

Hiring Matters: Steps to Ensure an Effective and Lawful Hiring Process

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I. Introduction

The hiring process through which school districts recruit, screen, interview and hire employees is one of the more critical functions within the school district. After all, it is the employment of school personnel, in particular teachers, who ultimately serve and fulfill the constitutional mission of school districts, which is to educate students. To that end, school districts should develop a fair recruitment program that meets the needs of the school district. Human resource directors are probably aware of the significant roles that federal employment laws play in employment decisions. All applicants should be treated consistently in order to attract and retain the best qualified work force and to avoid costly litigation. Applicants should be so treated at each stage of the hiring process.

Exposure to litigation over hiring issues can be lessened by developing specific, job-related guidelines for interviews, training interviewers in the use of those guidelines and ensuring that the guidelines are consistently applied.

II. Advertising the Position

Advertising requirements for certified positions

Georgia law outlines the requirements of school districts in advertising for certified employees.¹ However, as a fundamental first step, school districts are required to have:

a job description for each certificated professional classification, shall have policies and procedures relative to the recruitment and selection of such personnel, and shall adhere to such recruitment and selection policies and procedures. Such policies and procedures shall assure nondiscrimination on the basis of sex, race, religion, or national origin.²

Further, school districts must announce in writing the availability "of all certificated positions to the appropriate colleges and universities in the state and to the Department of Education and within the local school system."³ The local board has the discretion to post job announcements for certificated employees at colleges and universities outside of Georgia.

Moving from positions for certificated employees, where and how a school district seeks to solicit qualified applicants for a position depends on the position that the district is attempting to fill and the skills and attributes sought for that position. For example, a school district looking to hire a human resource director is likely to target universities with training programs for those employees. In any event, the school district should be careful to ensure that the manner in which it seeks applicants does not have the effect of screening out potential candidates in a protected class. The federal courts have made clear that the employer should be wary of relying extensively on word of mouth to advertise available positions.⁴

Evaluation of Job Requirements

Of course, before undertaking to fill a position, an employer should evaluate what kind of person it desires for the position. This requires an analysis of what skills or attributes the

¹ O.C.G.A. § 20-2-211(d).

² Id.

³ Id.

⁴ EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1279 (11th Cir. 2000).

position requires. This analysis should not rely on outdated job descriptions, but rather should be based on what tasks the employer has determined that must be accomplished by the person in the position. The position may be a skilled job where a specific training, experience or job skills are extremely important. On the other hand, the position may be an unskilled job where other attributes such as attendance, dependability and physical strength may be the most important.

Before initiating the hiring process, the school district should also consider what kind of personality is desirable for the position. For a job requiring judgment, the employer will want someone who is intelligent and has initiative, analytical ability and leadership skill. For a repetitive job, the employer will want someone who is not overly qualified, dependable, someone who is proud of doing steady, consistent work, and someone who is content to follow rather than to lead. If the job requires working with other employees, the employer will desire someone who enjoys being around other employees and who is not timid or shy. If the job requires working alone, the employer may desire a candidate who is introverted. One way or the other, school districts should be clear about the mix of skills and personality traits that are needed for the position to be filled.

III. Evaluating the Employment Application

Once the job qualifications have been identified and the job is appropriately posted, school districts should be prepared to review the information provided by prospective employees. Before examining resumes and applications, the school officials should again review the list of key factors that applicants should have to qualify for the position. All applicants and potential applicants must be given equal access to apply for the considered for available job.

Differentiation among candidates must be based only upon bona fide job requirements. Thus, the employer may not impose an otherwise neutral standard for hiring and in fact help eliminate from consideration a class of potential applicants, unless there is a justifiable business reason for the standard. These "neutral factors" that have a disproportionate impact upon a certain group of applicants most often come in the form of pre-employment tests or minimal education requirements. They also typically may not include height or weight requirements, consideration of arrest or conviction record and specific minimal levels of experience. With any of these standards, it is likely there will be a disproportionate impact on a protected group.

At the outset, the school district should make clear the consequences of giving incomplete or false information on applicant. School districts should state prominently on the application any missing or false information on the application will result in rejection of the application, and that any false information will render the applicant ineligible for future consideration.

Evaluating the application

The officials should then review the resume of the applicant and determine whether most of the key factors are mentioned and whether the desired background, experience, skill, or training has been acquired in a setting required by the school district. If the accomplishments are indicated, then the officials will have the opportunity to evaluate whether these accomplishments are significant. If the applicant emphasizes routine or superficial achievements, this may indicate that the applicant's standards are not very high or the applicant misperceives what is important.

In reading an application, keep in mind that the piece of paper submitted cannot possibly completely describe the applicant it represents. Yet from this piece of paper the employer often must make a key decision. If the employer chooses not to see the applicant based on a review of a piece of paper, then it is very likely that it will lose this prospect forever. It is easy to discard an application, but before putting it in the reject file, the school district should ask these questions:

1. Is the reason for your rejection based on the applicant's lack of qualification?
2. If the rejection is based on the type of jobs that applicant has held, is it likely that the experience is there even though specified?
3. Is the reason for rejection due to a poorly written application?

