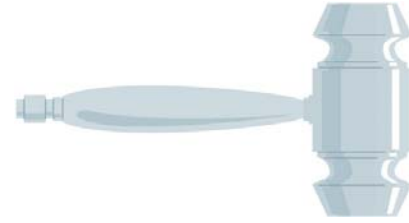


Legal Corner



By Michael I. Levin, Esq., PAESSP Chief Legal Counsel

The Hiring Process



Perhaps no activity of principals and assistant principals is as important for the success of a school as the hiring of the best candidates possible to teach students and to provide all of the support services necessary for the school to run smoothly and effectively. The interview and selection process is very important to making successful hiring

decisions. However, the interview and selection process is highly regulated and those involved in the process need to know the rules in order to play the game properly, ensuring the best individual is hired and reducing the potential for legal liability.

There are a number of sources for the rules that govern the hiring, interview and selection process, including state and federal law, applicable collective bargaining agreements, applicable school board policy and administrative guidelines or protocols.

Recommendation: If your school district does not have written administrative guidelines or protocols controlling every aspect of the hiring process, I highly recommend that you insist that such guidelines or protocols be prepared and implemented. It will help ensure that legal and contractual requirements will be fulfilled and that quality of the process will be enhanced.

Sources of the Rules Governing the Hiring Process¹

The laws governing the hiring and selection process include the following:

1. Title VII of the Civil Rights Act of 1964, prohibiting unlawful discrimination on the bases of race, color, religion, sex or national origin that cannot be justified by a bona fide occupational qualification.²
2. The Americans with Disabilities Act, prohibiting unlawful discrimination on the basis of disability.

3. Title IX of the Education Amendments of 1972, prohibiting unlawful discrimination on the basis of gender.
4. The Pennsylvania Human Relations Act, prohibiting unlawful discrimination on the basis of race, color, familial status, religious creed, ancestry, age, sex, national origin, handicap or disability, use of guide or support animals because of blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals.
5. The Equal Pay Act, prohibiting unlawful discrimination on the basis of gender with respect to pay.³
6. The Veterans Preference Act, granting preference to veterans who meet the qualifications for the job.
7. School Code provisions pertaining to recall rights of certain individuals who have been suspended or demoted.
8. School Code provisions pertaining to hiring of certain teachers who have been suspended by another entity where there has been a transfer of programs or classes (i.e., “transfer of entity”).
9. The Workers’ Compensation Act, requiring employers to give a job to injured workers who are out of work on workers’ compensation that the individual is qualified for and capable of performing.

Unless you have a working knowledge of each of these laws and how it affects your conduct and actions in the interview and hiring process, you are driving blind.

The rules that govern the interview and hiring process that are not legal in nature include applicable collective bargaining agreements (which may contain job posting and job preference provisions) and school board policy (which also may contain job posting and job preference provisions).

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Postings and Job Advertisements

The first step in the hiring process is posting or advertising for the job.⁴ At a minimum, the postings should include the job title, the location of the work, a statement pertaining to required job qualifications, the due date for the submission of applications and the individual or office where applications are to be submitted. Collective bargaining agreements and school board policy need to be reviewed to ensure that any requirements pertaining to job postings or advertisements are complied with. Do not state that any qualifications are “preferred” or “desired.” State only those qualifications that are actually required.

The Application

The school district needs to develop job applications for all positions and needs to make a determination as to what documentation needs to be submitted by applicants for the job. These requirements need to be set forth in a written protocol or administrative guideline. Unlawful questions may not be included in the application and all applications should be reviewed to ensure that no question is unlawful and that the necessary information will be obtained. The application should illicit such information to establish that the candidate meets the necessary qualifications for the job and has the credential and ability to perform the job. There may be times when applications are not necessarily required, such as when a vacancy is to be filled by a current employee pursuant to a job posting and hiring provisions in a collective bargaining agreement. Where that is to occur, it should be set forth in the written protocol.

Selecting Individuals for Interview

Once the deadline for the submission of applications has passed, the applications will have to be reviewed to determine who will be interviewed. The process for determining how many candidates will be interviewed and how they will be selected for interview

needs to be set forth in writing. It is highly recommended that no “courtesy interviews” be conducted or permitted. Either the person meets the standards set forth for the interview, or he or she does not. If the individual does not meet the standards, then they should not be interviewed.

