



LEGAL ISSUES IN THE RECRUITMENT PROCESS

UWGB OFFICE OF LEGAL COUNSEL¹

As an equal opportunity employer, the University of Wisconsin-Green Bay's ("UWGB") procedures and practices in recruiting and identifying candidates for faculty, administrative and staff positions are conducted in such a manner as to ensure equal opportunity for all potential applicants.

PRINCIPLES TO GUIDE THE PROCESS

Recruitment committees should adopt several basic principles to guide the recruiting process. First, the committee should strive to create a process that will provide fairness and consistency for all applicants. No candidate should be subject to any special, different, or additional consideration or process. In order to provide this fairness and consistency to all candidates, committee members should plan well ahead of each step in the process, so that decisions can be made jointly as to the specific procedures that will be used.

Second, committee members should feel free to use their professional expertise and judgment to make informed decisions about candidates. UWGB is encouraged to set high standards and to stick to those standards in the recruiting process. Each committee member's own expertise is an invaluable asset identifying high-quality candidates, so long as the committee members are able to articulate their rationale in making decisions along the way.

A process based upon these principles will produce not only a slate of highly qualified candidates, but it will provide legal justification for the result as well.

EQUAL EMPLOYMENT OPPORTUNITY, AFFIRMATIVE ACTION, AND DIVERSITY GOALS

Federal and state fair employment laws prohibit employers from making employment decisions based upon a person's protected status. Under Wisconsin law, protected statuses include race, age, sex, national origin, religion, disability, marital status, sexual orientation, arrest record, membership in the military or national guard, veteran status, and use of lawful products outside of work (such as tobacco and alcohol). For the same reason, committee members should not solicit information in an application or interview process that would likely reveal a person's protected status in any of these categories. The Wisconsin Department of Workforce Development publishes a guide to "Avoiding Loaded Interview Questions," which is available at: http://dwd.wisconsin.gov/er/discrimination_civil_rights/publication_erd_4825_p.htm.

Increasing the numbers of underrepresented groups of people and achieving diversity on campus are two extremely important goals to the UWGB community and throughout the UW System. Nevertheless, because equal employment opportunity laws prohibit discrimination, even benign discrimination in favor of underrepresented groups, there are certain steps that UWGB can and cannot take to achieve its goals. First, UWGB can and should carefully analyze each position description to ensure that candidates with alternative, but equally valuable, experiences are not excluded from consideration. That is, the minimum qualifications should be stated carefully so as to avoid excluding any individuals who are qualified to perform the responsibilities of the position.

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Second, UWGB can and should take steps to broaden the available applicant pool for each position by in creative ways. For example, UWGB staff identifies national professional organizations in which to advertise the position, or take word of the position to national conferences attended by individuals working in that area. Recruitment committees should consider advertising in some non-traditional places that may be more likely to reach minority candidates. Even better, UWGB staff may make direct contact with known qualified individuals to share information about the opportunity with them. UWGB can also reach out to people or organizations who may know qualified individuals.

UWGB cannot, however, make employment decisions such as whom to interview or select for the position based on the candidate's protected status. Instead, recruitment committee members must carefully examine each applicant's qualifications and experiences to determine which one would best serve UWGB's interests, as articulated in the position description, without regard to the applicant's race, sex, age, or other protected status. The argument that an individual of a particular race or sex will be better suited to the position is generally not legally sustainable because it is based on assumptions about the person's experiences that may or may not be valid. Instead, the committee must rely on tangible evidence of the person's actual experiences and qualifications.

My office often receives questions such as, "What if there are two candidates who have equal qualifications? Can the person's race or sex or disability be used as a tie-breaker?" or "Can't a person's particular race or sex or disability be considered a 'plus factor'?" The clear legal answer to these questions is no. Recruitment committees must make their recommendations based on the candidates' qualifications in relation to the stated requirements for the position, and not based on the person's protected status.

These concepts remain confusing to many in higher education because legal decisions in the area of student admissions tend to allow some use of a person's diverse status as a "plus factor." However, the area of student admissions is legally distinct from employment decisions.