In addition, the school district should review their application to ensure that it is soliciting the appropriate information about the candidate in order to screen the individual for the position. Finally, the school district should be clear about how long it will keep an application on file and when the candidate will have to reapply for a position.

Certification

A major issue that arises in hiring someone for a position which requires a certificate is whether the person, in fact, has the required certification. Beginning with the 2006-2007 school year, school districts are required to hire teachers and paraprofessionals who are "highly qualified" under No Child Left Behind ("NCLB"). The qualification requirements vary for teacher and paraprofessionals. For teachers, the "highly qualified" standard applies to teachers teaching in core academic subjects⁵, and requires that a teacher: (1) be fully licensed; (2) hold a

⁵ Core academic subject areas include English, reading, language arts, mathematics, broad-field science (such as physics, biology, or chemistry), foreign languages, broad-field social studies (such as civics and government, economics, history, geography), and the arts (visual arts, music, band and chorus).

minimum of a bachelor's degree; and (3) demonstrate subject matter competency. A good resource for consulting the certification requirements for teachers and paraprofessionals is The Georgia Implementation Guidelines: The No Child Left Behind Act of 2001, Title II, Part A, which was revised in September, 2006.

It should be pointed out that the requirements differ for new and veteran teachers in regards to the demonstration of competency. To satisfy this requirement, new teachers are to “have evidence of specialized training in the subjects they teach, such as an academic major or the equivalent in the subjects and a passing on the required content assessment for area/subjects they teach.” On the other hand, veteran teachers are to “have evidence of specialized training in the subjects they teach, such as an academic major or the equivalent in the subject, and a passing score on the required content assessment for the area/subject they teach or evidence that they have met the requirement of a ‘high objective uniform state standard of evaluation’ (HOUSSE), . . .” By way of background, HOUSSE is an assessment that may be used to verify a veteran teacher’s competency if the teacher has not met either the content or testing requirement in a specific core academic area. The HOUSSE assessment is only available for a veteran teacher with a life certificate.⁶

Further, not all certificated employees are required to meet the “highly qualified” criteria. The following employees are exempted from the NCLB requirements: certain teachers in Alternative Schools; teachers in in-school suspension if the students are serving short term suspensions; and teachers in Hospital/Homebound programs in short term circumstances.

⁶ Professional Standards Commission Rule 505-2-.09.

With regard to paraprofessionals hired after 2002 to work in Title I schools, the qualification requirements are: (1) completed at least two years of post-secondary study at an institution of higher education; (2) obtained an associate's degree or higher; or (3) have passed a PSC-approved paraprofessional assessment.

IV. Interviewing Process

The critical part of the hiring process is the interview. However, the interview is not without potential pitfalls that the employer should avoid. These will be discussed in more detail below. First, the interviewer should be mindful of the place of the interview and ensure that the surroundings are comfortable and private. It is best to view the interview as a two way exchange in which the applicant demonstrates his or her interests in the job and the qualifications for it. In addition, the interviewer has a chance to inform the applicant about what the company has to offer and why the applicant should accept the position.

Fundamentally, the interviewer should provide the applicant with a clear description of the company and the type of work it does. This will include a description of the job, the job duties, any manual labor involved with the job, and the working conditions. The interviewer should be ready to respond to questions about benefits, salary, and leave/vacation.

Interview Questions

In soliciting information from the applicant, the interviewer should ask open-ended questions, rather than direct questions that can be answered by a simple yes or no. One potential result of asking such questions is that the interviewer will get a better sense of who the applicant is and what the applicant's interest in the position is. The interviewer will want to pay attention

to the applicant's responses and questions about considered qualifications for or interest in the position. For example, if the applicant is looking to be promoted quickly, and the position has little opportunity for such, it would be important to gather that information in the interview. Further, the applicant who is quick to criticize the last company he or she worked for is probably someone who would find problem areas in the future as well.

Applicants understandably desire to present themselves in the most favorable light possible. Therefore, the interview should attempt to discover any weaknesses in the applicant's candidacy. To probe for weaknesses, the interviewer may ask the applicant about disappointments in their previous jobs, areas in which the applicant needs help or guidance from his or her supervisor, compliments or criticisms the applicant has received from his or her supervisor, and other aspects of the last job that the applicant liked the most or the least.

An applicant's ability to work under direction of others is typically an important trait. To assess the applicant in this area, the interviewer may ask applicant what he or she has thought about her previous supervisors, what the applicant liked or disliked about the supervisors' supervisory methods, what kind of supervisor the applicant likes to work for, when the applicant has worked on a team as a group member, and how much the applicant has worked previously as a part of a team or individually.

