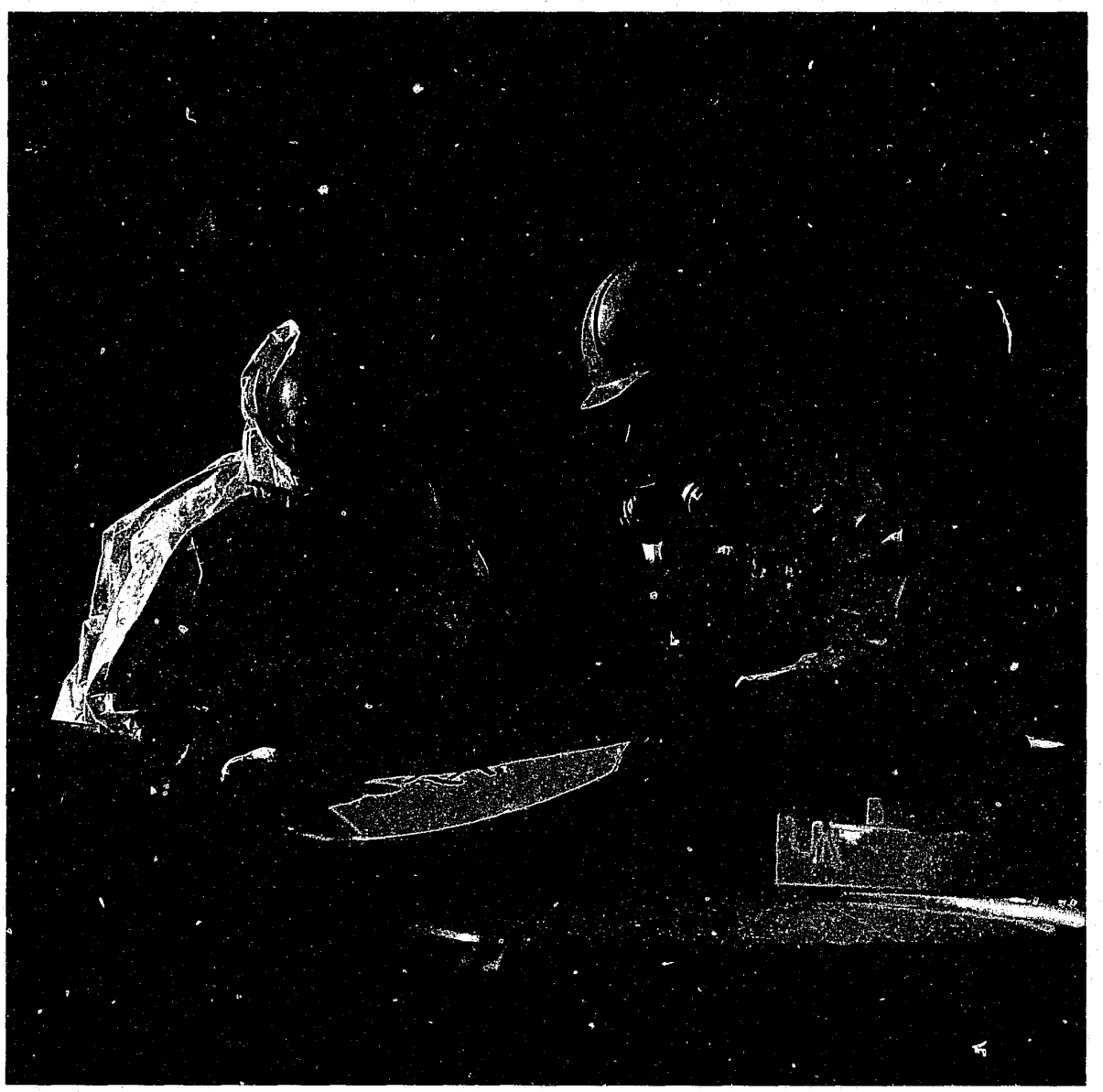


November 1993
Volume 62
Number 11

United States
Department of Justice
Federal Bureau of
Investigation
Washington, DC 20535

Louis J. Freeh,
Director

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, Washington, D.C. 20535.

Cover photo by Steve Delaney, Environmental Protection Agency

FBI Law Enforcement B U L L E T I N

Features

Departments

ISSN 0014-5688 USPS 383-310

145804

Hiring Standards
Ensuring Fitness for Duty

By
DANIEL L. SCHOFIELD, S.J.D.

