested in the public service. At this juncture, the practice of nepotism, legacy of the old public administration, undergoes transformations, being submitted to the framework of administrative improbity to offenders, still under the risk of nullity of the act, fine and loss of position. The Federal Constitution determined meritocracy through a public contest to avoid serving interests outside the public service. The principles of public administration are solidly based, providing for competition as a form of persecution against civil servants.

KEYWORDS: Public Administration. Public Tender. Administrative Improbity. Nullity of the Act. Constitutional Precepts.

RESUMO

A partir da Constituição Federal de 1988, a investidura no emprego público passa por aprovação em concurso público e esta previsão, além de moralizadora, requer planejamento por parte da Administração Pública: Quais são as consequências administrativas para a investidura em cargos públicos sem concurso público? Este artigo visa identificar as implicações legais para a administração pública da contratação sem licitação pública. O objetivo é analisar questões como nepotismo e clientelismo, patrimônio cultural da administração pública; situar as questões relacionadas aos preceitos constitucionais de contratação de servidores públicos. Os pressupostos do estudo apontam que a contratação de servidores públicos tem como preceito a realização de uma licitação pública, prevista como princípios reguladores de moralidade e legalidade. A fim de responder aos objetivos do estudo e ao problema identificado, foi realizada uma pesquisa bibliográfica com base nos fundamentos teóricos dos autores. Os resultados mostraram as implicações legais da contratação sem concurso público, mostrando que os preceitos constitucionais prevêm a realização de um concurso público, baseado no direito de concorrência e oportunidade para o cidadão de ser investido no serviço público. Neste momento, a prática do nepotismo, legado da antiga administração pública, sofre transformações, sendo submetida ao quadro de improbidade administrativa aos infratores,

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RECIMA21 - REVISTA CIENTÍFICA MULTIDISCIPLINAR ISSN 2675-6218

SOCIAL SCIENCE OF PUBLIC ADMINISTRATION: AN APPROACH TO THE LEGAL IMPLICATIONS
OF HIRING WITHOUT TENDERING
Antônio José Ribeiro Nunes

ainda sob o risco de nulidade do ato, multa e perda de posição. A Constituição Federal determinou a meritocracia através de um concurso público para evitar servir interesses fora do serviço público. Os princípios da administração pública têm uma base sólida, prevendo a competição como forma de perseguição contra funcionários públicos.

PALAVRAS-CHAVE: Administração Pública. Concurso Público. Improbidade Administrativa. Nulidade do Ato. Preceitos Constitucionais.

RESUMEN

A partir de la Constitución Federal de 1988, la investidura en el empleo público pasa por la aprobación en concurso público y esta previsión, además de moralizante, exige planificación por parte de la Administración Pública. consecuencias administrativas de la investidura en cargos públicos sin concurso público? Este artículo tuvo como objetivo identificar las implicaciones jurídicas para la administración pública de la contratación sin licitación. Se pretendió analizar temas como el nepotismo y el clientelismo, patrimonio cultural de la administración pública; situar las cuestiones relativas a los preceptos constitucionales de contratación de servidores públicos. Los presupuestos del estudio apuntan que la contratación de servidores públicos tiene como precepto la realización de licitación pública, prevista como principios normativos de moralidad y legalidad. Para dar respuesta a los objetivos del estudio y al problema identificado, se realizó una investigación bibliográfica a partir de los fundamentos teóricos de los autores. Los resultados mostraron las implicaciones jurídicas de la contratación sin concurso público, demostrando que los preceptos constitucionales prevén la realización de un concurso público, con base en el derecho de competencia y la oportunidad del ciudadano de invertir en el servicio público. En esta coyuntura, la práctica del nepotismo, legado de la antigua administración pública, sufre transformaciones, sometiéndose al marco de la improbidad administrativa a los infractores, aún bajo riesgo de nulidad del acto, multa y pérdida del cargo. La Constitución Federal determinó la meritocracia a través de un concurso público para evitar servir intereses ajenos al servicio público. Los principios de la administración pública están sólidamente fundamentados, previendo la competencia como forma de persecución de los servidores públicos.

PALABRAS CLAVE: Administración Pública. Licitación Pública. Improbidad Administrativa. Nulidad de Ley, Preceptos Constitucionales.