Because school districts are required by law to conduct background checks, the applicant may be asked either on the employment application or during the interview if he or she has ever been convicted of a crime. Other questions that a interviewer may ask are as follows:

1. questions regarding the information on the application for follow up purposes;
2. the employer may ask questions to determine whether applicant can perform specific job functions based on the applicant's ability, not because of any disability;

3. an employer may attach a job description to the application form with information about the specific job functions and ask the applicant whether they can perform these functions;
5. the employer may condition a job offer on the results of a medical examination or on the responses to medical inquiries if such an examination or inquiry is required of all employees entering the same job category, regardless of disabilities;
6. the employer may ask why the applicant left former employment;
7. the employer may ask about prior job duties;
8. what the applicant thought about prior supervisors;
9. how employee problems and complaints were resolved at the prior job; and
10. any promotions granted in prior jobs.

Just as important as the questions to ask are the questions that are not permitted to be asked at an interview. Those questions are as follows:

1. have you ever been treated for any diseases;
2. have you ever been hospitalized;
3. have you had a major illness in the last five years;
4. how many days were you absent from work because of illness in the last year;
5. does the applicant have any physical disabilities which preclude performance in certain kinds of work⁷;
6. if the applicant is taken prescribed medications;
7. has the applicant ever been treated for drug or alcohol addiction;
8. has the applicant ever applied for worker's compensation insurance;
9. how old the applicant is;
10. what the applicant's date of birth is;
11. how long the applicant has resided at the permanent address;
12. what is the name of the church that the applicant attends;
13. what the surname is of the applicant's family;
14. whether the applicant is married, divorced, separated, widowed, or single;
15. how many children the applicant has;
16. if the applicant is a member of the armed services;
17. what the applicant does in his or her spare time; and
18. if the applicant is for or against unions.

V. Fingerprinting, Criminal history searches and Reference checks

One of the most critical points of the hiring process is when the employer verifies the prospective employee's employment information. This verification process can be broadly divided into two different steps, both equally important.

⁷ SBOE 160-5-3-.08 (Rule GCBA "School Bus Drivers") requiring a physical of school bus drivers to be conducted prior to being employed and conducted annually after hiring.

Mandated Verifications

The first step is straightforward enough as it is mandated by state law. Without a doubt, school districts are well aware of its requirements in regards to fingerprinting and performing criminal background checks on all school district employees.⁸ While the obligation to obtain fingerprints and background checks is mandatory, school districts are given some leeway to hire a certificated employee with a provisional certificate or a classified employee pending the results of the criminal background check. OCGA 20-2-211(e)(1) states as follows: "The local unit of administration shall have the authority to employ a person holding such a certificate under a provisional or temporary contract for a maximum of 200 days and to employ a person who does not hold such a certificate for a maximum of 200 days, in order to allow for the receipt of the results of the criminal record check." Of course, if a certified employee is found to have a criminal record with a felony or certain misdemeanor, then the same must be reported to the Professional Standards Commission.⁹ It is important to point out that O.C.G.A. § 20-2-984.2. does not require a conviction, but only that the superintendent must receive a written report that an educator has committed one of the following criminal offenses: murder, manslaughter, aggravated assault, aggravated battery, or kidnapping. Additional reportable offenses are listed at O.C.G.A. § 20-2-984.2.(a)(2)-(6).

If the criminal background check reveals that the prospective employee has been charged with a felony or misdemeanor, then the school district should further investigate that matter to determine the disposition of the charge. Once the facts are gathered, it is the school board's decision as to whether the applicant should be hired. Significant to the board's decision are more

⁸ OCGA 20-2-211(e)(1).

⁹ O.C.G.A. § 20-2-984.2.

than likely the following: the age of the employee at the time of the charge; the seriousness of the offense; the truthfulness of the employee's disclosure; and the impact of the offense on the workplace.

One issue that arises from time to time is who pays for the fees associated with conducting a criminal background check. Georgia law gives school districts discretion as to who pays for the fees associated with the criminal background check. Hence, it is the school district's call on that issue.

Along the same lines, school districts should inquire with any applicant for a teaching position whether or not he or she was ever been dishonorably discharged from the military. Specifically, state law mandates that "no local governing board shall employ any person as a teacher who has been discharged from the armed forces of the United States with a dishonorable discharge as a result of desertion or any person who has fled or removed himself from the United States for the purpose of avoiding or evading military service in the armed forces of the United States, excluding those who have been fully pardoned." Under state law, school districts are not allowed to hire such individuals.¹⁰

Reference Checks

Next, the school district should conduct a reference check on prospective employees. These inquiries are directed primarily to persons who supervised the applicant's work for previous employers. This process, if nothing else, must be systematic and consistently done. It is important to point out that O.C.G.A. § 31-1-4 shields school districts from liability arising from the disclosure of information regarding an employee's job performance. In order to be afforded statute's protection, the employer's comments must be provided in good faith.

¹⁰ OCGA 20-2-211(c).

To facilitate this process, school districts should require a common application form for every candidate position. The applications compel the candidate to provide the information needed to investigate adequately and also to compare applicants fairly. School districts should not accept the resume instead of their application. School districts should require that the applicant to identify at least two persons who can verify basic job information and discuss the applicant's work performance and reasons for leaving. In turn, the school district should actually contact two persons at each past employer and ask a standard set of questions using a form to document their responses.