Constitutional and statutory principles impact on the hiring standards established by law enforcement agencies. Courts recognize the need for hiring standards that effectively ensure officers possess the physical, educational, emotional, and integrity qualifications to handle the challenges and stresses inherent in law enforcement employment.

This article specifically discusses the legal defensibility of the following hiring standards: 1) Physical fitness testing; 2) educational requirements; 3) psychological testing; 4) polygraph examinations; and 5) criminal history assessments. The general conclusion reached is that law enforcement administrators have considerable managerial prerogatives under State and Federal law to implement hiring standards and procedures to ensure officers are competent and fit for duty.

Physical Fitness Testing

The recent passage of the Americans with Disabilities Act[1] (ADA) and the Civil Rights Act of 1991[2] (CRA of 1991) makes it imperative that law enforcement agencies carefully identify the essential functions of police work and develop physical fitness standards and tests based on those functions. Under the ADA, employers may not refuse to hire or discharge a qualified individual with a disability because of that disability, unless that person, with or without a reasonable accommodation, is unable to perform the essential functions of the job.[3]

The CRA of 1991 prohibits employers from adjusting (or "norming") test scores for employment-related tests based on race, color, sex, religion, or national origin.[4] This provision may render illegal many currently used physical

Special Agent Schofield is the Chief of the Legal Instruction Unit at the FBI Academy.

> ***"...State and Federal laws afford law enforcement administrators considerable latitude to implement reasonable job-related hiring standards...."***

fitness programs and tests with different standards or passing scores for men and women.[5]

Neither of these statutes requires law enforcement agencies to hire or retain persons who are physically unable to perform the job. They do, however, raise many difficult questions regarding the legal defensibility of physical fitness tests for law enforcement employment.

Accordingly, in March 1993, the FBI Academy hosted a working conference of personnel specialists, physical testing experts, and attorneys for the purpose of recommending legally defensible and operationally effective physical standards for law enforcement. A comprehensive report sets forth the findings and conclusions of this conference.[6]

The report concludes that Federal statutory requirements can be met by establishing physical standards that are job-related and consistent with business necessity and that the following simulative, content-based task test is a legally defensible fitness standard for law enforcement:

1) The person taking the test must complete a 1/4-mile course consisting of a series of 20- to 40-yard runs/sprints interspersed with the events described below.

2) The course includes a 5- to 6-foot wall climb, a 4-foot horizontal jump (may be done while running), a stair climb (six steps up, six steps down), the drag of a 160- to 170-pound dummy for 50 feet, and another run/sprint in a different direction. No specific order or frequency of events was established, but all events should appear at least once.

3) At the conclusion of the course, the applicant must dry fire the service weapon five times with both strong and weak hands.

The report also suggests that an additional 1.5-mile run may be legally defensible as a measure of extended endurance in departments that can demonstrate that such extended endurance is a needed physical ability for successful performance of an essential function.

The report recommends that the passing time for completing the test be determined by each agency, based on the levels of performance required of its employees. The passing times should not be adjusted for age or gender.

Because all physical abilities needed to perform law enforcement duties are not tested in this recommended task test, departments may choose to test such areas as vision, hearing, manual dexterity, flexibility, reflexes, and weight/body composition separately. However, under the ADA, tests that involve medical questions or inquiries about disabilities may be given only after an offer of employment is extended.

The report concludes that the recommended task test is legally defensible as applied to both applicants and incumbent employees and encourages its use in that fashion. Yet, it counsels caution in applying the standards to incumbents unable to meet the passing standard in the absence of a medically sound period of time in which incumbent employees may regain the needed level of fitness.

Educational Requirements

Under Title VII of the Civil Rights Act of 1964,[7] courts have afforded law enforcement organizations considerable latitude to adopt reasonable educational hiring standards that do not *unnecessarily* disadvantage groups of applicants based on their race, color, national origin,

religion, or sex.[8] As a general rule, selection standards with a legally significant disparate impact must be justified by a showing of "business necessity."[9] Unlike written tests that are developed and administered by the employer, educational requirements that are largely in the control of the applicant have been upheld, even though there was no empirical validation study to prove their "business necessity" for law enforcement employment.

For example, in *Davis* v. *City of Dallas,*[10] the U.S. Court of Appeals for the Fifth Circuit upheld as job-related a hiring standard for police officers of 45 semester hours of college credit with at least a C average at an accredited college or university, even though the requirement had a disparate impact on minorities. The court noted that educational requirements for police officers have been consistently sustained by the courts because law enforcement is a profession with a high degree of risk and public responsibility.

