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THE AMERICANS WITH DISABILITIES ACT - TITLE I:

EQUAL EMPLOYMENT OPPORTUNITIES IN JAILS

NIC SPECIAL INTENSIVE SKILLS TRAINING WORKSHOP

TUESDAY, AUGUST 3, 1993

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PRESENTERS:

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NATIONAL INSTITUTE OF JUSTICE

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CITY OF ALEXANDRIA, VIRGINIA

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THE AMERICANS WITH DISABILITIES ACT - TITLE I:
EQUAL EMPLOYMENT OPPORTUNITIES IN JAILS

AGENDA

8:00 - 8:45 INTRODUCTION AND EXPECTATIONS
8:45 - 10:00 ASSESSING YOUR KNOWLEDGE OF ADA
10:00 - 10:45 TITLE I INVENTORIES
10:45 - 11:45 CASE STUDIES
11:45 - 12:00 WRAP UP AND EVALUATION

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- "The Americans with Disabilities Act: An Overview," Paula N. Rubin, Visiting Fellow, National Institute of Justice.
- "The Americans with Disabilities Act: Hiring Criminal Justice Professionals," Paula N. Rubin, Visiting Fellow, National Institute of Justice.
- "Meeting the Multiple Challenges of the Americans with Disabilities Act in the Correctional Setting Title I Issues for Corrections," Susan W. McCampbell, Assistant Sheriff, City of Alexandria, Virginia.

**THE AMERICANS WITH DISABILITIES ACT
AND CRIMINAL JUSTICE:
AN OVERVIEW**

by

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**PRELIMINARY DRAFT - NOT FOR QUOTATION OR
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THE AMERICANS WITH DISABILITIES ACT AND CRIMINAL JUSTICE: AN OVERVIEW

When President Bush signed into law the Americans with Disabilities Act (ADA) on July 26, 1990, a new era began in the quest to integrate persons with disabilities into the mainstream of society. The ADA is perhaps the most sweeping civil rights legislation passed since the enactment of the Civil Rights Act of 1964 nearly 30 years before.

This law is predicated on the belief that persons with disabilities have traditionally been isolated and segregated and that this discrimination took many forms, including: "outright intentional exclusion, the discriminatory effects of architectural, transportation and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, degradation, and relocating to lesser services, programs, activities, benefits, jobs, or other opportunities."¹

One purpose of the ADA is simple: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."² The obvious goal is to provide the estimated 43 million persons with disabilities³ access to employment and public accommodations, such as restaurants, hotels, theaters, and shopping centers. To achieve this goal, the ADA contains five sections designed to eliminate barriers in the areas of employment, public services, transportation, public accommodations, and telecommunication.

The ADA was intended to pick up where the Rehabilitation Act of 1973 left off by expanding coverage to include employers not receiving Federal funds or working pursuant to a Federal contract. The ADA also covers access to the facilities and the delivery of services and programs by governmental agencies.

Overlooked and not fully considered during the drafting, negotiating, and lobbying of the ADA was its impact on the criminal justice system. "Law enforcement" is mentioned only once in the legislative history of the ADA and even that is only in reference to persons with a history of illegal drug use.⁴ Yet, the impact in criminal justice is major:

The ADA may very well be the most significant piece of legislation affecting law enforcement since the Civil Rights Act. It will cause police agencies throughout the United States, as well as other employers, to adjust and in some cases, completely overhaul their recruitment and selection procedures. Furthermore, if departments do not immediately develop changes in their personnel policies by the time the Act becomes applicable, they will expose themselves to substantial liability.⁵

Attempts to create an exemption for law enforcement were unsuccessful. Now, the way the criminal justice community selects its employees and delivers services to the public must be brought into compliance with the ADA. This includes an end to blanket exclusions of certain medical conditions or disabilities and now requires a selection process which deals with individuals on a case-by-case basis.

The requirements of the ADA present unique challenges for the criminal justice system. As pointed out by former New York City Police Commissioner Lee Brown in a letter to the Equal Employment Opportunity Commission (the "EEOC") in his capacity as president of the International Association of Chiefs of Police, "[W]e do...think that the extremely 'physical' nature of law enforcement work coupled with the 'security/integrity' needs inherent to the job, impart a special perspective to our analysis of the Act."⁶

Critical to beginning to develop strategies for the recruitment, screening and employment of police and corrections officers as well as for the delivery of services by criminal justice agencies is the need to have a working understanding of the law itself. This *Research in Brief* provides a framework within which to begin to assess the impact of the ADA on the criminal justice system. It is from this foundation that the implications for criminal justice can be seen and solutions to the issues it raises developed.

ADA's IMPACT ON CRIMINAL JUSTICE: THE ISSUES

Since the enactment of the ADA, criminal justice agencies have begun to apply these criteria in the context of how they operate, and to recognize the far-reaching implications of ADA for agency policies and procedures. At this juncture, there are more questions than answers about how to implement the ADA within the justice system.

The law affects virtually every facet of the application, screening, and selection process for corrections and law enforcement. Future *Research in Briefs* will examine these issues and explore solutions as answers emerge. In the meantime, careful consideration of actions is required as there are, as yet, no certainties about how the courts will interpret the ADA. As aptly put in the October 1991 issue of *Fire & Police Personnel Reporter*, "professionals can act only as weathervanes, and not forecasters." Among the questions that have been raised are the following:

Conditional Offer of Employment

1. What constitutes a conditional offer of employment?
2. How can a conditional offer be developed which is legally sound?
3. Under what circumstances may a conditional offer be withdrawn?
4. Can agencies develop a pool of qualified candidates from which to pick employees, both sworn and unsworn?
5. Must the existing pool of qualified candidates be hired before new candidates are put into or hired from the pool?

Medical Exams and Medical Inquiries

1. What constitutes a medical exam or inquiry?
2. What impact does this have on administering polygraph exams?
3. How does the ADA affect background checks, inquiries about attendance records, or workers' compensation history?
4. How can agencies effectively screen applicants while still making good-faith conditional offers of employment?

Psychological Exams

1. When may a psychological exam be given?
2. Is a psychological exam testing medical issues or common personality traits such as poor judgment or quick temper?

Agility Tests

1. Are agility tests considered medical exams?
2. What impact is there on applicants if incumbents cannot pass the same agility test? Does this create a new hiring standard?
3. If a test is administered there are different standards for new recruits than incumbents, does that dilute the job-related and business necessity argument for administering these exams?
4. What is the ADA's position on fitness for duty tests for incumbents?
5. If administered prior to extending a conditional offer of employment, what precautions can be taken to ensure that an applicant is fit enough to take the agility test?

Visual Acuity

1. Will stringent eye standards withstand the scrutiny of the ADA?
2. What impact will vision impairments or learning disabilities such as dyslexia have on the selection and training process?

Light Duty

1. What happens if an employee becomes disabled while employed?
2. What if the disability occurs in the line of duty?
3. Are agencies required to create permanent light duty positions?
4. If permanent light duty positions exist, what obligations exist to make the same or similar positions available to other employees? To applicants? Does this create new hiring standards?
5. If a light duty position is vacated, must it be made available to another person with a disability?

Drugs and Alcohol

1. What does the ADA mean by "current use"?
2. What constitutes the successful completion of a rehabilitation program?
3. What is meant by the terms "successfully rehabilitated"?
4. How long must an individual be drug free to no longer be a current user of illegal drugs?
5. What kind of documentation is appropriate to establish that an individual is successfully rehabilitated?
6. What about the impact of a former drug user with or without a criminal record on the security and integrity of the agency?

This *Research in Brief* is the first in a series planned to be published by the National Institute of Justice on the ADA and its implications for criminal justice. Future *Research in Briefs* will focus on critical issues facing criminal justice agencies dealing with the delivery of their services to the public as well as in their hiring, promotion, and firing practices.

ADA: The Basics

The ADA makes it illegal to discriminate against persons with disabilities. In the context of employment, these individuals are entitled to equal access to employment, including recruitment, hiring, promotion, and any other benefits and privileges of employment. To be "protected," (that is, covered by the Act) the individual must have a disability *but nevertheless be qualified for the job.*

A person is disabled under the law if s/he suffers from a mental or physical impairment which substantially limits a major life activity. Examples of a major life activity are walking, talking, breathing, sitting, standing, or learning. A person will also be considered disabled, for purposes of this law, if there is a record of such an impairment or s/he is perceived as having an impairment. Likewise, those associated with the disabled person are also entitled to certain protections. Thus, family members who need special consideration in caring for someone with a disability may be entitled to protection under the law.