Job Descriptions and Essential Function Listings

The cornerstone of the interview and hiring process is a properly formulated job description for the position under consideration. Unless there is a job description, I suggest that you should not start the hiring process and should not engage in any interview. How will you be able to determine who can best perform the job unless you know what the job is? The job description must contain, at a minimum, the following:

1. Qualifications. Job descriptions must itemize the minimum qualifications that the candidates must have. Having the qualifications for a job listed clearly and directly in a job description can be the difference between winning and losing litigation. Required job qualifications are the key to the anti-discrimination laws, the Veterans Preference Act and other applicable rules. These must be stated as requirements, not preferences or wishes. They must naturally include the minimum legal qualifications, but also the additional qualifications that the school district may desire. If the district wants candidates to have three years of experience, then such a requirement should be clearly stated.⁵ Advertisements and job postings need to contain the required qualifications, either a summary or all, and must not include words suggesting that certain qualifications are “preferred,” if the qualifications are not required by the district.

2. Job Duties, Separated into Essential Functions and Other Duties. The cornerstone of the Americans with Disabilities Act is the concept of “essential functions.” An individual is a qualified individual with disabilities only if he or she can perform the “essential functions” of the job with or without reasonable accommodations. The accommodations that must be provided are only those that will enable the individual to perform the “essential functions” of the job. The school district cannot disqualify an applicant simply because the applicant cannot perform non-essential functions of the job. As I travel to school districts across the Commonwealth, I continue to see too many job descriptions that do not accurately itemize “essential functions.” It is not an essential function of a teacher, for example, to be able to walk or stand, yet I see job descriptions with such items listed. It is not an “essential function” of a teacher’s job to “walk” around the class. An individual who is confined to a wheelchair cannot be disqualified from teaching

because he or she is unable to stand or walk. Job descriptions must contain a complete listing of job duties, but that list needs to be divided into those duties that constitute essential functions and those duties that are not essential functions. For example, the job duty to perform “all other tasks assigned” can be listed as a job duty, but it would not be “essential” as that term is defined in the Americans with Disabilities Act.

Not only do I see too many job descriptions which do not correctly describe the essential functions of the job, but I see too many job descriptions that fail to contain all of the essential functions. Items that are typically missing are such things as attendance and hours requirements. Such items need to be included.

The Interview

Written protocol or administrative guidelines ought to describe who will conduct the interview and what the interview process will be. It is recommended that questions be written in advance and that all candidates be asked the same questions. That is not to say that follow-up or clarification questions cannot be asked—they can. Moreover, the answers should be evaluated on as much of an objective standard as possible. Some employers actually give answer keys to the questions for use by the interviewers to determine if the applicant covers the information that is being sought by the question. All questions must be job-related and relevant to the consideration of whether the candidate is the best candidate for the job.

The anti-discrimination laws prevent certain questions from being asked and prevent certain information from being elicited in certain ways. In other words, some questions are illegal. You should not be engaged in the interview process unless you know and appreciate what questions are illegal. If you do not know that, you should be trained or self-taught. There are many web sites that provide guidance on illegal interview questions. Without intending to be all inclusive, it is illegal to ask a candidate if he or she is a citizen of the United States. One web site (http://www.workforcecentralflorida.com/employers/interviewing_questions.asp) provides the following advice:

“Don’t ask questions about or make any references to:

1. Age, religion, racial heritage

2. Languages spoken at home (if part of the job description, you can ask in what languages the candidate is fluent)
3. Family: spouse’s employment, child-care, marital status, where parents were born, where the candidate was born, if family lives locally, sexual orientation
4. Home ownership, car ownership
5. Arrest record (you may ask if candidate has ever been convicted of a felony, not if they’ve ever been arrested)
6. Handicaps
7. Citizenship

If the candidate volunteers information on any of the above “no-no’s,” say something like “That isn’t information I need for this interview” and move on to safer territory. Do keep questions open-ended and job-related and ask all candidates the same basic questions.”

There are many situations where proper questions can be asked in an improper way. For example, asking a female applicant her maiden name can be construed to be discriminatory, as it may disclose national origin or because male applicants may not have been asked for prior names. However, if all applicants, male and female, are asked to provide all names that may have been used by them in the past and as are necessary to permit a check on work and education records, such a question has less of a chance of being considered discriminatory.

The Americans with Disabilities Act generally prohibits pre-employment medical inquiries. Interviewers need to be prepared for how to react should the applicant volunteer information about his or her health or disability. It is recommended that the interviewer(s) state emphatically the school district’s commitment to provide a discrimination-free workplace for disabled individuals and that if the individual is hired and needs accommodations to perform the job, an interactive process will be engaged in to determine: **(i)** if the employee is disabled as defined in the Americans with Disabilities Act; **(ii)** is in need of reasonable accommodations to perform the job; and **(iii)** what accommodations may be needed. Depending upon the flow of the interview, the interviewer(s) may want to show the individual the job description (with the essential functions broken out) and simply ask if the applicant can perform the essential functions of the job with or without reasonable accommodations.