The court also added that under Title VII, employers bear a correspondingly lighter burden to show that employment criteria are job-related where the job requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great.[11] Thus, the *Davis* court concluded that empirical evidence is not required to validate the job-relatedness of the educational requirement.[12]

The U.S. Court of Appeals for the Seventh Circuit in *Aguilera* v. *Cook County Police and Corrections Merit Board*[13] used a similar rationale in concluding that educational standards for police officers must only meet the test of "reasonableness."[14] The court stated that EEOC guidelines for validating selection procedures do not have the force of law and that their exacting criteria are more applicable to tests made and scored by employers than to educational degrees that are awarded by schools that are independent of the employer.[15]

> **"...Federal statutory requirements can be met by establishing physical standards that are job-related and consistent with business necessity...."**

Psychological Testing of Applicants

Psychological testing for law enforcement positions is not legally required as a matter of Federal law.[16] However, this type of testing is generally a lawful option for police administrators if the psychological evaluation is job-related and the results are not disclosed in a manner that violates legitimate privacy interests.

Three recent Federal court decisions have ruled on the legality of psychological testing for law enforcement positions. In *Koch* v. *Stanard,*[17] the U.S. Court of Appeals for the Seventh Circuit ruled that applicants for the Chicago Police Department, who were denied positions because they failed a psychological test, were not constitutionally entitled to an opportunity to contest the judgment that they would not make good officers.

In another case, *Daley* v. *Koch,*[18] the U.S. Court of Appeals for the Second Circuit ruled that a police officer candidate, who was rejected because a psychologist found that he had shown "poor judgment, irresponsible behavior and poor impulse control," did not have a mental condition that Congress intended to be considered as a handicap under Federal law. The court noted that being perceived as unsuitable for the particular position of police officer because of those traits does not render one handicapped under Federal law.[19]

In a third case, *Klotsche* v. *City of New York,*[20] a Federal district court sustained the rejection of an applicant for appointment as a patrol officer because his psychological tests and interviews indicated "the presence of personality traits incompatible with the demands and stresses of law enforcement employment."[21]

Notwithstanding these cases, the decision of whether and how to use psychological testing should be based on the correlation of such tests to job performance. For example, the Supreme Court of New Jersey in the case of *Matter of Vey*[22] cautioned that while the use of psychological tests to predict or evaluate employee job performance is a recognized part of the American workplace, such tests "...are only as good as their correlation to actual job performance."[23] In this case, a candidate for appointment as a police officer was found to be mentally unfit to perform police duties based on a

psychological test, which identified a variety of seemingly unremarkable personality traits and then concluded that they demonstrated a below-average potential.

The court, relying on State civil service law, ruled that the law enforcement agency had the burden of establishing the job validity of its psychological tests by producing "...evidence of a correlation between such nonpathological test results and actual job performance."[24] The *Matter of Vey* case illustrates the importance of ensuring that a psychological test is validated as an accurate predictor of performance as a police officer *before* it is used as a basis for deciding that a particular applicant is psychologically unfit.

Preemployment Polygraph Examinations

Polygraph examinations as a component of the hiring process must be reasonably conducted to be constitutional, but may also be subject to more restrictive State laws. For example, in *Woodland* v. *City of Houston,*[25] the U.S. Court of Appeals for the Fifth Circuit ruled that the constitutionality of preemployment polygraph testing depends on a balancing of the police department's interest in preemployment testing against the applicant's privacy interest. The court also noted that factual questions relevant to this balancing test include the intrusiveness of the particular questions asked during the polygraph test and whether there were any abuses of privacy.

In *Anderson* v. *City of Philadelphia,*[26] the U.S. Court of Appeals for the Third Circuit upheld the constitutionality of preemployment polygraph testing by concluding that it is not "...irrational to believe that the polygraph has utility in connection with the selection of law enforcement officers."[27] Conceding that the use of polygraph testing is a debatable issue, the court nonetheless

concluded "...that in the absence of a scientific consensus, reasonable law enforcement administrators may choose to include a polygraph requirement in their hiring process without offending the equal protection clause."[28]

The court found polygraph testing to be rationally related to the legitimate purpose of selecting better officers because:

> "The main flaw of polygraph testing in the employment screening context, overexclusiveness through generation of false positive results, is not a problem of constitutional significance where, as here, the test of constitutionality is whether the relative quality of the final group selected might possibly be higher than that of the group selected if the polygraph were not used."[29]

The court also found it rational to believe the polygraph produced fuller, more candid disclosures by applicants on the department's "Personal Data Questionnaire" which, in turn, provided useful background information for selecting qualified law enforcement officers.