The bottom line is that hiring qualified employees who add diversity to the UWGB community is desirable and beneficial. It strengthens UWGB as a whole and bolsters its ability to provide students with a quality educational experience. By following the points above, UWGB will be able to enhance its diversity and be able to legally defend its actions.

THE RECRUITMENT COMMITTEE'S PRESENTATION OF CANDIDATES TO THE DECISION-MAKER(S)

The ultimate goal of the recruitment committee is to produce a list of candidates whom they recommend for interviews. When recruitment produces only one candidate, in most instances, this is a failed recruitment and the process should begin again, hopefully with some modifications to draw a large, qualified, and diversified pool. When there are enough candidates to present, my office urges that the committee not rank the candidates. Instead, the committee should provide the decision-maker with the names of all qualifying candidates, accompanied by positive and negative observations about each one. This practice affords the decision-maker the opportunity to make her/his own determinations without the possibility of bias that ranking could create. This is also consistent with the concept that the purpose of a recruitment committee is to find and review candidates, while the decision-maker chooses the candidate to hire.



APPLICATION OF OPEN MEETINGS LAWS TO THE RECRUITMENT COMMITTEE

The general rule for all recruitment committees is that when they act, they must do so publicly and consistently with Wisconsin's open meetings laws. This means that first, each committee meeting must be properly noticed to the public. This may be accomplished by posting the meeting on the all-campus calendar. Second, the committee meetings must always begin in an unlocked room (preferably with an open door) that will be accessible to members of the public who wish to attend. While members of the public may not participate in the discussions, they may listen and have access to any handouts provided to committee members in open session. Third, committee members may not meet or make decisions outside of meetings that are properly noticed. For example, committee members may not decide by email whom to interview because the public has not had the opportunity to be informed of the "meeting" or attend it.

There are times, however, when the recruitment committee may act in closed session. Most commonly, the recruitment committee may meet in closed session when it discusses and/or considers data regarding the individual candidates for the position. The Wisconsin Statutes describe two separate exceptions that allow committees to go into closed session under these circumstances:

[When] [c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility. Wis. Stat. § 19.85(1)(c).

[When] [c]onsidering financial, medical, social or personal histories or disciplinary data of specific persons... Wis. Stat. § 19.85(1)(f).

In order to use these exceptions, however, the meeting must be properly noticed. That is, there must be a statement in the meetings notice that explains the reason for going into closed session and that cites the statute. For example, the following statement would be sufficient:

"The committee will go into closed session pursuant to Wis. Stat. § 19.85(1)(c),(f) to discuss the individual candidates' qualifications."

Committees must also move into closed session properly. To do so, the chairperson of the committee must announce both the nature of the business to be considered in closed session and the specific statutory exemption which authorizes the closed session. In addition, of course, the chairperson's statement of the reasons for going into closed session must be consistent with the reasons provided in the open meetings notice. The chairperson may efficiently meet all of these requirements by simply reading the quoted statement found in the above preceding paragraph (assuming this statement was also used in the meetings notice). The chairperson must then seek a motion to go into closed session, which must be carried by majority vote. The announcement, the motion, and the votes of each member on the motion should be recorded.

Once in closed session, committees should take care to avoid discussing any general business or other committee business that is not covered by the exceptions allowing the closed session.

For example, committees often will want to discuss planning and scheduling for future meetings at the end of each meeting, when it knows better what is left to be accomplished. In order to do so properly, the committee must provide an additional statement in its open meetings notice to the effect of the following:

"The committee will reconvene in open session to discuss planning and scheduling for future meetings."



If the committee fails to provide notice to the public that it plans to reconvene in open session after the closed session, it may not do so at this session.

Recruitment chairs should feel free to contact the Office of Legal Counsel or the Secretary of the Faculty and Academic Staff to further discuss the requirements of the open meetings law to ensure understanding and compliance.

APPLICATION OF PUBLIC RECORDS LAWS TO COMMITTEE PAPERWORK

The open meetings law is only one half of the equation for recruitment committee members. The committee must also bear in mind that all documents officially generated by the committee are subject to public records requests.