1. INTRODUCTION

In the Public Administration, in many Brazilian municipalities, there is a delay to recruit public servants from the realization of contests, as must be determined considering the constitutional character. The lack of public tenders denies the citizen the right to claim a place in the public service in a legitimate way. However, this initiative is intended to make hiring without competition, as support support in political campaigns in exchange for votes, producing a situation without legal legality that has major implications. According to Lange (2017), all this archaic and addicted culture, based on illegality, evidenced the well-known political nepotism.

In this way, hiring without a public tender is outside the principle of legality, where the administration acts in a discretionary way, without the due legal competence of the hiring and still suggesting bad faith, as it allows acts of nepotism, always based on non-republican interests, alien to others. to public interests (OLIVEIRA, 2014).



RECIMA21 - REVISTA CIENTÍFICA MULTIDISCIPLINAR ISSN 2675-6218

SOCIAL SCIENCE OF PUBLIC ADMINISTRATION: AN APPROACH TO THE LEGAL IMPLICATIONS
OF HIRING WITHOUT TENDERING
Antônio José Ribeiro Nunes

The study deals with the issue of hiring employees and the implications when it comes to not having a public tender to legalize the conditions of public servants and avoid legal problems with irregular hiring.

The objective of this study is to identify the legal implications for the public administration, the hiring without public tender of civil servants. It was intended to analyze issues such as nepotism and clientelism existing in the cultural heritage of the Brazilian public administration; to situate the questions related to the constitutional precepts of hiring public servants.

In this perspective, the problem of the study presents the following question: What are the administrative consequences for hiring employees to fill public positions without public tender?

The presuppositions of the study point out that the hiring of public servants has as a precept the realization of a public contest foreseen in the Federal Constitution of 1988 and based on the insertion of the practice of hiring without a contest as an act of public improbity, having as its axis morality and legality as regulatory principles.

In order to respond to the objectives of the study and the problem pointed out, it was decided to carry out a bibliographic research based on the theoretical foundations of authors.

The choice of the theme is justified based on the assumption that improper hiring in the public administration currently falls under administrative improbity, although there are still many gaps and controversies that affront the constitutional precepts with contracting mechanisms without approval in a public tender.

The relevance of the study is to demonstrate the new trends and legal innovations that apply to administrative improbity to the act of hiring and public servants without competition, which can generate an act of nullity and consequences related to administrative sanctions.

2. DEVELOPMENT

2.1 SITUATION OF THE PROVISION OF PUBLIC OFFICES IN BRAZIL

The 1824 Constitution provided for the creation of a meritocracy system that focused on: every citizen could be admitted to civil, political or military public positions, without any other difference than their talents or virtues. However, placing servers illegally by appointment, without any legal criteria in any public office, becomes an unfair and pretentious action (MELO DA CUNHA, 2019, p. 55).

The Brazilian political heritage has a special reinforcement for the establishment of positions of trust, generating the breach of principles to establish the public tender in order to avoid gaps with the maintenance of nepotism and clientelism practices, from informal means of appointment of positions. In Brazilian society, even with the creation of the meritocratic system, the remnants of exchange of favors and cordial actions of favoritism remained (BROXADO, 2016).

Fernandes (2021) leads us to the idea that although there was an effort to implement the merit system, concomitantly there were always clientelistic indications, many scholars believe that even in



RECIMA21 - REVISTA CIENTÍFICA MULTIDISCIPLINAR ISSN 2675-6218

SOCIAL SCIENCE OF PUBLIC ADMINISTRATION: AN APPROACH TO THE LEGAL IMPLICATIONS
OF HIRING WITHOUT TENDERING
Antônio José Ribeiro Nunes

the merit system there was paternalism or actions that were intended to facilitate the entry into the public service of people who offered advantages as a way of giving in exchange for political favors.

According to Lange (2017, p. 98):

This non-professional and clientelistic system generated what is called political nepotism, a phenomenon that has become ingrained in the Brazilian political system, an action that reveals a practice incorporated into Brazilian culture since the model of Portuguese political administration imposed on the colony that was perpetuated. until nowadays.

The evolution of maintaining a non-professional and clientelistic system brings social injustice in the access to public positions in order to avoid clientelism that intertwines with the political interests rooted in Brazilian culture in the field of Public Administration (LANGE, 2017).