While a former employer may be reluctant to discuss the applicant, the school district should at least ask the applicant's prior employers if they would rehire this person, and if not, why not?

Finally, school districts should limit the number of people who do background investigations for the district. Background investigations is a task that should not be assigned randomly to members of the screening committee or even to a busy supervisor whose priority may be to fill a vacancy quickly. Limiting the performance of background investigations to one or two staff members helps ensure that the consistency, experience and investigative skills of those individuals are developed.

VI. Immigration Issues

Making a hiring decision about a staff member can be difficult enough, but when the applicant is a foreign national or "alien" (any person in the U.S. who is not a U.S. citizen or national) the hiring process can be even more complex. The most straightforward way to approach the hiring of a non-citizen or alien is this: If that individual is not authorized to work in

the United States, then the board of education is prohibited from employing the individual. However, if the non-citizen is authorized to work in this country, then the process for employing such individuals involves three major federal government agencies, which are the Department of Homeland Security, the Department of Labor and the Department of State.

Nuts and Bolts of Immigration Law

Before reviewing the specific rules governing the employment of aliens in the U.S., a brief overview of immigration terms and the governmental agencies charged with enforcing immigration laws may be useful.

Aliens in the U.S. can be divided into two basic groups: "immigrants" and "non-immigrants." An immigrant is an individual who intends to reside permanently in the U.S. A non-immigrant is an individual who intends to enter the U.S. for a temporary period of time and for a specific purpose. Unless and until a person proves that he or she has non-immigrant intent, the government will presume that he or she intends to remain in the U.S. permanently.¹¹ In many cases, an alien will not be permitted to enter the U.S. as a non-immigrant unless he or she can establish that he or she has a permanent residence abroad to which he or she intends to return.

The admission of aliens into the U.S. is governed by two different departments of the U.S. government: the Department of Homeland Security (DHS) and the Department of State (DOS). The Department of Homeland Security has taken over all functions of the former Immigration Naturalization Service as of March 1, 2003. Its Bureau of Citizenship and Immigration Services (CIS) reviews petitions requesting immigration benefits from individuals and organizations within the U.S., and determines whether a particular visa status is appropriate

¹¹ 8 U.S.C.S. § 1101(a)(15).

for an individual. DHS officers also interview applicants at ports of entry in the U.S. to determine whether to admit them into the U.S. and how long they can remain.

The Department of State, through the U.S. consulate outside the U.S., reviews applications for visas from individuals who wish to enter the U.S. For some types of non-immigrant status, such as H-1B and O, an individual must have approval first from the Department of Homeland Security before applying at a U.S. consulate for a visa.

In order to understand how these two departments work together, it is essential to understand the difference between a "visa" and an "immigration status" in the U.S. A visa is issued by a U.S. consulate and is physically placed in the holder's passport. It enables an alien to apply to a Department of Homeland Security official for admission to the U.S. A visa includes a photograph of the holder and information about the type and duration of the visa. In most cases, an alien must have a visa to enter the U.S.

Immigration status in the U.S. is conferred by a DHS official upon an alien's entry into the U.S. and is accompanied by a Form I-94 (Admission/Departure Record). This form indicates the date of entry, the holder's name, country of citizen, the date of birth, the status in which the person was admitted, and authorized period of stay during which an individual can remain in the U.S.

H-1B Visas

H-1B visas are probably the most frequently used for employment of faculty and staff by school districts. This category of visa permits a U.S. employer to hire foreign professional who have at least a bachelor's degree, if those individuals work in a position requiring that degree.

The initial factors in determining whether a H-1B visa is the appropriate status to use for potential hires is fairly simple: Does the position require at least a four-year bachelor's degree in a particular field? Does the prospective employee have such a degree?

If the answer to both questions is yes, an H-1B visa may be a good choice.

There are three major steps in applying for an H-1B visa. First, the employer must obtain a prevailing wage determination for the occupation in question in the area of intended employment from the State Employment Services Agency. Next, the employer must obtain a certification of a labor condition application ("LCA") from the U.S. Department of Labor. Finally, the employer must file an H-1B petition package with the regional immigration service center with jurisdiction of the site of intended employment. For the aliens outside of the U.S., a fourth step may be necessary, and this requires that the alien obtain an H-1B visa stamp in his or her passport at the U.S. consulate or embassy abroad after the immigration agency approves the H-1B petition.

I-9 Forms

Further, the Immigration Reform and Control Act (IRCA) requires, among other things, that an employee's eligibility to work be verified by the use of a form called I-9. By way of background, an employer must keep I-9 forms for three years from the date on which employment started and for one year from the date the employment ends.

The I-9 form consists of two basic parts. Section one contains some basic information about the employee, including information about the employee's date of birth, social security number, and citizenship/immigration status. Section two of the form contains several attestations

of the employer regarding the documents presented by the employee and the employee's right to work in the country. The Bureau of Immigration and Customs Enforcement (ICE) requires a section one of the I-9 form be completed before work commences. Section two is to be completed within 72 hours of work commencing. This policy is to have the entire I-9 form completed before a new hire begins work. New hires who do not have the required documents with them should be sent home to get the documents and should not be allowed to work until satisfactory documents are produced and the I-9 form is completed.