Individuals with a disability must also be qualified for the position. To be qualified, the individual must satisfy the job requirements, such as education, experience, and skills and must be able to perform the essential functions of the job, with or without a reasonable accommodation.

A reasonable accommodation can include modifying existing facilities to make them accessible, job restructuring, part-time or modified work schedules, acquiring or modifying equipment, and changing policies.

Accommodations will

not be required when doing so causes an undue hardship for the agency or there is a direct threat of serious harm to the individual or to others.

Undue hardship means significant expense or difficulty. Not just money is involved; it can also mean disruption or fundamentally altering the nature or operation of the business or agency. Direct threat of serious harm is defined by the law as "a significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation." Speculative or remote threats will not satisfy this requirement. Such a determination must be predicated on objective evidence. Subjective criteria will not suffice.

In addition to specifying the employment aspects of the law, Title II requires governmental entities to achieve accessibility to their facilities as well as in the delivery of services and programs. Accessibility encompasses new construction and the alteration of existing facilities. It can mean anything from adding curb ramps to creating parking spaces reserved for persons with disabilities.

Defining Disability

To be covered by the ADA a person must be disabled. The ADA defines disability in three ways and a person meeting any one of these criteria may be entitled to protection. Under this law, a person with a disability is someone who:

- has a physical or mental impairment that substantially limits one or more major life activities;
- has a record of such an impairment; or
- is regarded as having an impairment.

There are several key phrases in this definition: "impairment," "substantially limits," "major life activity," "record," and "regarded as." Understanding these concepts is essential to making an evaluation of whether someone is disabled for purposes of the ADA.

A threshold criterion which must be met under this definition is that there be an impairment. Simply stated, an impairment is "some sort of physiological disorder or mental disorder."⁸ This is true whether or not an individual uses an auxiliary aid or medication because of the disorder. For instance, someone who uses a hearing aid because of a hearing impairment nevertheless has a disability under the ADA even if the hearing aid restores the person's hearing to normal levels. Likewise, an insulin dependent diabetic whose diabetes is fully controlled by the insulin nevertheless has a disability under the law.

On the other hand, physical characteristics such as hair or eye color or lefthandedness do not constitute impairments. Similarly, certain personality characteristics such as a poor judgment, a bad temper, or lack of dependability are not considered disabilities.

Not all cases are clear cut. The EEOC's Technical Assistance Manual, Section 2.2(a)(i), provides a helpful example:

A person who cannot read due to a disability due to dyslexia is an individual with a disability because dyslexia, which is a learning disability, is an impairment. But a person who cannot read because she dropped out of school is not an individual with a disability, because lack education is not a disability.

Having a disability, in and of itself, is not enough; it must be a disability that substantially limits a major life activity. These types of activities include: walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, and working.⁹ Also considered major life activities are the ability to have intimate sexual relations and procreation. For this reason, those with AIDS or HIV disease will fall within the definition.

There are three criteria to consider when determining whether a major life activity is substantially limited:

- its nature and severity;
- how long it will last or is expected to last;
- its permanent or long term impact, or expected impact.¹⁰

A good rule of thumb is to look at the effect of the condition and not its name.¹¹ So, for example, "an individual with mild cerebral palsy that only slightly interferes with his/her ability to speak and has no significant impact on other major life activities is not an individual with a disability under this part of the definition."¹²

Even if an individual does not currently have a physiological or mental disorder, s/he may still be considered to have a disability under the three part definition. Those who have a record of an impairment are also protected from discrimination. This includes persons who have been erroneously classified as having an impairment. Remember, however, having a record of a disability, alone, will not satisfy the definition. The disability must have been one that substantially limited a major life activity.

A more subtle concept to grasp about the definition of disability is that part which protects those who are regarded as having an impairment. Individuals who qualify under this provision do not currently have a disability nor do they even have a record of a disability. Instead, these are persons perceived to have a disability.

How does this occur? Here are some examples provided in Section 2.2(c) of the Technical Assistance Manual:

- (1) A person has high blood pressure controlled by medication. Nevertheless, his employer places him on permanent light duty for fear of a possibility of a future heart attack. In this case, the person has a disability that does not substantially limit a major life activity, but his employer treats him as though it does.
- (2) Refusal to hire someone who has severe scars from burns. Here, there

is no disability nor a limitation of a major life activity. Instead, it is the fears, stereotypes, and attitudes of others toward these scars that are disabling.

- (3) Firing someone rumored to have HIV disease who, in fact, does not have the disease, may violate the law. Even though the individual does not have a disability, s/he is regarded as having a substantially limiting impairment.

There are very subtle differences between these examples. Indeed, they have been described as "all different sides of the same coin."¹³ The bottom line is that the ADA prohibits discriminating against someone who is being treated as if s/he has a disability.¹⁴

Who is not covered by the ADA?
The law explicitly excludes certain conditions from coverage, including homosexuality, transvestism, bisexuality, transsexualism, voyeurism, exhibitionism, pedophilia, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and gender identity disorders not caused by a physical impairment.

Persons with conditions which are temporary are also not usually found to have a disability under the definition. To make this determination, look to see whether there is an impairment which substantially limits one or more major life activities. An example offered by the EEOC is that of a broken leg. If it heals normally within a few months, there would be no disability. On the other hand, if the leg heals improperly, causing a permanent limp, or if the leg takes an abnormally long time to heal, during which time the person cannot walk, s/he might be considered to have a disability.¹⁵ Another temporary disability, pregnancy, is addressed in the Pregnancy Discrimination Act and is therefore not covered by the ADA.

Also specifically excluded from protection under the ADA are those who currently use illegal drugs. Those who are in

the process of, or who have successfully completed, a rehabilitation program may be protected by the law. This protection applies to those with an addiction to drugs or alcohol. It does not apply to the casual or recreational user of drugs or alcohol.

The issue of current drug use or prior drug history has significant implications for criminal justice agencies. Issues of as to what constitutes "current" drug use and what, if any, exemptions may be made for individuals with a history of drug use who are seeking sworn positions will form the basis of a future *Research in Brief*.

WHAT'S IN A NAME?

In 1973 when the Rehabilitation Act was signed into law, it used the term "handicapped" to describe persons with disabilities. Since that time, individuals with disabilities have indicated their preference for the term "disabled." Many terms used to describe certain disabilities invoke stereotypes and can be dehumanizing. Here are some terms to avoid with suggested substitutes.

AVOID...	INSTEAD SAY...
Handicapped, disabled	Person(s) with the invalid, disabilities
Victim of epilepsy, arthritis	Officer Smith has epilepsy; Lt. Jones has arthritis
Deaf-mute, deaf and dumb	Deaf, hearing impaired, speech impaired
Confined to a wheelchair, wheelchair bound	Wheelchair user, users of wheelchairs, mobility impaired
Cripple, crippled	Physically disabled, mobility impaired Use the name of the disability (e.g. polio)
Deformed	Physical disability
Retarded, slow, stupid	People with mental disabilities
Slow, stupid, illiterate	People with learning disabilities Officer Day has dyslexia
Spastic, fits	Seizures Captain Collins has epilepsy

Otherwise Qualified Individuals with Disabilities

Having a disability does not automatically entitle someone to protection under the ADA. *The ADA is not a guaranteed jobs law requiring criminal justice agencies to hire persons with disabilities.* Nor is it an affirmative action law requiring that preference be given to persons with disabilities over those who are not disabled. Under this law, employers may hire the most qualified candidate for the job.

The ADA does not safeguard a person with a disability unless the person is also otherwise qualified for the position. In evaluating whether a person with a disability is qualified for a job, two questions should be answered:

- (1) Does this person meet the initial job requirements, such as work experience, education, skills, certificates, or licenses?
- (2) If so, can the person perform the essential functions of the job, with or without reasonable accommodation?

In answering the first question, care must be taken to make sure that the specifications for the position are job-related and consistent with business necessity. For example, law enforcement agencies would most likely be permitted to require applicants and employees to have a driver's license, since operating a patrol car is an essential part of police work in most jurisdictions. On the other hand, driving a car is most likely not an essential part of the job of a corrections officer or administrative or clerical employees and so it might not be appropriate to include this requirement for these positions.¹⁶

Note that the purpose of the law is to integrate persons with disabilities into the work force. It is impermissible to attempt to subvert the intent of the ADA by imposing qualifications and job requirements which are not job-related or only relate to marginal functions of the job.