A short list of acceptable and unacceptable pre-employment inquiries follows:

Subject	Acceptable Pre-Employment Inquiries	Unacceptable Pre-Employment Inquiries
Name	<ul style="list-style-type: none"> • Name? • Is there any additional information relative to change of name, use of an assumed name or nickname necessary to permit a check of your work and educational status? 	<ul style="list-style-type: none"> • What is your maiden name?
Marital Status	<ul style="list-style-type: none"> • None 	<ul style="list-style-type: none"> • What is your marital status or living arrangements?
Dependents	<ul style="list-style-type: none"> • None 	<ul style="list-style-type: none"> • How many dependents do you have? • Do you have children?
Age	<ul style="list-style-type: none"> • For those applicants who appear to be too young, questions may be asked to ensure that they meet the minimum age requirements. Therefore, if you have reason to question whether an individual is 18, you may ask whether the applicant is 18 or older. 	<ul style="list-style-type: none"> • How old are you? • What is your date of birth? • When did you graduate from high school?
Residency	<ul style="list-style-type: none"> • At what address can we reach you? 	<ul style="list-style-type: none"> • Where do you live? • Have you any foreign residences?
Child Care Arrangements	<ul style="list-style-type: none"> • Is there anything that would interfere with your regular attendance at work? 	<ul style="list-style-type: none"> • Who is responsible for taking care of your children? • Do you have children at home?
Health History	<ul style="list-style-type: none"> • Are you capable of performing the essential functions of the job with or without reasonable accommodation? 	<ul style="list-style-type: none"> • What is your health history? • Have you ever been on workers' compensation? • Who is your doctor? • Have you ever been turned down for health insurance?
Height & Weight	<ul style="list-style-type: none"> • None 	<ul style="list-style-type: none"> • How tall are you? • How much do you weigh?
Birthplace & Citizenship	<ul style="list-style-type: none"> • Do you have the legal right to work in the United States and can you provide verification of that right? 	<ul style="list-style-type: none"> • What citizenship do you hold? • Where were you born? • Are you an American? • What is your spouse's or parents' nationality or origin? • How did you acquire the ability to speak a foreign language?
Credit Record, Charge Accounts, Home Ownership	<ul style="list-style-type: none"> • Do you have any problems that would interfere with your ability to perform your job? 	<ul style="list-style-type: none"> • Do you own your own home? • What are your credit card balances? • Have you been involved in a bankruptcy? • Have you had anything repossessed?
Arrests	<ul style="list-style-type: none"> • None 	<ul style="list-style-type: none"> • Have you been arrested?
Associations or Organizations	<ul style="list-style-type: none"> • Are you a member of any organizations which have relevancy to your ability to perform the job? 	<ul style="list-style-type: none"> • List all clubs, societies and lodges to which you belong.
Salary	<ul style="list-style-type: none"> • Will you accept a salary of \$__? • Will you accept a starting salary within the range of \$__ and \$__? 	<ul style="list-style-type: none"> • What is the lowest salary you will accept?

Author's Note: Allison S. Petersen, Esq., of the Levin Legal Group, P.C., contributed to this article.

Endnotes

¹ It is beyond the scope of this article to address all of the features of the many laws that are implicated by the hiring and employee selection process. However, it is important to briefly itemize the applicable law so that the reader has an appreciation for the fact that this is a highly regulated area of the law.

² It would be a "bona fide occupational qualification" to hire a person based on gender for purposes of supervising the gym locker rooms.

³ One of the issues in the hiring process that may come up in the interview and selection process is the starting salary. The recommended written protocol should address how starting salaries will be determined.

⁴ Unless board policy or an applicable collective bargaining agreement requires a posting or advertisement, there is nothing in the law that requires a vacancy to be posted. Many school districts have a large pool of teacher applications on hand at all times and do not need to advertise for teachers. Nothing in this article should be interpreted as suggesting that vacancies need to be posted in all instances.

⁵ If the number of candidates who apply is unreasonably small because the required qualifications eliminate many otherwise qualified candidates from consideration and it is determined to waive or disregard a particular qualification standard, then all applicants must be measured against the new qualifications that are being used. *See, Scheidemantle v. Slippery Rock University*, 470 F. 3d 535 (3d Cir.2006).