According to Capez (2015), the productive system had as its axis the family center and, therefore, the paternalism recognized by several Brazilian historians as a cultural element of the initial formation of the country.

The mixture of elements of this phenomenon is projected from the mixture of rural/urban and in the formation of oligarchies in Brazilian politics from which the actions of nepotism were generated. The State has become clientelistic, as it has an axis formed by Brazilian elites sustained in a slave-holding and unequal regime (BROXADO, 2016).

In the power structures of these relationships formed, the axis is the family, and from its cell the notion of cordiality, paternalism and nepotism is created, which is expressed in political relations as a particular character of cordiality in Brazilian social relations, translated as view the extension of public duty as a situation to be directly involved with the private domain and not as relationships outside the family (CAPEZ, 2015).

Based on this interpretation, Souza (2012, p. 29), assesses that, "there is a strong tendency towards the permanence of nepotism, even under the light of the Constitution", the boundaries that mark this insistence on maintaining these positions are justified by the notion of impunity, due to the paternalistic tendency existing in relationships involving private and collective matters, which has been interpreted as a vice posture by Brazilian society.

Oliveira (2014) assesses that the justification for this reproduction of clientelistic postures is associated with the electoral issue and the halter vote, which is linked to the lack of tradition of a meritocratic system that is not recognized, in the legal and formal terms, as the principles that be recognized as a practice of Public Administration.

The Federal Constitution of 1988 shed light on the morality and discretion of the State. However, even with the existence of laws that prohibit the illegal hiring of public servants, they are disseminated in the political condition of Public Administration agents (BRASI, 1988).

According to the Federal Constitution of 1988 in article 37:

Art. 37 - The direct and indirect public administration of any of the Powers of the Union, the States, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency, as well as the following:



RECIMA21 - REVISTA CIENTÍFICA MULTIDISCIPLINAR ISSN 2675-6218

SOCIAL SCIENCE OF PUBLIC ADMINISTRATION: AN APPROACH TO THE LEGAL IMPLICATIONS
OF HIRING WITHOUT TENDERING
Antônio José Ribeiro Nunes

I – the positions, jobs and public functions are accessible to Brazilians who fulfill the requirements established by law, as well as to foreigners, in accordance with the law;
II – investiture in a public position or job depends on prior approval in a public contest of tests or tests and titles, according to the nature and complexity of the position or job, as provided by law, except for appointments to a position in commission declared by law of free appointment and dismissal;
§ 2 - Failure to comply with the provisions of items II and III will imply the nullity of the act and the punishment of the responsible authority, under the terms of the law.

In the face of constitutional precepts, the public tender is an instrument for entering the Public Administration, in the legal system, public positions are subject to the principles of equality that represents a fair way to compete for a vacancy in the public service (BRASI, 1988).

From this perspective, the Federal Constitution determined principles of equality and morality, insofar as the contest eliminates the conditions for prevailing clientelism and nepotism actions, in addition to the risks of personal persecution (BROXADO, 2016).

The Public Contest is an administrative instrument that focuses on the participation of citizens from a competition, whose results must be classified based on the score of each candidate. It is a meritocratic model whose function is to produce effects of social justice, providing opportunities for each citizen, based on their own effort, to enter the public service (BROXADO, 2016).

2.2 LEGAL IMPLICATIONS OF ELLEGAL HIRING OF PUBLIC SERVANTS

The legal implications of illegally hiring people to work in the public administration generate legal liability, according to article 11 of Law 8.429/92, which classifies the practice as administrative improbity. Therefore, the common practice of contracting without a public tender may encompass a public civil action, referring to the decision to contract without meeting the selection through a public tender, as determined by art. 1, item IV, of Law 7,347/85 (BRASI, 1985).

In the legal precept, hiring without a public tender constitutes disrespect for diffuse or collective interests. Regarding penalties, they can be generated by administrative, civil or even criminal sanctions. In administrative terms, there may be loss of public office for 3 to 5 years, payment of a fine, prohibition of carrying out the practice of hiring (SOUZA, 2012).

