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From chapter: **Cases and Commentaries**

Fair Practices in Hiring ... Case Analyses

by Susan Poser, J.D., Ph.D.

General Observations

These two cases raise, at their core, questions of fairness in hiring, that is, procedural fairness in running a search. They force us to call up and examine our assumptions about and the goals of good hiring processes, and then test potential action against those assumptions and goals. On a more general level, consideration of the issues presented in these cases demonstrates, once again, that decisions about ethical dilemmas are only as good as their reasoned justifications. Before addressing the specifics of these cases, I think it is worthwhile to consider some assumptions that

I believe are almost universally made about the search process. These assumptions overlap substantially with basic tenets of due process. I will briefly describe these assumptions and then move on to more specific commentary.

Assumptions About Searches in Higher Education Administration

- We assume that search committee members share the goal of hiring the best person for the job.
- We assume that search committee members ultimately have the best interests of the institution in mind.
- We assume that search committee members should be free to voice their opinions about the candidates, based on the information provided to them in the search, and bring their unique perspective to the discussion. If this were not true, we would not try to populate search committees with people of diverse views and experiences, based on their personal characteristics, their rank, occupation, etc.
- We assume that the process should be fair, that candidates should begin the process on equal footing and have an equal chance to persuade the committee of their qualifications. We assume that committee members will be as impartial as they can be.
- Yet, we know that in a search that is open to internal candidates, it is difficult to form a committee of people who do not know the internal candidate or candidates, and it may be impossible for search committee members to avoid hearing outside information about candidates. But, again, we assume that, for the most part, search committee members can put aside this information and treat the candidates fairly and impartially.
- Finally, we assume that the search process should produce the most qualified candidate for the position.

Conflict of Interest in Hiring: Internal Candidate

George has applied for two positions: the Vice President position on a sister campus, and you are on the search committee, and a Dean position on your campus. For the Dean position, George has already received an offer.

You are on the Vice President search committee and you know that George is likely to be a strong candidate for the Vice President job. You also know that he has been offered the Dean position already and will need to decide before the determination of finalists is made for the Vice President position. The questions are:

- whether you should tell George that is likely to be invited to interview for the Vice President position
- whether that answer changes if you have an institutional and personal interest in having George appointed to the Dean position that has already been offered to him.

Analysis of the problem can initially be broken down into two questions. Before deciding whether you should tell George about his chances of getting the Vice President position, we must determine whether you may not tell him or, alternatively, whether you may tell him. The questions can be posed as follows:

- i. Are you under an ethical/moral obligation NOT to tell George that he is a strong candidate for the Vice President position?
- ii. Are you under an ethical/moral obligation to tell George that he is a strong candidate for the Vice President position?
- iii. If there is no duty one way or the other, what are the considerations that should go into determining if you should tell him?

First, are you under an obligation NOT to tell George that he is a strong candidate for the Vice President position?

Initially, this question is one of positive morality, that is, of rules: if the committee has agreed to confidentiality or there is a rule of confidentiality that governs search committees, then you have an obligation not to tell. So, if there are no rules of confidentiality operating that apply to this situation, then this question can be quickly disposed of.

Of course, positive morality in the form of rules or customs do not always solve these kinds of dilemmas, as sometimes rules must be broken in the name of ethics, they can be instructive and might, in a case like this, provide a kind of tie-breaker. That is, as I will discuss below, there are compelling considerations that militate against telling George about his chances at the Vice President position even without rules, so the existence of a rule gives even greater weight to those considerations.

This brings us to the next question.

Are you under an ethical/moral obligation to tell George that he is a strong candidate for the Vice President position? Must you tell him? I would answer that question in the negative.

In discussing this question, I will quickly dispense one aspect of it – whether it matters that your personal and professional preference is for George to take the deanship – because this fact should not play a role in deliberations about whether the right thing to do is to tell George. To make the decision based on the needs of the institution alone is to violate the second categorical imperative and to treat George as a means and not as an end. This is not to say that the needs of the institution are irrelevant, but they cannot be in this case the determining factor because it would conflict with respect for George's personhood, his right to be treated as an end and not a means. This tells us one thing about the assumptions that were stated at the beginning of this commentary; they have limits. Having the best interests of the institution in mind does not mean that it should trump respect for the individual.

The question of whether to tell George is difficult because by telling George, you may be trying to help him, but you are also requiring him, in his own mind, to take a substantial risk, to turn down an attractive job offer for a chance at a better job.

Even if you are certain that the committee would make him their choice, the question implies that the committee does not have hiring authority and that someone above the Vice President level will make the hire, and we do not have information about that person's views.

An important element in sorting out ethical questions is considering different perspectives. George knows he has applied for the Vice President position. Thus, if he would prefer that job to the Dean job, then the burden may be on him to ask the search committee chair about his chances. If he is open to grappling with the dilemma that this information might present to him, then he will make this inquiry. He does not have a reasonable expectation that this kind of information would be offered to him, unsolicited, knowing that in general, search committees are obligated, whether by positive rule or not, to be very discrete.

Moreover, an obligation to inform candidates that they are likely to be successful would be very difficult to define. How qualified does the candidate have to be in order to trigger the obligation on a member of the search committee to reveal this information to the candidate? Is it only triggered if the candidate has an offer for another job, as George does, or also if such an offer is likely? What if members of the search committee think a certain candidate will get the position, but they do not know if the candidate has other offers? Thus, any obligation to tell George in this case defies clear definition.