Persons with disabilities who meet the specified job requirements must also be able to perform the essential functions of the job with or without a reasonable accommodation. Making this determination also requires answering two questions:

- (1) Are the functions truly essential or are they marginal?
- (2) Can these essential functions be performed with or without a reasonable accommodation?

Identifying essential job functions involves looking at two considerations. First, whether employees in the position actually are required to perform the function and, if so, whether or not removing the function would fundamentally alter the job.

If the employer rarely requires a specific task, then it may not be appropriate to list the task as an essential job function. In that case, the employer would need to demonstrate that, although the function is rarely performed, to eliminate it would be to fundamentally alter the nature of the job.

For example, even if 99 percent of police officers rarely make forcible arrests, departments which can show that the consequences would be significant if a police officer were not able to do so may establish this as an essential function of the job. Likewise, although a pilot may only spend a few minutes landing a plane, the serious consequences of not being able to do so justify making this requirement an essential function.

Again, there are no clear cut answers regarding essential functions. Answers will vary not only from job to job, but from department to department as well. The size and location of the agency may play a role in this assessment. Here are three reasons offered by the EEOC as to why a job function may be essential:

- The position exists to perform the function.

- There are a limited number of other employees available to perform the function, or among whom the function can be distributed.
- A function is highly specialized, and the person in the position is hired for special expertise or abilities to perform it.¹⁷

What factors may be used in determining the essential function of a particular job? Section 2.3(a) of the Technical Assistance Manual gives guidance:

- The employer's judgment (while the employer may not be second guessed, other factors will also be regarded),
- A written job description prepared before advertising or interviewing for a job (this is not required under the ADA, but it is a good idea to have one which accurately reflects the true nature of the job and is created in advance of the screening and selection process),
- The amount of time spent performing the function (the example of the pilot, used above, might apply to this factor),
- The consequences of not requiring the person to perform this function (the example of the police officer used above might apply here),
- The terms of a collective bargaining agreement,
- The work experience of people who have performed the job in the past and work experience of people who currently perform similar jobs (it is a good idea to talk with employees who have performed the job in the past as well as those who are doing the job now - do not presume to know what a job involves, ask the people who are doing it), and
- Other relevant factors (this can

by the employer or the organizational structure of the agency).

The bottom line is that there should not be job requirements that have the practical effect of imposing a blanket exclusion of a particular disability or class of persons. The ADA requires that decisions be made on a case-by-case basis.

What happens if an otherwise qualified person with a disability cannot perform an essential function of the job unaided? In that event, a determination must be made as to whether a reasonable accommodation exists which will allow the individual to perform the function.

Reasonable Accommodation, Undue Hardship, and Direct Threat

If an otherwise qualified individual with a disability cannot perform the essential functions of the job, the employer may be obligated to provide a reasonable accommodation. However, an "employer has no duty to accommodate an employee with a disability unless the accommodation will enable the employee to perform the essential functions of the position."¹⁸ "Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity."¹⁹

An employer's duty to reasonably accommodate individuals with disabilities applies to all aspects of employment. This includes the application and selection process, an employee's ability to perform the essential functions of the position currently held as well as those desired within the department, and the benefits and privileges other employees without disabilities enjoy.

This duty, however, only applies to known physical or mental impairments. It is usually the responsibility of the person needing an accommodation to request one. But, even when an accommodation is not requested, it is advisable for employers to be

proactive in initiating discussions on this subject. An employer's applications, test announcements, or advertisements may request persons with disabilities requiring an accommodation to inform the employer within a reasonable time prior to applying or interviewing for a position or taking an examination.²⁰

Here are five tips on reasonable accommodation offered by the EEOC in Section 3.4 of the Technical Assistance Manual:

- A reasonable accommodation must be an effective accommodation.
- The reasonable accommodation obligation applies only to accommodations that reduce barriers to employment related to a person's disability; it does not apply to accommodations that a disabled person may request for some other reason.
- A reasonable accommodation need not be the best accommodation, as long as it is effective for that purpose.
- An employer is not required to provide an accommodation that is primarily for personal use.
- An individual is not required to accept an accommodation if the individual has not requested an accommodation and does not believe that one is needed.

When is an accommodation effective? When it enables the person to perform the essential functions of the job. The accommodation does not have to guarantee equal performance results or provide identical benefits of employment. The accommodation should avoid limiting, segregating, or classifying the individual.

What happens if an individual who is an employee refuses an accommodation? Remember, employers are not required to provide the accommodation the person requests, although where possible it is

advisable to do so. The employer does not even have to provide the best accommodation. The accommodation must be effective in helping the individual perform the essential functions of the job. If the individual chooses not to accept this accommodation, s/he runs the risk that doing so will render her/him unable to carry out essential functions of the job. When that happens, the individual is no longer "otherwise qualified" for the position.

Section 3.5 of the EEOC's Technical Assistance Manual offers ten examples of reasonable accommodations. These are examples only and are by no means meant to be construed as an exhaustive list. Moreover, since the same disability can manifest itself very differently in two different people, accommodations require case-by-case determination.

EEOC's examples of reasonable accommodations:

- (1) **Making Facilities Accessible and Useable.** For instance, providing designated parking spaces for those with disabilities.
- (2) **Job Restructuring.** This does not include reassigning essential functions of the job. It can include exchanging marginal functions, or changing how and when essential functions are performed.
- (3) **Modified Work Schedules.** This might include part-time work.
- (4) **Flexible Leave Policies.** Accommodations do not include paid leave, but could include using accrued leave, advanced leave, or leave without pay.
- (5) **Reassignment to a Vacant Position.** This is new to the ADA and applies to incumbents only and not to applicants.
- (6) **Acquisition or Modification of Equipment and Devices.** Examples include TDDs (telecommunication:

for the deaf) and apply to job-related equipment only. Employers are not required to provide devices for the personal use of the individual.

- (7) **Adjusting and Modifying Examinations, Training Materials, and Policies.** This includes using training sites that are accessible.
- (8) **Providing Qualified Readers.** This does not mean two people must be hired to do one person's job.²¹
- (9) **Providing Qualified Interpreters.** This can be done on an as-needed basis.
- (10) **Other Accommodations.**

There may be times, however, when providing an accommodation will not be required. Obviously, no accommodation is required when it would not enable the individual to perform the essential functions of the job.

Likewise, no reasonable accommodation will be required if it would impose an undue hardship on the employer or create a direct threat to the health and safety of the employee or others.

The ADA defines undue hardship as "significant difficulty or expense." Determinations as to whether or not an undue hardship exists must be made on a case-by-case basis. What may be an undue hardship for one criminal justice agency may not be a hardship for a different agency in different circumstances. Accommodations may constitute undue hardship if they are unduly costly, extensive, substantial, disruptive, or would fundamentally alter the nature or operation of the agency.²²

"An undue hardship may be something less than a cost that would drive the employer to the verge of going out of business, but at the same time it must impose more than a negligible cost."²³

Direct threat is a significant risk of substantial harm based on objective evidence

and not mere speculation. It cannot be predicated on some remote possibility in the future but must be a present risk. Employers are required to reduce or eliminate the risk with an accommodation. When this is not possible, then a refusal to hire due to direct threat may be appropriate.

When deciding what accommodation to provide, the best place to start is with the person requiring the accommodation. Often s/he will know what accommodation will work and how to obtain that accommodation in as cost-efficient a way as possible. It may also be a good idea to consult with other employers and local vocational rehabilitation agencies. The Job Accommodations Network (JAN) is an information and reference service that suggests accommodations. JAN may be reached at 1-800-ADA-WORK.

Accessibility to Programs and Services

The ADA not only addresses how criminal justice agencies are to treat their own employees; under Title II, but also governs how they are to treat members of the general public who may have a disability as well. While Title II went into effect on January 26, 1992, many of its provisions have been in effect for nearly twenty years under Section 504 of the Rehabilitation Act of 1973. The ADA merely expands coverage to all programs. However, a significant consequence of the ADA was to bring to the attention of the public at large the rights of those with disabilities to enjoy equal employment opportunity as well as equal access to programs and services.