With the establishment of Decree Law 201/67, the responsibility of municipal mayors for the improper hiring of employees for public positions outside the legal precepts is prescribed:

Art. 1st. They are crimes of responsibility of the municipal mayors, subject to the judgment of the Judiciary, independently of the pronouncement of the City Council: (...) XIII - to appoint, admit or designate civil servant, against the express provision of the law;

§ 1. The crimes defined in this article are of public order, punished those of items I and II, with the penalty of imprisonment, from 2 (two) years to 12 (twelve) years, and the others, with the penalty of detention, from 3 (three) months to 3 (three) years.

§ 2. The definitive conviction in any of the crimes defined in this article entails the loss of office and the disqualification, for a period of 5 (five) years, for the exercise of public office or function, elective or appointment, without prejudice to civil compensation for the damage caused. to public or private property (BRASIL, 1967, p. 1).



RECIMA21 - REVISTA CIENTÍFICA MULTIDISCIPLINAR ISSN 2675-6218

SOCIAL SCIENCE OF PUBLIC ADMINISTRATION: AN APPROACH TO THE LEGAL IMPLICATIONS
OF HIRING WITHOUT TENDERING
Antônio José Ribeiro Nunes

Under this condition, it is determined that the jurisprudence determines that the process of irregular hiring of public servants is a crime of responsibility, characterizing a crime of conduct and administrative improbity, creating the effect of nullity of the act (BROXADO, 2016).

However, it is necessary to mention that there are gaps in this legal procedure regarding the nullity of the act, which there is no consensus in the courts insofar as it presents differentiated solutions, being able to evidence in the Brazilian jurisdiction, understandings in the conditions in which it proceeds to irregular hiring and the responsibilities generated by the public administration (SOUZA, 2012).

In this area of discussion on the subject, there is the interpretation that “the recognition of the employment relationship between the worker and the Public Administration is legally impossible”, in view of the provisions of art. 37, II, of the Federal Constitution of 1988:

Art. 37. The direct and indirect public administration of any of the Powers of the Union, the States, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency as well as the following: (Wording given by the Constitutional Amendment 19, of 19980 – II – the investiture in a public position or job depends on prior approval in a public competition of tests or tests and titles, according to the nature and complexity of the position or job, as provided by law, except for appointments to a position in a commission declared by law to be free of appointment and dismissal (Wording provided by Constitutional Amendment nº 19, 1998) (BRASIL, 1988, p. 1).

Therefore, according to this constitutional guideline, there is no legal means of hiring public servants outside the meritocratic dimension conceived by the Federal Constitution, which applied the instrument of public tender as a means of morality and social justice.

According to Lange (2017, p. 34) “it is recognized that the elimination of nepotism acts through the constitutional provision of the public tender can favor the integrity and legality of the administrative act” with legal tools, in the administrative area and in the criminal area and civil.

According to Melo Cunha (2019, p. 67) on the form of contracting from a legal instrument such as the public tender:

The law is concise and, with mathematical precision, orders, in compliance with constitutional guidelines, the zeal for the principles of legality, impersonality, morality and publicity, among others. The determination to maintain the public tender represents a way of avoiding administrative probity and is closely linked to nepotism and clientelism.

Law No. 8,429/92, which defines improper contracting, as an act of administrative improbity that leads to illicit enrichment, causes damage to the treasury or violates the principles of the Administration, defined in art. 37, among which morality is included, alongside legality, impersonality and publicity, in addition to others that, distributed throughout the Constitution, also apply to the conduct of public affairs (BRASIL, 1992).

The act of improper hiring or infringing the Federal Constitution represents a practice of immorality that, in the doctrine, is an affront to honesty, good faith, respect for the equality of other people to obtain an effective position through public competition (FERNANDES, 2021).

According to Fernandes (2021, p. 77) evaluates that:



RECIMA21 - REVISTA CIENTÍFICA MULTIDISCIPLINAR ISSN 2675-6218

SOCIAL SCIENCE OF PUBLIC ADMINISTRATION: AN APPROACH TO THE LEGAL IMPLICATIONS
OF HIRING WITHOUT TENDERING
Antônio José Ribeiro Nunes

Any citizen can propose a popular action, with the objective of annulling an act harmful to administrative morality, such as the denunciation of illegal hiring by the public administration, he will not have to bear the judicial costs nor is he subject to succumbence, unless the bad deed is proven. -faith. As long as the occurrence of damage to public property is demonstrated, by willful or culpable action or omission of the agent or third party, full compensation for the damage will be given. Dolo presupposes the intention to perform the act.