Regulations allow an employer to make photocopies of documents presented by employees in connection with the I-9 process. The regulations do not presently contain any specific retention requirements for photocopies. Therefore, photocopies can be kept or thrown out at any time. For most employers, keeping photocopies is a good idea because it helps in correcting forms during periodic self audits. There is no rule or regulation requiring that I-9 forms must be retained in a personnel file. In general, it is a good idea to keep I-9 forms separate from other personnel record, especially so time is not wasted during an audit of I-9 forms.

Recent changes in Georgia law concerning hiring workers

Finally, state law requires employers to verify an employee's immigration status prior to hiring the employee. On April 17, 2006, Georgia Governor Sonny Purdue signed a new immigration law entitled the Georgia Security Compliance Act, which imposes fines on employers that knowingly hire undocumented workers and requires any contractor hired by the state government to have its employees' work eligibility verified by the federal government. The law takes effect in July, 2007.

Georgia's new immigration law applies the federal work authorization program to all employers. In order to comply with the new law, the following steps should be taken: be sure to

complete employment eligibility verification forms (I-9 forms) for all employees, including U.S. citizens, within three days of hiring; applicants should not be asked to complete an I-9 form before an offer of employment. Remember to put the I-9 form in the file so you can re-verify employment eligibility before the new employment authorization document expires. Do not accept a photocopy of a document because prospective employees must present original copies. School districts should not continue to employ someone who cannot present documentation that meets the foregoing requirements.

VII. Residency Requirements and Loyalty Oaths

Residency requirements

From time to time, a question will arise as to whether the school district can require its employees, such as a principal or superintendent, to reside within the boundaries of the school district. The short answer is no. The general rule is that a school district cannot require an employee to reside within the county that the school district is located as a condition of employment. O.C.G.A. § 45-2-5 states as follows:

No municipal or county government in this state shall require as a condition of employment by such government that applicants for employment as officers and employees, or such officers or employees now or herein after, must reside within the boundaries of the county or municipality.

The Georgia Supreme Court has upheld this statute in the face of a challenge by an Atlanta police officer over a residency requirement that police officers and firemen live within the city of Atlanta.¹² There, the Supreme Court held that "the ordinance of the city of Atlanta providing residential requirements for officers and employees of the police and fire bureaus...was unconstitutional and void..."

¹² City of Atlanta v. Myers, 240 Ga 261, 241 S.E. 2d 60 (1977).

The exception to the foregoing general rule is that residency requirements are permitted so long as there is a public safety necessity associated with the requirement and a specific geographic locale is not required. The Georgia Supreme Court found an exception to the prohibition on residency requirements. In Dixon, public safety personnel were required to live within a certain distance of work.¹³ The City of Perry required public safety employees to reside eight miles from city hall in order to have such employees living within a fifteen minute commuting distance "for the purposes of prompt response in emergencies." Specifically, the Supreme Court in Dixon found that the residency requirement did not violate O.C.G.A. § 45-2-5 because there was no requirement that the employee reside in any particular county or city.

Loyalty oaths

Georgia law requires all school district employees to take a loyalty oath. O.C.G.A. § 45-3-11 states as follows:

All persons who are employed by and are on the payroll of the state and are the recipients of wages, per diem, or salary of the state or its departments and agencies, with the exception of pages employed by the General Assembly, and all counties and cities, school districts, and local educational systems throughout the entire state, are required to take an oath that they will support the Constitution of the United States and the Constitution of Georgia, and they are not members of the Communist Party.

The oath is required to be in the following form:

"I, (insert name), a citizen of _____ and being an employee of _____ and the recipient of federal funds for services rendered as such employee, do hereby solemnly swear and affirm that I will support the Constitution of Georgia, and that I am not a member of the Communist Party."¹⁴

¹³ Dixon v. City of Perry, 262 Ga. 212, 416 S.E. 2d 270 (1992).

¹⁴ O.C.G.A. § 45-3-12.

The superintendent's oath is contained in a separate section of the Education Code.¹⁵ An opinion by the Attorney General held that the portion of the Georgia loyalty oath which requires one to swear support to the Constitution of the state of Georgia and the United States' Constitution is valid.¹⁶ However, the portion of the Georgia loyalty oath which requires one to disavow membership in the Communist Party violates the First and Fourteenth Amendments of the U.S. Constitution and should not be administered.¹⁷ The Attorney General opined that "[a]lthough a state may take reasonable steps, including the use of loyalty oaths, to protect itself from officials and employees who seek to overthrow the government of the United States by force, violence, or other illegal or unconstitutional methods, the state may not exclude a person from office or from employment based solely on membership in an organization." There has been no other Georgia or federal cases regarding this statute. However, it is recommended that the school districts require that employees take the portion of the loyalty oath regarding upholding of the constitution.