For that reason, the chair of the committee and/or the individual providing clerical support to the chair must maintain copies of every document generated as a part of the committee's processes. This would include the applications, any and all correspondence to applicants, any and all correspondence to or between committee members (including email), any forms or procedures generated for use by the group, minutes of meetings, and any other records of official actions.

Because, however, Wisconsin law requires governmental bodies to apply a balancing test analysis prior to releasing public records, and also requires certain protections for any individuals named in public records, all requests for committee records should be referred to University Legal Counsel. No individual committee member should release committee records on their own.

Individual committee members may wish to adopt some form of note-taking to help keep track of their observations regarding individual candidates along the way. Such personal notes are not subject to public records requests, and do not become a part of the official file, as long as they are prepared for the individual committee member's own use and are not shared with anyone else, including others on the committee. The Office of Legal Counsel recommends that as a matter of practice, any worksheets used by individual committee members be treated in the same manner. So long as the notes are only personal, and are not used for any official purpose, they may be destroyed at the conclusion of the recruitment process.

Even though they are not subject to public records requests, committee members should still take care when creating personal notes. Committee members should not write down anything they would not want shared with others. In the (rare and unlikely) event that a lawsuit results from a recruitment process, all individual notes in existence at the time the lawsuit becomes known must be preserved and likely will be subject to subpoena by the parties to the lawsuit.

CANDIDATE CONFIDENTIALITY

All applicants in the recruitment process have basic, fundamental privacy interests that committee members should take care to protect throughout the process. These rights are based on several legal principles.

First, applicants have the right to indicate in writing that they wish for their identities to remain confidential up to the point they become a "final candidate." Wis. Stat. § 19.36(7). Under UWGB's policies and procedures, the committee chair sends applicants a form on which they can make this request soon after the applications are



received. In order to allow all applicants the opportunity to return this form, committee members should simply avoid disclosing in open session or outside committee meetings the identities of any candidates.

Second, references should be contacted only after the committee develops a procedure for doing so that will apply to all candidates who have reached the final level of consideration. If the committee determines that it will contact references that are "off the list," it should plan to do so for all of those candidates. Further, as a matter of fairness, committee members should inform candidates beforehand of their intent to contact "off the list" references and should give the candidates the opportunity to withdraw prior to doing so.

Third, all individuals must be notified of certain legal rights before documents which implicate their privacy or reputational interests are released to the public. This is yet another reason why public records requests, particularly those requesting records which contain information about individuals, should be referred to the Public Records Custodian. The Public Records Custodian will work with the committee to determine whether the candidate is a "final candidate" for the purpose of the open records law.

CAN UWGB EMPLOYEES BE SUED FOR PARTICIPATING IN THE RECRUITING PROCESS?

Having discussed all of the legal principles outlined above, committee members may wonder whether they can be sued for participating in the recruiting process. It is true that any UWGB employee may be "named" as a defendant in a lawsuit at any time. However, Wisconsin law provides broad protection for employees who are named in a lawsuit as a result of acting within the scope of their employment.

WISCONSIN LAW STATES:

If the defendant in any action ... is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs ... shall be paid by the state... Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment. Wis. Stat. § 895.46(1).

Thus, a recruitment committee member will be provided a full legal defense if he or she is sued relating to service on that committee. Further, if any judgment is entered against a recruitment committee member, UWGB will be responsible for that judgment.

One will note from reading the statute that if a UWGB employee acts outside of the "scope of employment," that employee is not protected from legal judgment. What acts are or are not within the "scope of employment" and thus protected is something that has been defined by case law. On the one hand, acts that are obviously not in good faith or within the scope of one's employment (e.g., requesting sexual favors in return for support in the recruitment process) may not be protected. However, over the years, courts have determined that the law broadly protects employees who are in good faith performing their job responsibilities, including serving on recruitment committees.



CONCLUSION

This guide is intended to be a summary of the legal issues impacting recruitment committees, but it cannot substitute for actual legal advice. Recruitment committee members may contact the Office of Legal Counsel to discuss any of these issues further.