Title II applies to any governmental agency regardless of its size and requires the agency to make sure that its programs, services and activities are accessible to persons with disabilities. This affects two areas: (1) the services and programs delivered by the agency, and (2) physical access to the facilities where these programs, services and activities are offered.

What does this requirement involve? To know if the agency is meeting the requirements of the ADA, examine the programs, services, and activities in their entirety and ask the following questions:

- Are any modifications to the agency's policies, practices, or procedures necessary to ensure accessibility?
- Are there any eligibility criteria which eliminate or tend to screen out an individual with a disability from enjoying the benefits of these programs, services, or activities?
- Do any policies or practices segregate persons with disabilities from others participating in these programs, services, or activities?
- Are any of these programs, services, or activities delivered at a location or facility that has the effect of denying persons with disabilities the right to enjoy the benefits of these programs, services, or activities?
- If alternative services are offered to persons with disabilities, are these benefits unequal to those offered to the public at large?

If the answer to any of these questions is "yes," the agency may need to revise the way it offers its programs, services, and activities. Modification will not be necessary, however, if doing so fundamentally alters the nature of the program, service, or activity or causes an undue burden. Undue burden under Title II is analogous to undue hardship under Title I, and means "significant difficulty or expense...taking into account such factors as the nature and cost of the action, the financial resources of the site or a parent organization, the nature of the site or the parent organization, and the nature and cost of the modification." ²⁴

Is it always illegal to have discriminatory practices or policies? Obviously not. An agency is allowed to take into account the safety of the public. So, for

example, restricting persons with heart disease from riding on a roller coaster at a county fair might be a permissible rule with a discriminatory effect.

What about physical access to the facilities? Are criminal justice agencies expected to rebuild or renovate their facilities? The answer is a qualified "no." Criminal justice agencies are not expected to "retrofit" their existing buildings. Nor are they expected to alter historical landmarks. A rule of thumb is to look at the program, not the building. Is it possible to change the way the program is delivered rather than the building? Examples include moving the program or service to an accessible part of the building, such as the first floor, providing home delivery of the service, or calling the person with the disability. If so, then remodeling the delivery of the service rather than the building it is delivered in may suffice. A little creativity can go a long way in complying with this part of the ADA.

New construction or alterations to existing buildings, however, must comply with the ADA. The Architectural and Transportation Compliance Board (the "Access Board") will be issuing accessibility guidelines for State and local governments. Indeed, these guidelines are expected to have special considerations for courthouses and correctional facilities not originally contemplated. Until these guidelines are issued, however, agencies may choose between two different sets of architectural standards: the Uniform Federal Accessibility Standard (UFAS) or the ADA Accessibility Guidelines (ADAAG).

What must be done at the administrative level to comply with this part of the ADA? Several things. Some of these administrative requirements will only apply to entities with 50 or more employees. A word of caution on calculating the number of employees. The size of a particular police department, for example, will be computed based on the number of employees not only in the department, but in the city or county in which it operates as well. Therefore, only the smallest of jurisdictions will be exempt from most administrative requirements.

LEGAL EASE

The ADA uses numerous terms to describe its requirements and the obligations of those covered by the law. Here is a brief index and short explanation of some of the key words and phrases commonly used in the ADA.

DISABILITY - (1) A mental or physical impairment that substantially limits a major life activity; (2) a record of such an impairment; (3) being regarded as having such an impairment.

IMPAIRMENT - A physiological or mental disorder.

SUBSTANTIAL LIMITATION - When compared to the average person: (1) an inability to perform a major life activity; (2) a significant restriction on how or how long the activity can be performed; or (3) a significant restriction on the ability to perform a class or broad range of jobs.

MAJOR LIFE ACTIVITY - Basic functions that the average person in the general population can do with little or no difficulty such as walking, seeing, hearing, breathing, speaking, procreating, learning, sitting, standing, performing manual tasks, working, or having intimate sexual relations.

OTHERWISE QUALIFIED - A person with a disability who satisfies all of the requirements of the job such as education, experience or skill and who can perform the essential functions of the job with or without reasonable accommodation.

ESSENTIAL FUNCTIONS - The fundamental, not marginal, duties of a job.

REASONABLE ACCOMMODATION - A change in the application process, work environment, or job descriptions or the use of modified or auxiliary devices that enable a person with a disability to perform the essential functions of the job without causing an undue hardship or direct threat to the health and safety of her/himself or others.

UNDUE HARDSHIP - Significant difficulty or expense relative to the size and overall financial resources of the employer.

DIRECT THREAT - A significant risk of substantial harm based on valid, objective evidence and not mere speculation.

What are these requirements?

- Self-evaluations of programs, services and activities delivered should be conducted and a study made of whether the policies and practices prevent persons with disabilities from enjoying the benefits and privileges of them. For entities with 50 or more employees, the self-evaluation must be completed by January 26, 1993 and be made available to the public for three years.
- Transition plans for entities with 50 or more employees are required if structural changes are necessary.
- Public notice should be given to all interested parties of their rights and protections under the ADA. This notice can include signs, posters and pamphlets and should be made in accessible formats.
- ADA compliance officers should be designated for entities with 50 or more employees as the contact point for individuals who need information on the ADA and to assist in the education of employees in the law.
- A grievance procedure should be created and implemented for entities with 50 or more employees to handle the receipt and processing of complaints as well as their resolution.

ENDNOTES

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8. Feldblum, C., "The Americans with Disabilities Act: The Definition of Disability," 7 *The Labor Lawyer* 11 (1991).
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19. Fitzpatrick, R., "Reasonable Accommodation and Undue Hardship Under the ADA," *Federal Bar News & Journal*, January 1992.
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21. Id., p. 167.
22. TAM, Section 3.9.
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**THE AMERICANS WITH DISABILITIES ACT
AND CRIMINAL JUSTICE:
HIRING NEW EMPLOYEES**

by

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PRELIMINARY DRAFT - NOT FOR QUOTATION OR ATTRIBUTION

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THE AMERICANS WITH DISABILITIES ACT AND CRIMINAL JUSTICE: HIRING NEW EMPLOYEES

The Americans with Disabilities Act (the "ADA") was inspired by a desire to eliminate barriers to equal employment opportunity and equal access to public accommodations and the programs, services and activities delivered by governmental entities. Under this law, employers must reevaluate their application and selection process to ensure that they do not deliberately or unintentionally tend to adversely impact on persons with disabilities. The requirements of the ADA have significant consequences for the criminal justice system. Many of the tests and screening devices commonly used to hire public safety personnel as well as the order in which these tests may be administered must be scrutinized in light of the law.

THE ADA AND HIRING: SOME GENERAL PRINCIPALS

Appreciating the impact of the ADA on hiring requires an understanding of the law itself. In a nutshell, the ADA prohibits discrimination against qualified individuals with a disability. (See Box #1)

Having a disability, in and of itself, does not entitle someone to protection under the law. A job applicant must also be qualified for the position. This means that the individual can satisfy the requirements of the job such as education, experience and skills as well as be able to perform the essential functions of the job, with or without a reasonable accommodation.

Whether or not an applicant with a disability is otherwise qualified for the job

touches the core of the issue on hiring decisions under the ADA. How are these

determinations made? What constitutes an essential function of the job? Are performance standards permitted?

Generally, limiting, segregating or classifying applicants so that persons with disabilities are adversely affected is to be avoided. Hiring decisions should be made on a case-by-case basis and not generalized ideas, stereotypes or myths.

Under the ADA, blanket exclusions of individuals with a particular disability are, in most cases, not permissible.¹ For example, to exclude "all applicants with diabetes ignores the varying degrees of severity of this disease and the ability to control its symptoms."² On the other hand, the "ADA does not require quotas, it only requires that employers not reject applicants with disabilities because of their disabilities."³

Qualifications and Standards

The ADA requires that standards and qualifications that screen out or tend to screen out individuals or groups of individuals with disabilities be related to the job to be performed.

¹EEOC's Technical Assistance Manual ("TAM"), Section 4.4.

²Snyder, D. The American with Disabilities Act, Labor Relations Information System (1991), p. 212.

³Id. at 210.

ADA: The Basics

A person is disabled under the law if she or he suffers from a mental or physical impairment which substantially limits a major life activity, such as walking, talking, breathing, sitting, standing, or learning. A person will also be considered disabled, for purposes of this law, if there is a record of such an impairment or she or he is perceived as having an impairment. Those associated with the disabled person are also entitled to certain protections. Family members who need special consideration in caring for someone with a disability may be entitled to protection under the law.

