

Creating Acceptance Guidelines For Positions of Trust: Do Recent Court Decisions Require Changes

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Many Human Resources interviewers and Law Enforcement background investigators are unaware that the recent Supreme Court *Students For Fair Admissions* (SFFA, 6/29/23) decision includes a prohibition against the use of “standardless goals” which as the term indicates defy objective measures of effectiveness or achievement. In July, the University of North Carolina Board of Trustees, one of SFFA defendants, decided that the SFFA decision applies not only to college admissions but hiring and contracts as well. Also in July, a federal Court (Ultima, 7/19/23) applied the SFFA decision to Section 8(a) federal contracts. When applied to the selection process for law enforcement, teachers and other positions of trust, public and private employers are encouraged to review both the selection information targets and standards involved to make sure they avoid decision criteria that lack any objective, work performance measure. The following discussion is taken from the **Objective Pre-employment Interviewing** program which has been accepted and used by thousands of federal, state and local law enforcement and other government agencies, School Districts and numerous diverse private employers since 1988 (OPI, 2023).

Selecting Information Targets

Selection systems for law enforcement, education and other positions of trust differ significantly from other professions in that the quality of the applicants’ character is often valued more by employers than the applicants’ competency in performing work related tasks. While these jobs do in fact include a minority of applicants with experience in the job being sought (laterals), most applicants lack such prior experience with the employer willing to train and intern candidates during a probation period. It is this character or behavioral aspect of the applicants’ qualifications that is delegated to integrity type interviews, criminal record checks required for state certification and pre-employment substance abuse testing. The process of identifying legally defensible pre-employment information targets is basically the same regardless of the category or method of gathering information used. In essence, the employer must be able to demonstrate that the selection information directly relates to the applicants’ ability to adequately perform the job being sought. The issue of adequate performance will be discussed in the subsequent section regarding Acceptance Guidelines or Standards but target relevancy and level of performance are inexorably combined and presented here as separate topics only to facilitate discussion.

Many employers take advantage of Focus Groups and other “expert” Assessment Panels that engage in Job Analyses to identify information targets appropriate for integrity interviews. Ideally, participants should have actual real experience in the job being sought and/or supervised people working the job. When the panel participants have been responsible for conducting internal investigations regarding allegations of wrongdoing they already know objectively what needs to be targeted as a predictor of

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future problems. Another or perhaps additional approach is to factually review the bases for employee dismissals, suspensions, reprimands and other work-related disciplinary actions. Likewise, any record of criminal or civil litigation, findings by government oversight agencies or media reports involving employee work related activities should be reviewed as a possible source of information targets. Finally, pre-existing menus of time-tested targets may already exist for some professions as is the case for law enforcement and public education where certification agencies such as Departments of Education and some Police Officer Standards and Training (POST) Commissions mandate what needs to be investigated prior to certification. The **Objective Pre-employment Interviewing** program used an Assessment Panel of law enforcement Executives and Internal Affairs Investigators to compile a menu of appropriate targets (Appx. 1). A similar approach was used to create the menu of information targets for the American Association of School Personnel Administrators. Regardless of the source, the menu of information targets usually exceeds both the time the employer can devote to the background process and the format limits of the method used to collect the information. This surplus of choice allows each employer to select a different list of targets based on individual needs and missions. It is important to mention that employers can select an information target even if there is no existing record that the topic of the target has happened within the organization's history just as long as it can be demonstrated that it happens with sufficient frequency within the profession. Thus, a School District doesn't have to wait until a teacher is proven guilty of sexually abusing a child before the District starts screening future applicants for child sexual abuse. Likewise, a Municipality may never have been sued over allegations that a member of its Police Department used excessive force during an arrest before it evaluates domestic, work place and criminal violence with applicants.

Defining Information Targets

After the information targets have been identified it is important to define each target in order to maintain consistency among and within practitioners. Although not a topic of this article, it is also important with regard to question design and formulation. There are three general principles to consider:

1. The more focused the interviewer's understanding of what he or she really wants to know, the easier it becomes to formulate and ask initial and follow-up questions;
2. The more focused the information target, the easier it becomes to recognize evasive answers and other forms of misrepresentation and, subsequently, the easier it becomes to elicit accurate information; and
3. The "wider" and "deeper" each information target is defined, the greater the number of possible subtopics (questions) and, in general, the longer the interview will take. When time is limited, prioritize the number of targets and/or "tighten up" the target focus based upon the employer's historical record of importance.