In the view of Fernandes (2021), in any case that may include an act harmful to morality, such as the illegal hiring of public servants, it is an act of bad faith, insofar as the lack of ethics and morals in the Public Administration is staged.

Still in the view of Oliveira (2014, p. 90):

The public agent acts culpably, when he does so due to malpractice, negligence or imprudence in the face of the higher law, insofar as the contracting outside the legal mechanisms is characterized as public improbity, as this is just one of the species of the improbity genre.

The discussion about the nature of the sanction for the loss of public function in Law nº 8.429/92, whether civil or criminal, although it still exists, is gradually losing its *raison d'être*, with the deepening of the analysis of the subject by jurists and courts. The doubt begins to dissipate in the text of the law itself (BRASIL, 1992).

In this jurisprudential field there is the aspect that understands that this legal position is radical, taking into account it is necessary to demonstrate the existence of bad faith to configure the act of administrative improbity, in order to configure the intent. This decision was expressed by the Superior Court of Justice (STJ), in an assessment of an appeal filed by a former mayor of a municipality in São Paulo who sought a new decision from the local Court of Justice, which imposed a conviction for improbity, alleging that needs in the areas of nursing, dentistry and law (FERNANDES, 2021).

According to the defendant, in the hiring there was no intent or illicit advantage to justify the conviction for administrative improbity. The TJ's decision was to consider that there was bad faith in the cases of hiring personnel with functions typical of positions that require approval in a public contest. Therefore, the decision was not justified because it was not a management, leadership and advisory role (FERNANDES, 2021).

The TJ's interpretation showed that there are certain contracting functions that cannot be transitory, but permanent and dependent on public tender, as they are fundamental in public services. The decision resulted in the defendant's conviction, a fine, loss of tax and credit incentives for three years, in addition to loss of political rights (FERNANDES, 2021).

The aspect that admits openings or gaps, recognize that the hiring of public servants without competition has the function of generating lower costs, given the reduction of labor costs, in addition to political opportunities such as the exchange of favors. Although, it can generate the nullity of the act and the civil liability of the public administration, which can generate the loss of public office, in the case of municipal mayors, where the practice is current (SOUZA, 2012).

In the case of contractual nullity and its effects, the Court of Justice of Paraná understands:



RECIMA21 - REVISTA CIENTÍFICA MULTIDISCIPLINAR ISSN 2675-6218

SOCIAL SCIENCE OF PUBLIC ADMINISTRATION: AN APPROACH TO THE LEGAL IMPLICATIONS
OF HIRING WITHOUT TENDERING
Antônio José Ribeiro Nunes

PUBLIC CIVIL ACTION – ACT OF ADMINISTRATIVE IMPROBITY – CONTRACTING A SERVER WITHOUT PROVISION OF PUBLIC TENDER – ACTIVE LEGITIMITY AD CAUSAM OF THE PROSECUTION OFFICE – CF, ART. 129, INC. III – LAW Nº 7,347/85, ART. 1st, INC. IV – LAW No. 8.429/92, ART. 17 – NULL CONTRACT – VIOLATION OF ART. 37, CAPUT, AND INC. II, CF – PUNISHMENT OF THE RESPONSIBLE AUTHORITY - ART. 37, § 2, of the CF – PRESUMPTION OF LEGACY OF THE ILLEGAL ACT – NEED FOR COMPENSATION FOR DAMAGES RESULTING FROM THE PAYMENT OF SALARY MONEY – LAW No. 8,429/92, INC. III – DISMISSAL OF THE DEFENDANT'S APPEAL – GRANT OF THE PLAINTIFF'S APPEAL – 1. The public prosecutor has the legitimacy to file a public civil action in order to protect public property and administrative probity, which are diffuse interests, in the precise terms of art. 129, Inc. III, of the Federal Constitution. 2. The hiring of civil servants by the municipality, without a public tender, violates art. 37, caput, and inc. II, of the Basic Law, implying the nullity of the act and the punishment of the responsible authority, under the terms of the Law, as established in its § 2. 3. Although it is accepted that this server, when in good faith, must receive for the services performed, it is up to the administrator who illegally hired him to bear the costs that the farm had with this hiring, given that the sanctions provided for in Law No. 8,429 /92 are independent of the actual occurrence of damage to public property, according to the lesson of Hugo Nigro Mazilli. Freeing the public administrator of such responsibility, under the pretext that the employee, in consideration, provided services, will be to build a stranger free from impunity in favor of the political agent who practiced an act manifestly against the Law. Causal nexus of the obligations of the employment relationship born of an illegal act. Creating an unusual validation of the effects of the null act. It will be to encourage the unprofessional to act because, in the end, that consideration will protect him from civil liability action, according to a warning. (TJPR – AC 0094007-2 – (6181) – 6th Civil Service – Reporting Judge Leonardo Lustosa – DJPR 03.05.2001).