The ADA makes it illegal to discriminate against persons with disabilities. These individuals are entitled to equal access to employment, including recruitment, hiring, promotion, and any other benefits and privileges of employment. To be "protected," (that is, covered by the Act) the individual must have a disability *but nevertheless be qualified for the job.*

A reasonable accommodation can include modifying existing facilities to make them accessible, job restructuring, part-time or modified work schedules, acquiring or modifying equipment, and changing policies. However, *reasonable accommodations will not be required when doing so causes an undue hardship for the agency or there is a direct threat of serious harm to the individual or to others.*

Undue hardship means significant expense or difficulty. Not just money is involved; it can also mean disruption or fundamental alteration of the nature of operation of the business or agency. Direct threat of serious harm is defined by the law as a "significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation." Speculative or remote threats will not satisfy this requirement. Such a determination must be predicated on objective evidence.

Title I of the Act specifies the employment aspects of the law. In addition, Title II requires governmental entities to achieve accessibility to their facilities as well as in the delivery of services and programs. Accessibility encompasses new construction and the alteration of existing facilities. It can mean anything from adding curb ramps to creating parking spaces reserved for persons with disabilities.

An analysis of job qualifications begins by answering three questions:

- (1) Do the qualifications or standards relate to essential functions of the job?
- (2) Are the qualifications and standards job-related and consistent with business necessity?
- (3) Is a reasonable accommodation available that enables a person who would otherwise not be qualified for the position due to a disability to meet the qualification standards?

Fundamental, not marginal, job functions are considered essential for purposes of the ADA. Functions are essential when the employees in that position are required to perform the function and eliminating that particular function would fundamentally alter the job. This is so even if the function is rarely performed. For example, even if 99 percent of police officers rarely make forcible arrests, departments which can show that the consequences would be significant if a police officer were not able to do so may establish this as an essential function.

There is nothing preventing employers in criminal justice agencies from using qualifying standards. Indeed, it is permissible to "establish physical or mental qualifications that are necessary to perform specific jobs (for example, jobs in the transportation and construction industries; police and fire fighters jobs; security guard jobs) or to protect health and safety."⁴

⁴"ADA Questions and Answers," Bureau of National Affairs, Americans with Disabilities

What happens, however, if the qualifying standards eliminate someone with a disability or a group of individuals with disabilities? In that case, standards must be shown to be job-related and consistent with business necessity.⁵ In other words, entrance exams and performance tests cannot be used as a subterfuge to screen out applicants with disabilities. This requirement "underscores the need to examine all selection criteria to assure that they not only provide an accurate measure of an applicant's actual ability to perform the essential functions of the job, but that even if they do provide such measure, a disabled applicant is offered a 'reasonable accommodation' to meet the criteria that relate to the functions of the job at issue."⁶

A qualification standard is job-related when it is "a legitimate measure or qualification for the specific job it is being used for."⁷ Section 4.3 of the Equal Employment Opportunity Commission's ("EEOC") Technical Assistance Manual explains:

"A qualification standard for a secretarial job of 'ability to take shorthand dictation' is not job-related if the person in the particular secretarial job actually transcribes taped dictation."

Business necessity means that the selection relates to an essential function of

the job. Thus, "if a test or other selection criterion excludes an individual with a disability and does not relate to the essential function of the job it is not consistent with business necessity."⁸

Even if a standard is job-related, it may nevertheless be inappropriate if it does not relate to an essential job function. For example, requiring a driver's license may be job-related for both patrol officers and corrections officers. However, in the case of a patrol officer the requirement relates to an essential function of the job, while for a corrections officer, who is not required to drive in the course of business, it may not. Therefore, requiring a driver's license would be justified for a patrol officer while it would probably not be appropriate for a corrections officer if driving is not an essential function of the job.

Reasonable Accommodations During the Hiring Process

Employers have a duty to reasonably accommodate persons with disabilities, during the application process. This enables a qualified job applicant to have an equal opportunity to be considered for the job.⁹ However, there is no prohibition against asking applicants to request a reasonable accommodation prior to completing the application or taking a screening test.¹⁰

Reasonable accommodations during the hiring process can include providing qualified interpreters or readers. It can also mean revising or modifying

Manual (ADAM), (Washington, D.C., monthly), Section 90:0233. TAM, Section 4.4.

⁵TAM, Section 4.4.

⁶House Labor and Education Report to the ADA, p. 72.

⁷TAM. Section 4.3(1).

⁸TAM, Section 4.3(2).

⁹TAM, Section 3.3.

¹⁰Snyder, p. 218.

exams or tests. Section 3.3 of EEOC's Technical Assistance Manual offers these examples:

"A person who uses a wheelchair may need an accommodation if an employment office or interview site is not accessible.

A person with a visual disability or a person who lacks manual dexterity may need assistance in filling out an application form.

Without such accommodations, these individuals may have no opportunity to be considered for a job."

On the other hand, unlike the kinds of reasonable accommodations afforded employees such as job restructuring or changing work schedules, employers do not have to find a job for an applicant who is not otherwise qualified or consider an applicant for a job for which s/he did not apply. There is no requirement that employers lower performance standards.

MEDICAL EXAMINATIONS AND INQUIRY

Under the ADA, job applicants must be given a conditional offer of employment before being required to provide medical information or take a medical exam.¹¹ Law enforcement and corrections agencies routinely administer medical and psychological exams to applicants. "As a result, this provision of

the ADA will significantly change hiring practices in the country."¹²

The rationale for this requirement is to "protect individuals with disabilities from actions based on...information that is not job-related and consistent with business necessity, including protection of health and safety."¹³ In other words, "to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose."¹⁴

QUICK QUIZ

Now, under the ADA, it is unlawful to make medical inquiries prior to extending a conditional offer of employment to a job applicant. Yet, the law does not define terms such as "medical examinations" or "medical inquiry."

What kind of questions, then, are off-limits before extending a job offer? Here are some common questions asked on applications and during interviews. Which questions should be asked only after making a conditional offer of employment?

Place an "X" by those questions which could be construed as a medical inquiry.

- 1. Have you ever filed a claim for workers' compensation?
- 2. How did you become disabled?
- 3. How often were you absent from your last job?
- 4. Have you ever been injured on-the-job?
- 5. Are you taking any medication at this time?
- 6. Please describe how you would perform the following functions of the job ...
- 7. Are you willing to submit to a drug test at this time?
- 8. How many sick days did you use on your last job?
- 9. How much time off will you need because of your disability?
- 10. Do you need any reasonable accommodation to participate in our agility test?

[Answers appear on page .]

¹¹ Americans with Disabilities Act, Section 12112 (d).

¹²Snyder, p. 228.

¹³TAM, Section 6.7.

¹⁴EEOC Regulations, Interpretive Guidance, Section 1630.13(b).

The rules governing what an employer can ask of a medical nature or when a medical exam can be administered vary. The law distinguishes between job applicants and employees. In addition, what is permitted with respect to applicants depends on whether or not a conditional offer of employment has been extended.

Ironically, neither the law itself nor the interpretive regulations actually define the terms "medical examination" or "medical inquiry." Indeed, sometimes it is easier to say what medical is not rather than what it is. For instance, "tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions on such examinations."¹⁵ Likewise, "physical agility tests are not medical examinations and so may be given at any point in the or employment application process."¹⁶

In the absence of a clearly defined explanation, a good rule of thumb is that questions, whether on an application or asked during an interview, or any test, procedure or performance exam which would disclose information regarding a disability may be construed as a medical exam or inquiry. Therefore, criminal justice agencies which customarily use psychological exams, polygraph tests, background checks and medical exams will need to evaluate their hiring process in light of the ADA.

¹⁵TAM. Section 6.1.

¹⁶EEOC Regulations Interpretive Guidance, Section 1630.14.

Job Applicants: Pre-Offer

While the ADA may not specifically say what a medical exam or inquiry is, the law does expressly prohibit pre-employment medical examinations and inquiries.¹⁷ In other words, "an employer may not ask or require a job applicant to take a medical examination before making a job offer."¹⁸ Inquiry into the nature or severity of a disability is also forbidden at this stage in the hiring process.