Creating Acceptance Guidelines and Standards

Once the desired Information Targets have been selected and defined, the employer must then establish the level of acceptance for each target, in effect, what constitutes a Qualifier and what

constitutes a Disqualifier. Qualifiers include such basic job requirements as a job specific level of education or a current valid driver's license for jobs that require the operation of a motor vehicle. Disqualifiers include "how much drugs is too much drugs" and the applicant's history of work related disciplinary actions. The following criteria should be considered in creating these standards which in turn directly effect the "pass" and hiring rates:

1. Time: the period of accountability usually expressed in years or months commencing backwards from the time of the interview, e.g. "In the last 3 years..."
2. Frequency: where it applies, the minimum number of occasions needed to Qualify or maximum number of incidents needed to Disqualify within the Period of Accountability expressed in objective or quantifiable terms. Depending on the specific job, an applicant might have to agree to periodically rotate work shifts in order to Qualify while any felony conviction would be considered a Disqualifier for jobs requiring some types of government certification;
3. Quantity, value and type: where it applies, similar to (2) above and might include various, minimum education requirements, the amount of theft from prior jobs expressed in dollars and limited to a Period of Accountability ("...not more than \$200 in merchandise stolen from jobs in the last 3 years") and type which could include distinctions between misdemeanors and felonies or moving versus parking traffic violations.
4. Circumstances and Exceptions: the procedure and process for considering and granting exceptions to the Acceptance Guidelines, e.g. most state POST Commissions will consider waiving the felony conviction Disqualifier depending upon the applicant's age at the time, degree of involvement and actions since the conviction giving special weight to things such as service in the military. It is recommended that the interviewer or examiner who obtained the Disqualifier not grant themselves an Exception since Exceptions in effect change the standard so all future applicants with the same Circumstances should be granted the same Exception. Instead, an impartial decision maker or panel should be created and the language in the record of Acceptance Guidelines changed to incorporate Exceptions. Both the practitioner and the applicant should be allowed to seek Exceptions and the process remain identical no matter who the petitioner.

Once the Acceptance Guidelines have been created, they should be reviewed and, if necessary, modified after field testing. Typically, based on disqualifying admissions, employers using these procedures generally experience a 70% "pass" rate. Besides the targets and Acceptance Guidelines, this rate is also effected by the overall U.S. economy. When the U.S. economy is doing poorly, the pool of qualified candidates for public sector jobs fills, presumably because applicants seek more stable employment. When the economy is doing well and the number of qualified candidates drops, there's a temptation to lower the Acceptance Guidelines in an attempt to meet hiring goals. While this sometimes works with regard to physical agility and educational standards, it should always be avoided with regard to applicant character issues. It is far more expensive to investigate and resolve post-hire problems – including damage to workforce morale and reputation – than dealing with the issues in the pre-employment phase. Recent reported comments of Memphis Police recruiters attribute the "lowering the bar for hiring" – including the evaluation of past criminal activity – for the Tyre Nichols tragedy (AP, 2/7/23).

Instead, employers should consider expanding and investing in more effective recruiting efforts starting with a simple survey of recent, top performing hires to identify how and why they were recruited.

The finalized standards should be reduced to writing and distributed to all practitioners. While this need is self-evident for organizations with more than one interviewer or examiner, even when there is only a single practitioner, formal, written standards are recommended. It is difficult to remember what specific criteria should be applied particularly when there are many information targets and/or a small number of applicants are processed on an infrequent basis. In short, consistency is a critical factor in defending employment decisions with inconsistent decisions almost always interpreted as proof of bias.

Nothing in this article should be considered legal advice and it is suggested that all employers have their employment policies and practices reviewed by their own legal counsel.

Amid soaring crime, Memphis cops lowered the bar for hiring, Associated Press, 2/7/23

Objective Pre-employment Interviewing, www.stanleyslowik.com, 2023

Students For Fair Admissions, Inc. v. President and Fellows of Harvard College, 143 S.Ct. 2141, 6/29/23

Ultima Services Corporation v. U.S. Department of Agriculture/Small Business Administration, U.S. District Court for Eastern District of Tennessee, 2:20-CV-0041_DCLC_CRW, 7/19/23

Appendix 1: Objective Pre-employment Interviewing Information Targets

1. Biographical data
2. Employment history and discipline
3. Relocation attitude and commitment
4. Shift attitude, availability and commitment
5. Retention and permanency
6. Financial responsibility
7. Integrity
8. Drug behaviors
9. Alcohol behaviors
10. Criminal activities
11. Military history and discipline
12. Driving history
13. Reliability
14. Service attitude and response
15. Certification/education history
16. Perjury/falsification of official reports/records
17. Bribes and gratuities
18. Workplace/Domestic violence/Excessive Force
19. Child/Elderly/Patient abuse