Finally, the court rejected the claim that the applicants who failed the polygraph were "branded as liars" in violation of due process. The court noted that even if the polygraph results were viewed as stigmatizing, the fact the department kept the polygraph results confidential and undisclosed meant that an applicant's liberty interest was not implicated.[30]

In *O'Hartigan* v. *State Dept. of Personnel,*[31] the Supreme Court of Washington ruled that the State patrol constitutionally refused to consider an applicant for a word processor position who had refused to submit to a polygraph examination required of all applicants. The court noted that if hired, she would have been privy to highly confidential and extremely sensitive matters, such as investigative reports and employee disciplinary records, and that the State has a legitimate interest in providing its citizens with law enforcement agencies free of corruption and secure in their employees' access to sensitive information.

The court found the scope of disclosure required by the questions asked during the polygraph examination was no greater than needed to meet the goal of hiring employees with integrity. At the same time, the

court cautioned that limits and guidelines to avoid "standardless, boundless inquiries" need to be set in order for the actual administration of a polygraph test to be constitutional.[32]

Finally, the court rejected the claim that testing only law enforcement applicants and not applicants for other government jobs constitutes a violation of equal protection. The court found "...a valid reason for treating law enforcement job applicants differently due to the sensitive information accessible to employees (even nonofficers), and the unique potential dangers inherent to compromised intelligence during ongoing criminal investigations and other law enforcement activities."[33]

Criminal History Assessments

Employers are generally afforded considerable latitude under Federal law to consider criminal history and past criminal conduct to determine an applicant's fitness for law enforcement employment. In that regard, the U.S. Supreme Court in *New York Transit Authority* v. *Beazer*[34] upheld a general policy against employing persons in "safety sensitive" jobs who used drugs, including persons receiving methadone maintenance treatment for curing heroin addiction.

The Court ruled that even if the policy had a disparate impact on minorities that established a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964, the rule is "job-related" to the legitimate employment goals of safety and efficiency for "safety sensitive" positions.[35] The Court also rejected an equal protection objection to the policy, finding the policy rationally related to the general objectives of safety and efficiency.[36]

State law may limit the extent to which criminal history can be used as a basis to deny employment for a law enforcement position. For example, in *Tharpe* v. *City of Newark Police Department*,[37] a New Jersey appellate court interpreted State law as generally permitting the disqualification of an applicant from law enforcement employment based on an arrest 7 years earlier for possession of a small amount of marijuana, even though that arrest was unsupported by conviction and resulted in a conditional discharge.

> ***"Polygraph examinations...must be reasonably conducted to be constitutional, but may also be subject to more restrictive State laws."***

However, the court cautioned that the circumstances surrounding any such arrest should be considered because "...the fact of an arrest, standing alone, may have no persuasive force in assessing an applicant's qualifications."[38] Because such arrests might be based on a misidentification or constitute a trivial and isolated event in an otherwise unblemished life, the appropriate inquiry should be whether the circumstances surrounding the arrest "adversely relate" to law enforcement employment. The court said, "...consideration should be given to the nature and seriousness of the offense charged, the surrounding circumstances, the date of the offense and the individual's age at the time, whether the offense alleged was an isolated incident, and any evidence of rehabilitation."[39]

In *Sandlin* v. *Criminal Justice Standards & Training Commission*,[40] the Supreme Court of Florida ruled that a pardoned felon, who sought certification as a law enforcement officer, was entitled under State law to consideration to determine if he possessed sufficient good character required of law enforcement officers. While the commission has broad discretion under State law to certify a pardoned felon for a law enforcement position, it may also refuse to do so if it deems the pardoned felon to be of bad character, a poor moral risk, or an otherwise unfit appointee. In that regard, the court concluded the commission may take into account the facts of any pardoned convictions and also give weight to State legislation that establishes a general policy against certifying convicted felons or persons with a criminal history incompatible with law enforcement employment.[41]

In *Adams* v. *County of Sacramento*,[42] a California appellate court upheld a State law provision that barred anyone convicted of a felony from employment as a peace officer, despite the expungement and setting aside of that prior conviction. The court interpreted the State preclusion from law enforcement employment as not the kind of penalty or disability that is eliminated by expungement. The court also noted

that the provision against employment of convicted felons as peace officers was designed "...to assure, insofar as possible, the good character and integrity of peace officers and to avoid any appearance to members of the public that persons holding public positions having the status of peace officers may be untrustworthy."[43]