It is permissible to ask applicants about their ability to perform specific job functions "and may, with certain limitations, ask an individual with a disability to describe or demonstrate how he or she would perform these functions."¹⁹ On the other hand, hiring practices which focus on disabilities rather than abilities will, in most instances, be discriminatory. Section 6.3 of EEOC's Technical Assistance Manual provides an example relevant to criminal justice agencies:

"A policy that prohibits employment of any individual who has epilepsy, diabetes or a heart condition from a certain type of a job, and which does not consider the ability of a particular individual, in most cases would violate the ADA."

¹⁷Americans with Disabilities Act, Section 12112.

¹⁸"ADA Questions and Answers," Bureau of National Affairs, Americans with Disabilities Manual (ADAM), (Washington, D.C., monthly), Section 90:0233.

¹⁹Id.

Job Applicants: Post-Offer

The ADA does contemplate an employer's need to ensure that job applicants can perform the job effectively and safely. What can employers do toward this end? Section 6.1 of EEOC's Technical Assistance Manual provides guidance:

"An employer may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be 'job-related' or 'consistent with business necessity.' Questions also may be asked about previous injuries and workers' compensation claims."

Questions that are prohibited before a conditional offer may be posed in the post-offer phase of the hiring process.

"Such post-offer medical examinations are legal only if the following requirements are met:

* All entering employees in a particular category are required to submit to the same examination regardless of disability.

* Information concerning the offeree's medical condition must be maintained on separate forms.

* The information must be maintained in separate medical files.

* The information must be treated as a confidential medical record."²⁰

What happens if a post-offer medical exam or inquiry reveals a disability? In that event, the reason for withdrawing a conditional offer of employment must be job-related and consistent with business necessity. The withdrawal of the offer may be permissible where the medical inquiry discloses facts relative to the applicants' qualifications. However, the withdrawal of the offer does not have to be related solely to essential job functions. The employer will need to demonstrate that there is no reasonable accommodation available to enable the applicant to perform the essential functions of the job.

Likewise, "a post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a 'direct threat' in the workplace (i.e., a significant risk of substantial harm or safety of the individual or others) that cannot be eliminated or reduced below the 'direct threat' level through reasonable accommodation."²¹ Remember, a "direct threat" cannot be speculative or remote and must be based on current medical knowledge.

Section 6.4 of EEOC's Technical Assistance Manual offers this example:

"If a medical examination reveals that an individual has epilepsy and is seizure-free or has adequate

²⁰Snyder, p. 232 - 233.

²¹"ADA Questions and Answers," Bureau of National Affairs, Americans with Disabilities Manual (ADAM), (Washington, D.C., monthly), Section 90:0233.

warning of a seizure, it would be unlawful to disqualify this person from a job operating a machine because of fear or speculation that he might pose a risk to himself or others. But if the examination and other medical inquiries reveal that an individual with epilepsy has seizures resulting in loss of consciousness, there could be evidence of significant risk in employing this person as a machine operator. However, even where the person might endanger himself by operating a machine, an accommodation such as placing a shield over the machine to protect him, should be considered."

Employees

Once an applicant has become an employee, the ADA imposes a different set of restrictions. "In short, employers cannot investigate an employee's health or disabilities unless questions have a relationship to the employee's job performance."²²

Under the more strict requirements for employees, the ADA permits medical exams *only* if job-related and consistent with business necessity. This can occur, as suggested in Section 6.6 of EEOC's Technical Assistance Manual:

* When an employee is having a problem performing his or her job effectively.

* When an employee becomes disabled.

²²Snyder, p. 251.

* When examination is necessary for reasonable accommodation.

* Where medical examinations, screenings and monitoring are required by other laws.

* Through voluntary wellness programs.

* In connection with fitness for duty exams conducted by the department.

IMPLICATIONS FOR CRIMINAL JUSTICE

The ADA has unquestionably had an enormous impact on the hiring process in criminal justice. "The development of selection procedures which are in compliance with the ADA appear to be somewhat reversed to current arrangements."²³

Prior to the enactment of the ADA, most departments required applicants to pass written exams, agility tests, a polygraph exam, a background investigation, a medical exam and a psychological exam before being offered a position of employment. However, with the ADA's prohibition against medical inquiry prior to making a conditional offer of employment, many of these testing and screening devices must be postponed until after an offer is made.

²³Schneid, T. and Gaines, L., "The Americans with Disabilities Act: Implications for Police Administrators," Police Liability Review, Winter 1991, p. 4.

Admittedly, this system was not made with criminal justice in mind. Indeed, "this essentially reverses the current selection procedure."²⁴ The bottom line is that a "department cannot even remotely investigate an applicant's disability or potential disability until the applicant's other qualifications have been evaluated and a contingent offer of employment has been made to the candidate."²⁵

A word about the conditional offer: it must be bona fide and made in good faith. Criminal justice agencies should not extend large numbers of conditional offers for a minimal number of positions.

The EEOC will be providing some guidance on this issue in the future. Until then, a good rule of thumb is to make sure there is a rational relationship between the numbers of offers and the number of vacancies. One way to do this is by reviewing historical ratios for past hirings.

Can agencies have a "qualified pool of candidates"? While some jurisdictions have used this method, EEOC has not specifically addressed this issue yet. A word of caution: agencies developing a qualified pool of candidates should exhaust the candidates in the pool before adding to the pool or hiring subsequent additions. The pool should not be used to avoid hiring qualified persons with disabilities by keeping them at the "bottom" of the pool while hiring candidates who have been subsequently added. Such a practice might be viewed

as a subterfuge and a method designed to side-step the law.

How does the ADA affect the exams most commonly administered by criminal justice agencies? Here's a quick survey:

Agility Tests. These tests may be "given at any point in the application or employment process so long as employers can demonstrate that they are job-related and consistent with business necessity."²⁶

Remember, however, that the ADA prohibits medical inquiry or medical exams establishing fitness to take the agility test. In other words, "agencies will not be permitted to screen applicants for medical conditions, such as heart disease, prior to giving them a physical agility test."²⁷ One solution to this problem is to provide applicants with a detailed written description of the test and require that they get a note or certification from their doctor that they are able to take the agility test.

Drug Tests. "A test for the illegal use of drugs is not considered a medical examination under the ADA, therefore employers may conduct such testing of applicants or employees and make employment decisions based on the results."²⁸ There is a caveat, however.

²⁶Vaughn, C. Roland III, "IACP's Response to the Americans with Disabilities Act," The Police Chief, December 1991.

²⁷Crime Control Digest, Vol. 25, No. 50, December 16, 1991.

²⁸"ADA Questions and Answers," Bureau of National Affairs, Americans with Disabilities Manual (ADAM), (Washington, D.C., monthly), Section 90:0233.4.

²⁴Id. at 5.

²⁵Id. at 4.

Certain drug tests may reveal the use of prescription drugs. This could lead to problems for employers. For example, what if the results of a drug test reveal that the applicant is taking AZT, a drug used in conjunction with treatment for AIDS and HIV disease? Persons with AIDS or HIV disease are protected under the ADA. As such, this information, in and of itself, could not be used to eliminate the applicant. In the event secondary medical information is obtained, agencies should treat it in accordance with ADA requirements relating to all medical information. It should be treated as a confidential medical record, maintained separately from the individuals personnel file and steps should be taken to guarantee the security of the information.

Polygraph Tests. "Polygraph tests are not addressed specifically in the Act."²⁹ However, preliminary questions attendant with administering a polygraph exam are often medical in nature. For instance, questions such as, "Are you currently on any medication?" would be impermissible prior to extending a conditional offer.

What does this mean for criminal justice agencies? "Pre-offer, there will be no medical questions on the polygraph examination allowed."³⁰ Thus, employers are faced with (1) pushing back the polygraph exam until after an offer is made; (2) conducting the polygraph without the initial medical inquiries often

²⁹Litchford, Jody M., "Implementing the Americans with Disabilities Act: Guidance for Law Enforcement Agencies," The Police Chief, December 1991.

³⁰Crime Control Digest, December 16, 1991, p. 7.

asked to ensure the validity of the exam; or (3) conduct one polygraph, pre-offer, without the preliminary medical questions and a second exam, post-offer, which includes medical exams. Obviously, the last option would be costly.

Background Checks. To the extent background checks involve medical inquiry, they must be delayed until after an offer is made. FBI checks, national credit checks and high school or college transcripts can be procured at the pre-offer stage.

But remember, employers may not contract with someone else to do that which the employers cannot do themselves. Likewise, agencies cannot ask prior employers or others those questions which the employer cannot ask the applicant directly.