VIII. Drug Testing

There is no requirement in Georgia law that any school district employee be screened for alcohol or drugs prior to hiring.¹⁸ O.C.G.A. § 20-2-1121 does require that "all persons employed as school bus drivers by any public school system in this state shall be subject to random drug

¹⁵ O.C.G.A. § 20-2-103.

¹⁶ Bond v. Floyd, 385 U.S. 116 (1966).

¹⁷ 1985 Op. Att'y Gen. No. 85-19.

¹⁸ The federal district court in Georgia granted a permanent injunction and declared that the 1991 Applicant Drug Screening Act was unconstitutional because it amounted to an unreasonable search under the Fourth Amendment. Georgia Ass'n of Educators v. Harris, 749 F. Supp. 11 10 N.D. GA (1990). The district court cited to several cases in which random drug testing of a government's general workforce was struck down. In one case, the Department of Justice sought to random drug test its workforce. The D.C. District Court stated as follows: "Although the government has a legitimate interest in ensuring that its employees obey the law,...that interest is not sufficiently compelling to justify a search. Von Raab, it seems to us, suggests that federal employment alone is not a sufficient predicate for mandatory urinalysis."

testing for evidence of use of illegal drugs." However, the scheduling of the testing is not set forth within the statute, only requiring that "not less than fifty percent of the school bus drivers in each public school system shall be tested annually in one or more random tests."

Further, it is prudent for school districts to have signage in the area where employees are hired regarding the federal drug-free workplace law, which requires recipients of federal funds to take certain steps to ensure they have drug-free workplaces.¹⁹ At the heart of the Drug Free Workforce Act are two sections, one covering contractors and the other covering grantees. The sections closely parallel each other. In general, a school district must comply with the certification requirement in the Drug Free Workplace Act if it receives or applies for any funding under any federal grant or cooperative agreement, regardless of dollar amount, or any federal contract of \$25,000 or more.

The Drug Free Workforce Act obliges every applicant for a federal contract or grant to execute a standard form certificate as part of the solicitation or grant application. A separate certificate must accompany each bid or grant application. The certificate commits the applicant, if it is awarded the contract or grant, to implement a seven component program for the elimination of workplace related drug abuse. The act requires the following actions: publication and circulation of anti-drug statements; establishment of a drug-free awareness program; and an action plan to deal with employees convicted of drug-related, work-related crimes.²⁰

IX. Contractual Matters

¹⁹ 41 U.S.C. Section 701: 54 Fed. Reg. 46 46-71. At the heart of the Drug Free Workforce Act are two sections, one covering contractors and the other covering grantees. The sections closely parallel each other. In general, a school district must comply with the certification requirement in the Drug Free Workplace Act if it receives or applies for any funding under any federal grant or cooperative agreement, regardless of dollar amount, or any federal contract of \$25,000 or more.

²⁰ 20 U.S.C. § 5152(a)(1) and 5153(a)(1).

Once a prospective employee is selected as the most qualified, an offer of employment by the school district is made to that individual for employment. For most classified personnel, the offer will consist of an oral offer of employment, including job title, job duties, salary, benefits and work hours.

Requirement of Superintendent recommendation, board approval

A fundamental step prior to making any offer of employment to any employee is that the employee be recommended by the Superintendent and approved by the Board of Education. Under Georgia law, all employees of the school district are employed by the board of education upon the recommendation of the superintendent.²¹ There is no statutory requirement that the school board approve an employee for a coaching or extracurricular assignment. Some school boards do choose to retain such control over the appointments to those positions. Of course, board members are prohibited from voting on prospective employees who are immediate family members.²² Once a prospective certified employee is approved by the board of education, then the superintendent must sign the employee's written contract.²³

Offers to certificated employees

But because a large percentage of school district employees are certificated, like teachers, specialized rules apply when making offers employment, like the requirement of issuing a written contract.²⁴ For such employees, Georgia statutes prescribe who must approve the hiring

²¹ O.C.G.A. § 20-2-211(a).

²² O.C.G.A. § 20-2-58.1.

²³ O.C.G.A. § 20-2-211(a).

²⁴ O.C.G.A. § 20-2-211(a).

decision, when an offer of employment has to be made, and the terms of the offer. What follows below is a review of those statutory requirements.²⁵

First, when the school district is hiring a certificated employee, it must offer that prospective employee a written contract. Certificated employees are not defined under state statute, but the Professional Standards Commission has identified the following positions with a school district as requiring a certification: paraprofessionals²⁶, teachers²⁷, principals and superintendents²⁸. In addition, the Professional Standards Commission requires that the following positions to have certifications: audiologists, media specialists, counselors, nutrition directors, psychologists, social workers, speech and language pathologists, student support team coordinator, and teacher support specialist.²⁹ Most leadership positions within the school district probably require a certificate issued by the Professional Standards Commission. School districts should confirm whether the leadership position being advertised requires a certificate in order to comply with the state requirements in the hiring process.³⁰ As stated, all employees who are certificated are required to have a written contract.

