



MEMORANDUM

OFFICE OF EMPLOYEE RELATIONS

No.: 49

Updated: March 2, 2016

Subject: **Selections for Positions in MSEA units**

To: Human Resources Directors, Agency HR Staff

From: Julie M. Armstrong, Chief Counsel, Office of Employee Relations

In May of 1995, BOER Memorandum #49 (“The Walo Memo”) was issued as the result of an arbitration decision on selections for which the Bureau of Human Resources provides a Certificate of Eligible Candidates. Since that time, subsequent arbitration decisions have provided additional guidance for those selections as well as for Direct Hire selections.

Attached is updated guidance and advice that incorporates the latest arbitral precedent for MSEA selections. It is essential that you provide a copy of this updated guidance and advice to each member of a selection panel prior to any selection, and give the panelists an opportunity for review and discussion. This guidance may also be appropriate for other selections outside of MSEA.

Thank you.

IMPORTANT BULLETIN – SELECTION GUIDANCE AND ADVICE
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**GUIDANCE AND ADVICE FOR CONDUCTING SELECTIONS TO FILL
POSITIONS IN MSEA BARGAINING UNITS
IN ACCORDANCE WITH ARBITRAL PRECEDENT**

Updated March, 2016

I. In selections for which the Bureau of Human Resources provides a Certificate of Eligible Candidates - Length of State Service is important. The Selection Panel must give length of satisfactory state service appropriate consideration along with qualifications for the position.

- A. Every interview panel must be aware of the relative length of state service of each applicant prior to the interview. This should be provided to them by agency Human Resources and may be confirmed with the candidate during the interview.
 - 1. Length of state service is defined as the total amount of time spent working for the state in a permanent position in any department. This service need not be continuous. [Note: this is not the same as ‘seniority’.]
 - 2. Time spent in a part-time or seasonal position counts equally toward length of service calculations; however the weight given (*i.e.* the value or importance placed upon) such service in considering it may be less than that given to full time year round service.

- B. The panel must expressly consider relative length of satisfactory state service, **AND there must be evidence of such consideration.**
 - 1. After the interviews the panel should discuss the relative lengths of state service, and then weigh the relative lengths of service and qualifications of the candidates.
 - 2. If, after that weighing process, the panel determines that a candidate with less state service is the best qualified for the position, they should **set forth in detail why the junior candidate’s qualifications outweighed the other candidate’s greater state service.** This should be **in writing** and “based on legitimate judgments as to the relative strengths of the candidates and how those strengths relate to

the particular requirements of the job.” When hiring the candidate with the greatest state service, it is not necessary to prepare a written justification.

II. In Direct Hire selections - When ability and qualifications to perform the duties are equal among two or more employees, seniority will govern. (Administrative Services, Professional and Technical, and Supervisory Services bargaining units). For OMS, seniority will govern when ability and qualifications to perform the duties are substantially equal among two or more employees.

- A. Before bypassing a senior candidate, the panel must scrutinize the ability and qualifications of the candidates to perform the duties with sufficient rigor to permit a full basis for comparison.
 - 1. This scrutiny should include a comparison of the candidates’ education, training, and positions/job duties held in the past compared to the duties and requirements of the position being filled.
 - 2. The assessment of whether two different candidates are at least “equal” cannot be fairly made without scrutinizing the past job performance of both. This is a scrutiny of the quality of the past performance as opposed to just quantity.
 - 3. Interview panels ‘dazzled’ by an interview must consider more than the interview performance in order to justify a candidate having superior ability and qualifications.
- B. Seniority is defined as continuous employment, since the last date of hire into a status-granting position. Seniority of the candidates should be known prior to the interviews. This may be provided by agency Human Resources.

III. The Selection Panel must consider past job performance.

- A. Past job performance is relevant as a predictor of future job performance. “Some observation of past performance should be used to determine if there are gross disparities in performance, major deficiencies, or to clarify or double check impressions created at the interview.” There are several options for a selection panel to consider past performance:

1. The recent (usually past two or three years) performance appraisals for each candidate may be reviewed;
 2. A panelist (usually the Chairperson) may contact the supervisors of the candidates to gather supervisory input on past performance; or
 3. Supervisory references may be prepared in advance of the interview with the specific promotional position in mind. This works best when an agency such as DOT has a large number of similar classes.
- B. Depending on the particular facts in the selection at hand, you may wish to use one method as opposed to another, or use a combination of these methods. For example, if there are candidates from outside state service, or if it is well known that one candidate's supervisor writes very critical appraisals of employees while another gives all employees top rankings, supervisory references may be a better option than performance appraisals. **The method used should be as consistent as possible within the selection.**
- C. A panel may review performance appraisals of all candidates to access past performance in a consistent manner and *then* contact supervisors for references of only the top candidate(s).
- D. When hiring a less senior candidate over a candidate with more seniority — whether or not the more senior candidate(s) was a top candidate after the interview — a thorough written justification is essential. This written justification **must** include a comparison of the candidates' educational achievements, a comparison of the positions and job duties they have held in the past and how these relate to the job duties of the current vacancy, an assessment as to their performance at the interview and on any other tools used in the selection process, and an assessment of their past performance in the jobs they have previously performed. **When hiring the most senior candidate, no written justification of the decision is necessary.**

IV. The panel cannot give a candidate who has been in acting capacity in the promotional position to be filled a possible advantage by considering that acting capacity service in the selection process.

- A. A candidate may not be permitted to gain an advantage by virtue of having served in the position being filled in acting capacity. Therefore experience and/or knowledge gained by a candidate **solely** because s/he had served in acting capacity in the position may not be considered.
1. Interview questions must be framed so that answers are not directly related to specific experiences a candidate had while serving in acting capacity.
 2. The panel shall direct the candidates not to mention such acting capacity service or any experience or knowledge gained solely through such service. One panelist or the monitor should monitor the questions and answers. Should a candidate forget this instruction, s/he should be reminded of it and asked to correct the answer to only contain information based on non acting capacity experience. The other panelists should be instructed to strike out of their notes and not consider any portion of the answer based improperly on acting capacity.
 3. Where an agency has been ordered by an arbitrator or settlement agreement to reselect for a particular position, the state must do everything feasible to minimize the possibility that the originally selected candidate will be advantaged by the time s/he spent in the job. Just as with acting capacity, the state may not consider the knowledge and experience gained by the originally selected candidate **solely** because s/he was in the position.

V. When a Grievance cannot be filed on a Selection

In 2013, the State and MSEA negotiated the following language into the Seniority Article for both Direct Hire and positions for which the Bureau of Human Resources provides a Certificate of Eligible Candidates:

No grievance may be filed by or on behalf of a candidate with less seniority than the selected candidate, if the grievance alleges that the senior candidate was selected in violation of the provisions of this Article.

In addition, neither MSEA nor an employee in an MSEA bargaining unit can file a nonselect grievance over the filling of positions in a bargaining unit not represented by MSEA or confidential positions. The reason for this is that only the union representing the bargaining unit containing the position applied for has the right to bargain over the filling of positions in its bargaining unit.

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