Medical Exams. Clearly the ADA permits medical exams once a conditional offer of employment is made. When a medical exam is scheduled it is a good idea to give a list of essential job functions to the doctor conducting the exam.³¹

What happens if the employer gets unsolicited medical information prior to extending a conditional offer? Can this information be used to exclude the applicant? The answer depends on whether the information is relevant to the applicants qualifications. The bottom line, notwithstanding the volunteered information, is whether or not the applicant is otherwise qualified for the position. If an applicant volunteers

³¹Crime Control Digest, December 23, 1991, p.7.

information about a disability which renders him or her unqualified for the job, then no offer need be made.

Take care not to make a decision on speculation or assumptions. For example, if an applicant discloses that he or she has epilepsy, such information, in and of itself, would not disqualify the applicant. Remember, blanket exclusions of a particular disability should be avoided. On the other hand, if an applicant were to reveal that he or she has epilepsy which cannot be controlled by medication, then it may be appropriate to eliminate the candidate assuming, of course, the reasons are job-related and consistent with business necessity.

Psychological Exams. While the EEOC has not fully addressed the issue of psychological testing, the conventional wisdom is that they are a 'grey area' and should be considered medical in nature.³²

Many departments have historically used tests such as the Minnesota Multiple Personality Inventory (MMPI). Yet, a close look at the MMPI suggests that it includes questions which might be construed as medical. For example, here are a few inquiries contained in the MMPI:

- * I am bothered by an upset stomach several times a week.
- * I have a cough most of the time.
- * During the past few years I have been well most of the time.

³²Id.; Police & Security News, May - June 1992, p.35.

* I have never had a fit or convulsion.

* I have had attacks in which I could not control my movements or speech but in which I knew what was going on around me.³³

However, prior to making a conditional offer, employers may assess personality traits, enduring personality traits, knowledge, skills and abilities as they apply to job qualifications. Then, once an offer has been made, employers are free to administer psychological exams which include medical questions.

ANSWERS TO QUIZ

- 1. Questions about workers compensation history are not permitted prior to making a conditional offer of employment because it could require an applicant to disclose a disability or a record of a disability.
- 2. The ADA prohibits questions about the nature, origin or severity of a disability at this stage in the hiring process.
- 3. Questions about attendance, in general, are permitted so long as they do not relate to absences due to illness. [See question 8.]
- 4. Questions regarding on-the-job injuries are another way of asking about workers compensation claims and therefore are not permitted.
- 5. This question is often asked prior to administration of a polygraph and is considered a medical inquiry. Since this question cannot be asked prior to extending a conditional offer of employment, polygraph exams should either be pushed back until the post-offer phase or, alternatively, conducted without these "pre-polygraph" inquiries.

³³"Minnesota Multiphasic Personality Inventory - 2," The University of Minnesota Press, 1989, #28, #36, #141, #142, and #182.

6. Questions about how a particular applicant would perform specific job functions, and with what accommodation(s), are allowed. Employers are permitted to determine whether the applicant can perform the essential functions of the job and questions like this one focus on the applicant's abilities not his or her disabilities.

7. Drug tests are not considered medical exams under the ADA. Therefore, a drug test may be administered at any time.

8. Questions about absences due to illness would be considered a medical inquiry. Likewise, questions regarding conditions or illnesses for which treatment was sought, or regarding treatment by a psychiatrist or psychologist or for a mental condition would also not be permitted at the pre-offer stage of the hiring process.

9. Even if an applicant voluntarily discloses a disability which is not manifestly obvious, employers may not then use this information to inquire into otherwise impermissible areas. Remember, exploration into what accommodation to provide should focus on the applicant's abilities, not disabilities.

10. Employers have a duty to reasonably accommodate participants in the application process including the application, the interview and any performance exams to be administered.

MEETING THE MULTIPLE CHALLENGES OF THE
AMERICANS WITH DISABILITIES ACT
IN THE CORRECTIONAL SETTING
TITLE I ISSUES FOR CORRECTIONS

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Prepared for: National Institute of Corrections

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I. INTRODUCTION - IDENTIFICATION OF ISSUES FOR CORRECTIONS ADMINISTRATORS

Most criminal justice agencies were not prepared for the impact of the Americans With Disabilities Act (ADA) of 1990 either on hiring decisions in their agencies.

The mandates of ADA are long overdue as civil rights legislation. While few argue with the principles embodied in this landmark legislation, there is heated discussions in criminal justice agencies about ADA and what is expected of agencies. Agencies just want to get to the "bottom line" without engaging in lengthy philosophical debates with federal, state or local officials.

This paper addresses primarily Title I - employment issues for jails and offers some practical suggestions for achieving compliance. These issues are:

- o Job Task Analysis/Essential Job Functions
- o Position Announcements
- o Medical Standards (entry-level and career)
- o Screening of Entry-Level Corrections Employees
- o Conditional Job Offer Letters

More is known about the specific impacts of ADA as the Equal Employment Opportunity Commission (EEOC), the Federal agency charged with Title I enforcement releases opinion letters and compliance documents. Many agencies, however, are marking their second year of successfully complying with ADA, and successfully hiring qualified staff.

Jails are scrambling to come into compliance for several reasons. First, most correctional agencies do not have adequate job task analyses needed to establish the essential functions of jobs. Secondly, very few agencies have medical standards that are defensible under the Act. Thirdly, the day-to-day personnel management decisions made by an agency administrator may often lead to unanticipated conflicts with ADA.

The suggestions and examples furnished in this paper presume that the reader has a working knowledge of the ADA mandates. There are many excellent summaries of the Act, and time will not be spent here with this subject.

II. PERSONNEL CHALLENGES

The number one message for correctional administrators in addressing personnel-related ADA compliance is - "don't go it alone". Each local government in the United States is mandated to bring all hiring into compliance with the ADA. This includes employment positions from clerks to police officers, to road maintenance workers. Policy development and subsequent implementation at the local and state government level, especially those addressing public safety agencies, need to be made with the administrators of all public safety agencies. A unified strategy and approach (not necessarily single standards and essential job functions) to advertising, hiring, screening and retention should be considered by every jurisdiction. There are fiscal impacts of achieving compliance, and those costs also can, and should, be shared by all public safety agencies in a jurisdiction.

A. Developing Job Task Analysis - Many correctional organizations do not have adequate documentation concerning the job tasks required of their employees. This is critical as employers need to identify the essential functions of jobs and use these functions in making hiring decisions. In this way, jobs that have been traditionally closed to the disabled, may be opened, when a job task analysis reveals that a disabled person can perform the job's essential functions; or that an accommodation can be easily made that will allow the disabled individual to do the job.

Job task analysis is a difficult and time consuming task to complete and validate, especially in light of the fact that jobs of correctional employees are so varied. The job task analysis defines "the essential functions" of each job classification.

Attachment A, "Establishing Essential Functions of the Job", developed to assist local criminal justice agencies by the Virginia Department of Criminal Justice Services, provides an overview of the process. The process of identifying essential functions should be assisted by a personnel management specialist from your local or state government. Although the process is not academically beyond the reach of administrators, the nuances of personnel administration make this assistance desirable. If local or state governments do not have available the necessary qualified staff, industrial psychologists associated with local community colleges or state universities are also qualified to provide technical assistance. Unfortunately, accomplishing this task may require expending funds for consultants or advisors if local or state governments do not have the expertise. This is a task in which public safety agencies in one jurisdiction should pool scarce resources in order to accomplish.

Identification of the essential elements of the job of correctional officers, along with the frequency and relative priority, provides the documentation to develop or update the job description. The job description should include a summary of duties and responsibilities, along with the minimum education, work history, and other requirements (driver's license, state required certification, for example). The job description provides the basis for advertising the position, testing for the position, establishing entry-level medical standards, career medical and fitness standards, as well as training, and performance evaluation standards.

For example, Attachment B provides an excerpt of a job task analysis for a Deputy Sheriff Sergeant working in a new generation jail (City of Alexandria, Personnel Services Department, December, 1988). This final task list was developed from many pages of information supplied by the position incumbents, as well as their supervisors. All tasks were ranked in order of importance, before the final list of knowledges, skills, abilities, and other characteristics for the position were derived. These are noted in Attachment C. From this list, the job description was updated, the promotional process revised, and new performance evaluation measures instituted.