Conclusion

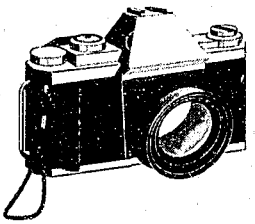
The court decisions surveyed in this article support the general proposition that State and Federal laws afford law enforcement administrators considerable latitude to implement reasonable job-related hiring standards to ensure law enforcement officers possess the physical, educational, emotional, and integrity qualifications to perform the essential functions of law enforcement. However, because of the potential for more restrictive State laws, it is recommended that a legal advisor review the legal defensibility of all hiring standards *before* they are implemented. ✦

Endnotes

[1] 42 U.S.C. sec. 12101 (1990).
[2] 42 U.S.C. sec. 2000e, *et. seq.* (1991).
[3] 42 U.S.C. sec. 12101, *et. seq.*
[4] 42 U.S.C. sec. 2000e - 2(1) (1991).
[5] For a discussion of how "normed" standards might still be defended in height/weight assessments, affirmative action programs, and voluntary physical fitness programs, *see* John Sauls, "The Civil Rights Act of 1991—New Challenges for Employers," *FBI Law Enforcement Bulletin*, September 1992.
[6] A copy of this report can be obtained by mailing a written request to the FBI Academy, Legal Instruction Unit, Quantico, Virginia 22135, Attention: Fitness Report.
[7] 42 U.S.C. sec. 2000e, *et. seq.* (1991).
[8] *See, e.g., Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *Morrow* v. *Dillard*, 412 F.Supp. 494 (D.C. Miss. 1976); and *United States* v. *Buffalo*, 457 F.Supp. 612 (W.D.N.Y. 1978).
[9] *See Wards Cove Packing Co.* v. *Antonio*, 109 S.Ct. 2777 (1988).
[10] 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 106 S.Ct 1972.
[11] *Id.* at 213.
[12] *Id.* at 215. The court endorsed the lighter burden of proof set forth in *Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972).
[13] 760 F.2d 844 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 237.
[14] *Id.* at 847.
[15] *Id.*
[16] It may be necessary to delay the psychological or polygraph testing of applicants for law enforcement positions until at least a conditional offer of employment is made. This is because the ADA prohibits medical examinations or inquiries about the existence, nature, or severity of a disability, unless an offer of employment, which may be conditional upon the results of the medical examination, has been extended. 42 U.S.C. sec. 12112(c).
[17] 962 F.2d 605 (7th Cir. 1992).
[18] 892 F.2d 212 (2d Cir. 1989).
[19] *Id.* at 215.
[20] 621 F.Supp. 1113 (S.D.N.Y. 1985).
[21] *Id.* at 1116.
[22] 591 A.2d 1333 (Sup. Ct. N.J. 1991).
[23] *Id.* at 1336.
[24] *Id.* at 1338.
[25] 940 F.2d 134 (5th Cir. 1991).
[26] 845 F.2d 1216 (3d Cir. 1988).
[27] *Id.* at 1223.
[28] *Id.* at 1225.
[29] *Id.* at 1223.
[30] *Id.* at 1222.
[31] 821 P.2d 44 (Sup. Ct. Wash. 1991).
[32] *Id.* at 49.
[33] *Id.* at 50.
[34] 440 U.S. 568 (1979).
[35] *Id.* at 587, n. 31.
[36] *Id.* at 592.
[37] 619 A.2d 228 (N.J. 1992).
[38] *Id.* at 230.
[39] *Id.* at 231. *See also, Delehant* v. *Board on Police Standards*, 839 P.2d 737 (Ore. App. 1992), holding it permissible to consider criminal record that was not expungeable under State law in determining fitness for law enforcement employment.
[40] 531 So.2d 1344 (Sup. Ct. Fla. 1988).
[41] *Id.* at 1347.
[42] 235 Cal. App. 3D 872 (Calif. 1991).
[43] *Id.* at 881.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Wanted: Photographs



The *Law Enforcement* staff is always on the lookout for dynamic, law enforcement-related photos to accompany and accent the various articles that appear in the magazine. We are interested in photos that depict the many aspects of the law enforcement profession discussed in the magazine and illustrate the numerous tasks and challenges law enforcement personnel perform.

We can use either black-and-white glossy or color prints or slides, although we prefer color prints (5x7 or 8x10). Appropriate credit will be given to contributing photographers when their work appears in the magazine. We suggest that you send duplicate, not original, prints as *Law Enforcement* does not accept responsibility for prints that may be damaged or lost. Send your photographs to:

John Ott, Art Director, *FBI Law Enforcement Bulletin*, J. Edgar Hoover F.B.I. Building, 10th and Pennsylvania Avenue, NW, Washington DC, 20535.