Georgia case law is clear that an oral contract for employment of a teacher or certificated employee is illegal because it is not in writing.³¹ However, unique circumstances can arise when employing certified employees. For instance, does a school district have to issue a written contract to a certificated employee when that employee is not working in a position where the

²⁵ O.C.G.A. § 20-2-101(a) prescribes a different term of contract for superintendents which can run from one (1) to three (3) years.

²⁶ Georgia Professional Standards Rule 505-2-.11(1)(b).

²⁷ O.C.G.A. § 20-2-200(a)

²⁸ O.C.G.A. § 20-2-108.

²⁹ Georgia Professional Standards Commission Rule 505-2-.02(1).

³⁰ Director of Media Centers Endorsement. PSC Rule 505-2-.351 Director of Pupil Personnel Services Endorsement. PSC Rule 505-2-.352 Director of Special Education Endorsement. PSC Rule 505-2-.353 Director of Technology/Career Education Endorsement. PSC Rule 505-2-.354 Instructional Supervision Endorsement. PSC Rule 505-2-.355.

³¹ Dodd v. Board of Educ., 46 Ga. App. 235, 167 S.E. 319 (1933).

employee has to have a certificate, i.e., when a teacher or principal is employed to be a human resource director? The answer is "no."

O.C.G.A. § 20-2-211(a) states that "[e]mployment contracts of teachers, principals, and other certificated professional personnel shall be in writing, . . ." The statute only requires a written contract if the job (teacher, principal, etc . . .) requires that the employee be certificated. Stated in the converse, if the job does not require that the employee have a certificate in order to be employee, then no written contract of employment is required. Hence, if the job does not require a certification, then no written contract should be offered.

Further, should a school district issue written employment contracts to part time certificated employees? Here, the statute makes no distinction in the requirement between full or part time certificated employees receiving written employment contracts. Further, O.C.G.A. § 20-2-212(a) addresses the salary schedules for certificated employees, including part time employees. Significantly, it states that part time certificated employees are required to be paid the pro rata share of their salary set forth for the employee on the salary schedule. Reading these statutes together suggests that part time employees are to be treated the same as full time employees except for the payment of the salary.

Certified-employee, salary issues

The salaries paid to the professional employees of a school district can be a straightforward matter. Such salaries are established by a schedule in which the employee's certification level is matched with the employee's years of service.³² State law requires that the State Board of Education establish "a schedule of minimum salaries for services rendered which shall be on a ten-month basis and which shall be paid by local units of administration to the

³² O.C.G.A. § 20-2-212.

various classifications of professional personnel required to be certificated by the Professional Standards Commission.”³³ In addition to the minimum state salary, school districts frequently provide a local supplement to the salary schedules for professional employees. Other local supplements may be given for extra duty responsibilities such as coaches, counselors, band directors, and administrators.

Calculating years of creditable service

However, issues can arise from time to time over the calculation of the employee’s years of service. School districts are responsible for verifying and calculating certified employees years of creditable service.³⁴ With some exceptions, the State Board of Education regulations require that a certified employee work 120 days of an academic year in order to receive credit for that year before advancing to the next level on the state salary schedule.³⁵ Generally, in order for school experience to count, the experience must have been earned at a public school or regional education service agency or in a regionally accredited private school (i.e., accredited by Southern Association of Colleges and Schools or the Georgia Accrediting Commission). A maximum of three (3) years credit will be allowed for military service regardless of the specific duties performed. A scale for military credit as follows will be used: Eight (8) full months of active duty = one year; Twenty (20) full months of active duty = two years; and Thirty-two (32) months of active duty = three years.³⁶ No credit will be given to a professional employee for any year in which the employee received an unsatisfactory performance evaluation.³⁷

³³ Id.

³⁴ S.B.O.E. Rule 160-5-2-.05(3)(Policy GBA(5)).

³⁵ S.B.O.E. Rule 160-5-2-.05(Policy GBA(5)).

³⁶ S.B.O.E. Rule 160-5-2-.05(4)(c)(Policy GBA(5)).

³⁷ S.B.O.E. Rule 160-5-2-.04. (Policy GBA).

Are substitute teachers required to have a written employment contract?

School districts should issue certified substitute teachers a written contract only if the substitute teacher has a teaching certificate. Of course, the hiring of substitute teachers has slightly different requirements than for other certificated employees. Georgia law does require that each school district hire substitute teachers.³⁸ However, as a preliminary matter, substitute teachers in Georgia are not required to hold a state certification and hence no written contract of employment is required to be offered to these individuals.³⁹ The statute places a preference on hiring substitute teachers with teaching certificates, however, if such individuals are not available, then school districts are "authorized to employ the person who most closely meets the requirements for certification as a teacher and who is available to serve as a substitute, provided such person is closely supervised by the school principal or the principal's designee."⁴⁰ The priority for hiring substitutes is set forth by the Georgia Professional Standards Commission. School districts are to give priority to hiring candidates based on the following criteria: a valid or expired teaching certificate, a completed bachelor's degree, a high school diploma, or a GED.⁴¹

Finally, school districts should be mindful of the length of the absence which is being filled by the substitute teacher. This issue can arise in two contexts. First, any absence by a classroom teacher that last 46 or more consecutive days in the school year shall be filled with a

³⁸ O.C.G.A. § 20-2-216.