In this understanding, it is evident that there is a strong tendency to have a conciliation with the constitutional precepts, as explained above, by the Court of Justice of Paraná in a decision about applying civil liability for illegally hiring public servants.

In this field of analysis, on the subject, the nullity of the act and the dissolution of the contract are determined on the subject, and there must be a refund of receipts for work for the reestablishment of legal practice. However, there are arguments that refer to the successive issue of the contract, which represents the generation of effects that, once determined, there is no way to make it disappear retroactively (CAPEZ, 2015).

In the legal field, Capes (2015, p. 48) analyzes that “the public servant hired irregularly performed a job and will not be able to return the amount to the public administration due to a contract that was nullified”.

Melo da Cunha (2019) considers that there is a tendency of continuing affront to the Federal Constitution in most Brazilian municipalities that spend up to more than 10 years without public tenders, which represents the existence of improper hiring.

The insertion of this common practice as administrative impropriety constituted a strategy to eliminate the current practice and determine in the municipal public administration the legality in the face of the control of contractions of public servants.

The Federal Constitution of 1988, when defining the public tender as an instrument of access to public service, focused on the preservation of ethics and morality in contracting as collective rights



RECIMA21 - REVISTA CIENTÍFICA MULTIDISCIPLINAR ISSN 2675-6218

SOCIAL SCIENCE OF PUBLIC ADMINISTRATION: AN APPROACH TO THE LEGAL IMPLICATIONS
OF HIRING WITHOUT TENDERING
Antônio José Ribeiro Nunes

that guarantee the realization of citizenship based on specific resources determined by Brazilian Law that grants citizens the rights to exercise social control over public administration, not allowing perks or privileges in public positions, since improper hiring determines the application of sanctions for public agents (LANGE, 2017).

3. FINAL CONSIDERATIONS

Considering that this article sought to answer the guiding question: What are the administrative consequences for hiring employees to fill public positions without a public contest? With the objective of identifying the legal implications for the public administration, the hiring without public tender of public servants. Through this study, it was possible to analyze issues such as nepotism and clientelism existing in the cultural heritage of Brazilian public administration; to situate the questions related to the constitutional precepts of hiring public servants.

The study made it possible to identify the legal implications for the public administration, the hiring without public tender of public servants, showing that the constitutional precepts provide for the realization of a public tender, based on the right to compete and to give opportunities to the citizen in a fair way. to become a public servant by legal means.

At this juncture, the practices of nepotism and clientelism that are part of the Brazilian political heritage in the context of public administration, undergo changes that apply to the framework of administrative improbity to public agents who carry out improper hiring, under the risk of nullity of the act, fine, loss of position and prohibition of receiving tax and credit incentives.

From this perspective, the study highlighted the need for constitutional precepts in the hiring of public servants. However, in Brazilian municipalities there is an affront to the Federal Constitution, insofar as the practice of hiring without public tender has become common, even if the administrative consequences for hiring employees to fill public positions or jobs are recognized, reach the nullity of the act.

The Federal Constitution of 1988 determined the meritocracy model through public tender to avoid that the hiring and public servants could serve the interests of political agents. The principles of public administration constitute a solid basis, providing for this requirement for hiring, which is a way to avoid mechanisms of bad faith and persecution against public servants (BRASIL, 1988).

It was concluded that the application of the law is necessary to avoid procedures of political convenience and the overcrowding of employees as a way of maintaining positions and functions in exchange for electoral favors.

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SOCIAL SCIENCE OF PUBLIC ADMINISTRATION: AN APPROACH TO THE LEGAL IMPLICATIONS
OF HIRING WITHOUT TENDERING
Antônio José Ribeiro Nunes

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