So, I do not think there is an obligation to tell him, and there may be an obligation not to tell him, depending on the agreed upon rules of the committee and the institution. The next question is whether you should tell George that he is a strong candidate for the Vice President position. As discussed above, there are potential unintended consequences of revealing this information and creating this dilemma for George. In discussions with the chair of the search committee, it might be determined that in this particular situation, revelation is the appropriate action, I would recommend not revealing this information but if George asked, the chair should tell him that he looks like a good candidate. But it should be George's decision to make the initial inquiry and thus to decide to take on the dilemma that this would create.

Fair Practices in Hiring – Outside Information

The questions that accompany this scenario more directly test the assumptions with which this essay began, and highlight the occasional tension among the ethic of fairness, the assumption of institutional loyalty, and the salutary effects of openness and transparency in reaching good decisions. The questions force us to think broadly about the hiring process and the function of the search committee.

When is it appropriate to bring into the search committee deliberations, certain pieces of information to which a committee member alone has access and that are relevant either to the deliberative process, or the candidate's qualifications? This case forces us to balance transparency and fairness through a process that has as its goal hiring the best person for the job.

On the one hand, if the purpose of the search committee is to find the best candidate and participate in a process of deliberation where different views are heard and information leads to consensus, then full transparency within the committee would seem to be the rule and sharing all information about a candidate would ultimately bring the committee to coalesce around the candidate with the best qualifications for the position.

On the other hand, ideals of notice and due process tell us that candidates must be treated equally and must be put on notice of what will and will not be taken into consideration in the decision-making process. A candidate told to provide a résumé, a statement of intent, and three references, for example, has a reasonable expectation that this is the information that will be used to deliberate about their qualifications, at least at the initial stages of the search.

At some institutions, search committee members are not permitted to serve as references for candidates. This is reminiscent of the rule for lawyers that, with very limited exceptions, they are not permitted to be witnesses in cases involving their own clients.¹ The theory is that it strains human nature to expect someone to present objective facts or honest opinions when one has a stake in the outcome. Although in the context of a search, it is more accurate to say that the reference often has a preference in the outcome, but not a stake, it is not fair to the rest of the pool if one member of the committee, which is supposed to be evaluating candidates impartially, begins the process as an advocate. This violates basic notions of distributive justice – treating similarly situated people the same.

So, at first glance, fairness requires that the interim dean not serve on the committee. However, if there is no rule against this at this institution, fairness requires that the other members of the search committee be made aware that one of their members is functioning as an advocate and a judge. Disclosure at least puts the rest of the committee on notice that one of their members did not begin the process in a spirit of neutrality and open-mindedness toward the candidates, awaiting to be persuaded by the evidence presented. There is one among them who appears to have entered the process with a closed mind and other members should be free to discount this opinion, or at least be put on notice that it must be tested.

It is worth noting that I am not making much of the information in this scenario that the candidate for whom the Dean is advocating is “not particularly strong.” Analysis of this case should be the same if the candidate were described as “very strong.” The problem here is not the relative quality of the candidate, but the fairness of the process. If the candidate were very strong, the rest of the committee would still need to consider discounting the opinion of the Dean, even though in the end, it might not make a difference as to the outcome.

¹ See Model Rule of Professional Conduct. 3.7 (American Bar Association 2008).

The preceding discussion addresses both the question of whether one should raise the fact that a member of the committee wrote a reference, and whether, if it is not raised initially, it should be raised at the point that the member advocates strongly for the candidate. The next questions concern what a search committee member should do with information (both good and bad) about a candidate that was learned through informal channels not part of the search process. Again, the main consideration here is fairness to all of the candidates; the professional obligation to find the best person for the position; and the importance of serving the best interests of the institution. A search committee member learns from (I'll assume) a trusted source first, very good things about the candidate, and, second, very negative things (poor treatment of women and minority staff). What does the committee member do with this information?

This question goes to the heart of the issue of fairness of the process to all of the candidates. The problem with the positive information is that if this is shared, it gives a clear advantage to one candidate, and therefore disadvantages the other candidates who do not happen to have a personal connection to the search committee. It may be that another person in the pool would get similar informal praise, but has no such opportunity. So using this information at this stage of the process violates the assumption that the candidates begin the process on equal footing and have a reasonable expectation that the materials requested by the committee are what they will use in making the determination. However, as the search process proceeds and wider range of references are consulted, it may be appropriate to include this information in the broader dossier of the candidate if the committee makes an effort to gather similar information about the other candidates. The negative information does not create this difficulty. Although it is possible that there is similar negative information about other candidates, the important point here is that this negative information creates a reasonable belief that the person is not qualified for the job. This assumes, of course, that the information is verifiable, not the product of rumor or a personal grudge. The reliability of the information would have to be explored before a member of the committee would share it with the search committee.

The duty to find the best person for the job, and the duty to the institution, would seem to require investigation of this information. If it turns out to be reliable and is then shared, it does not disadvantage the other candidates. The search committee is obligated to try to discover and treat similarly disqualifying information on the other candidates as well. Using this information to form a judgment about the candidate clearly does disadvantage this candidate, but the disadvantage was self-imposed. Depending on the circumstances, it might not be appropriate to rely on this information alone to eliminate the candidate, but it should be shared with the committee and considered a fact.