³⁹ Georgia Professional Standards Rule 505-2-.36.

⁴⁰ Id.

⁴¹ Georgia Professional Standards Rule 505-2-.36(s)(b).

certified, in-field teacher.⁴² Second, the PSC prohibits a substitute teacher with a GED or a high school diploma to fill any teacher vacancy for more than ten (10) consecutive days.⁴³

Timing of the offer of the written contract

For current certificated employees, the timing of the offer of employment is important. The local board of education by April 15 has to offer a written contract of employment to the certified employee "on the payroll of the local unit of administration at the beginning of the current school year"⁴⁴

Other requirements are set forth regarding the written contract to certified personnel. The written contracts must be "signed in duplicate by such personnel on their own behalf and by the executive officer of the local unit of administration on behalf of its governing board."⁴⁵ Further, the completeness of the written contract is critical. For instance, school districts should review its written employment contracts to insure that the salary, position, the term of the contract, the beginning and end date, and the requirement that the employee maintain his or her certification. A recent state statute states: "Such contracts when tendered to each teacher or other professional shall be complete in all of its terms and conditions of the contract, including the amount of compensation to be paid to such teacher, and shall not contain blanks or leave any terms or conditions of the contract open."⁴⁶

Hiring of independent contractors

Of course, school districts hire more than just certified and classified employees. From time to time, they hire other professionals, such as architects, attorneys, general contractors, and

⁴² S.B.O.E. Rule 160-5-1-.05(2)(d).

⁴³ PSC Rule 505-2-.36(2)(f).

⁴⁴ O.C.G.A. § 20-2-211(b).

⁴⁵ O.C.G.A. § 20-2-211(a).

⁴⁶ O.C.G.A. § 20-2-211(b).

other consultants. Before hiring such individuals, it is a good idea to consult with the school board's attorney. For instance, an independent contractor in a school district will typically be terminable at will.⁴⁷ Thus, before hiring independent contractors, a good understanding of the specific hiring requirements and procedures is needed. The failure to follow those procedures could result in the contract being found null and void or turning an independent contractor into a school district employee.⁴⁸ Because independent contractors, like attorneys, architects and others, are not employees, then the board of education can hire these individuals without the superintendent's recommendation.

In addition, depending on the service to be provided, the school district may be required to request bids for the services.⁴⁹ Typically, the local board of education will use a request for proposal to solicit service contracts. Specialized rules can pertain to the solicitation of construction of services, i.e., construction services in excess of \$100,000.00.⁵⁰ Second, school districts are required to have most contracts approved by the local board of education.⁵¹ Third, most contracts with a local board of education are limited in their term, i.e., the contracts must be approved annually by the local board of education.⁵²

⁴⁷ An at will employee is one whom the employer is free to decide among the job applicants which one it will offer employment and the employer can terminate the employee for any reason except an illegal reason. In contrast, a contractual, non-tenured employee is one who is hired under a contract for a specified term to perform certain duties. Joyce, pp. 4-5.

⁴⁸ Article III, Section 6, Paragraph 6 of the Constitution of the State of Georgia provides that the Government, including a public body, such as a Board of Education, cannot make donations, grants or gratuities. Shelley v. Board of Public Education, 132 Ga. App. 314, 208 S.E.2d 126 (1974). ("A payment of plaintiff's claim, with or without a judgment against the defendant board, in settlement of a supposed tort liability of the board would be a gratuity which is forbidden. Constitution, Art. VII, Sec. I, Par. I.")

⁴⁹ J. Matthew Maguire, Jr., "Government Contracting in Georgia," Georgia Bar Journal, Feb. 2005, pp. 12-21.

⁵⁰ O.C.G.A. § 36-91-1.

⁵¹ American Ins. Co. v. Seminole County Bd. of Educ., 51 Ga. App. 808, 181 S.E. 783 (199X) ("A county superintendent of school cannot contract a debt on behalf of the county board of education without previous authority from the board.") See also, Knight v. Troup County Bd. of Ed., 144 Ga. App. 634, 636, 242 S.E. 2d 263 (1978).

⁵² O.C.G.A. § 20-2-506 prohibits multiyear leases, purchases, or lease purchases of all kinds for the acquisition of goods, materials, real and personal property, services, and supplies. Further, the vendor is required to give the

Certain specialized contracts, like those architectural services, require extra attention. For instance, when school boards "contracting with a registered architect for the design and supervision of a state-funded capital outlay construction project [the school board] shall select and execute the architectural contract of their choice and incorporate the "Mandatory Addendum to the Owner/Architect Agreement" as an attachment to the contract selected."⁵³ Other specialized rules apply in this context and should be consulted prior to the issuance of a request for proposals or a contract.

school board an unrestricted right to cancel the contract at the end of each year. Finally, the total expenditure for each year of the contract must be shown within the contract.

⁵³ SBOE Rule 160-5-4-.11 (FGAD Architectural Contracts and Fees).