ADA does not require that a local or state government complete a job task analysis, but it is clear that this process is the principal way in which the job is documented.

The job task analysis should identify the level of physical effort required for the position. (See Section E., Medical Standards.) Often the physical requirements are under or overestimated. These determinations affect not only the pre-employment medical standards, career medical and fitness standards, but "light duty" posts that have evolved in many organizations.

ADA also asks employers to assess if altering any physical standards for the position to permit a disabled person to do the job would significantly alter the job. For example, would an emergency communications technician's job be significantly altered if the requirement to be able to walk the stairs between the call-taking and dispatching positions were eliminated? In this case, the answer may be "no", with the reasonable accommodation of a ramp, hence opening a position for a disabled person who may use a wheelchair.

On the other hand, eliminating the physical requirement that a corrections officer be able to handcuff a struggling person would significantly alter the job. ADA does not require such a job modification. In either example, the documentation developed in the course of developing essential functions will serve to answer those who may challenge the standard.

B. Developing Position Announcements - Attachment D, provides a graphic display of the process for Establishing the Job Position Announcement (Virginia Department of Criminal Justice Services, 1992). Clearly, the way in which the position is advertised follows directly from the essential elements of the job. The criteria for screening applications should also be consistent with the essential functions. Of course, this is sound advice regardless of ADA. The agency should also inquire as part of the application process is an applicant needs an accommodation to complete the process -- in other words, hearing, visual, or other accommodations to even enter the process. The agency should also consider noting on all it's recruitment materials and application materials that the agency endorses and complies with the ADA.

Position announcements may also incorporate a summary of the physical and medical requirements for the position. This may accompany the more traditional listing of the position duties and the education, employment and other requirements. Position announcement should also include any position disqualifiers - including past or current illegal drug use, past criminal history, etc.¹ This will assist applicants in self-selecting out of the process in the initial stages.²

C. Screening Applicants - One of the most significant challenges presented by ADA is the prohibition of asking applicants about protected issues prior to a job offer. Among the issues that cannot be raised, according the Act, are medical conditions, past or present drug or alcohol use, and even some questions aimed at establishing the candidate's emotional or mental health. A pre-employment agility test in which the potential employer takes medical information (blood pressure, pulse, respiration) to assure that the applicant is not at risk of

1. The EEOC is "neutral" on the question of pre-employment drug testing. An agency may require a drug test at any stage in the hiring process. But caution should be exercised as the presence of legal drugs may reveal a condition protected by ADA that the employer should not know in the pre-offer stage. Such conditions revealed in this manner might be epilepsy, HIV disease, etc. The best approach may be to instruct the drug testing laboratory to report only the presence of illegal substances.

2. Several agencies include a listing of the essential physical requirements of the position at the time of initial application and ask each applicant to initial that they are able to accomplish this physical objective.

injury during the test is not permissible under the ADA.¹ As polygraph examinations require some inquiry into the applicant's health (blood pressure, current medications) to provide the examiner with necessary baseline information, the use of this tool is limited in a pre-offer setting.²

How then, agencies ask, can we determine if a candidate can meet the physical, background, character, and medical standards necessary to perform the job? How can criminal justice agencies employ prior drug users, or even those who claim to have completed drug or alcohol rehabilitation programs? To offer jobs one at a time while each candidate is evaluated is not cost effective, realistic, nor even conceivable. Will assuring access by the disabled to corrections and law enforcement jobs result in a process that lowers the standards for those being hired?

The majority of the effort by law enforcement and corrections agencies since ADA has been on this single issue - how do we rationally process applicants - meeting our hiring needs (numbers) and standards, but remain in compliance with ADA? Added to these challenges are the fiscal restraints imposed on the hiring process in many jurisdictions.

This paper presents one strategy to achieve this end through a conditional job offer letter. This approach would appear to be most relevant to agencies with fewer than 300 employees. The conditional offer letter has been embraced by many organizations and has not been rejected by the Equal Employment Opportunity Commission.

If anything, ADA has resulted in criminal justice agencies further documenting why hiring decisions are made at entry level. Each step in the process must now contain more quantifiable and objective criteria. The revised process provides little room, rightly, to act on "hunches" or past experience with "that kind of applicant" in making hiring decisions.³

1. One way to address this issue is to have the specific requirements of physical agility tests laid out; ask each applicant to present it to his or her physician, and require the physician to certify that the applicant is fit to take the testing.

2. Some agencies are using a pre-offer letter polygraph that does not medical inquiries. This type of testing is of little utility in revealing information and adds costs and length to the process.

3. The EEOC's advise to agencies is to articulate the reason a candidate is disqualified from the hiring process, including that a person is disqualified due to a disability covered by the Act.

D. Conditional Offer Letters - Attachment E presents the conditional offer letter now in use by the Alexandria, Virginia Office of Sheriff. Prior to using this approach, several issues must be addressed by agencies in order to curtail possible abuses. What information can we gather about the applicant at these initial stages? The answer is any information that does not ask about the applicant's medical or emotional/mental history issues which are protected by ADA. The Act protects those who have completed a drug or alcohol rehabilitation program. Excluded from protection in the Act are current illegal drug use, and conditions such as homosexuality, transvestitism, bisexuality, transsexualism, voyeurism, etc. (See the ADA for further delineation of protected conditions and excluded conditions).

Requesting any information from the applicant beyond education background, employment history, military record, criminal activities, and driving record should wait until there is a job offer - in this example - a conditional job offer. The conditional offer letter comes at the stage after an applicant has had a criminal history record check, a driving record check, and has successfully passed an oral interview panel. The interview panel uses job-related scenarios to evaluate the applicant's communication ability, past employment, and educational experience, along with other traits documented as relevant to Deputy Sheriffs managing inmates in new generation jails.

A critical issue in using the conditional job offer scenario is that the offer must have some basis in the hiring process for that agency -- in other words, every candidate cannot be provided with a conditional offer letter. Every agency should know how many qualified applicants must come in the front door, before one qualified person emerges as suitable for hire. This data, known as the "yield ratio" is derived from carefully reviewing hiring cycles and determining when applicants drop out of the process. This analysis also, incidentally, documents where women, minorities, and others in protected classes fall out of the process and why. (A requirement of accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc.)

Chart 1

Example of Computing Yield Ratios for
Entry-Level Hiring

<u>Steps in the Hiring Process</u>	<u>Number Remaining Applicants</u>	<u>Yield Ratio</u>
Applications Received	250	100
Meet Minimum Standards	225	1.1
Appear for Initial Interview	117	2.1
Pass Initial Interview	75	3.3
Pass Criminal History Check	65	3.8
Pass Driver Record Check	64	3.9
Given Conditional Officer Letter	64	3.9
Pass Background Investigation/Polygraph	50	5.0
Pass Pre-Employment Psychological Screening	25	10.0
Pass Pre-Employment Medical	20	12.5
Pass Final Interview	18	13.8
Offered Position/Eligibility List	18	13.8

In this example, the agency must receive 14 applications to hire one qualified candidate.

When the yield ratio is known, it may be used to determine the number of conditional job offer letters an agency should be issuing during the hiring process. In the example provided above, the agency should anticipate offering no more than 64 conditional offer letters to fill 18 positions. While this approach is not flawless, it does provide an objective and deliberative framework to approach a currently ambiguous area.

Following the conditional offer letter, questions can be asked concerning existing medical conditions, past or current use of illegal substances, and mental health history. The polygraph examination may be used effectively at this stage. Any pre-employment psychological screening can also take place after the conditional job offer letter.

If a position is not available at the time a candidate completes the process, he or she can have their name placed on an eligibility list for future hiring. Hopefully, if the hiring process matched the agency's needs through using the yield ratios, there will not be a lengthy eligibility list that could call into question the genuineness of a conditional job offer letter. Such a qualified pool should be exhausted prior to placing more qualified applicants in the pool. Expanding the pool with new applicants may have the effect of pushing qualified disabled persons to the bottom.

In the fourteen months since the Office of Sheriff has initiated the conditional offer letter, there have been no questions or challenges to its use by applicants. In the City of Alexandria, all public safety agencies (Fire, Police and Sheriff) agreed to this approach with the advice and consent of the City Attorney. Care is taken to review the conditional offer letter individually, in person, with each applicant. The applicant acknowledges receipt of the letter in writing. What constitutes "pass" and "fail" in the process is spelled out in the letter. All those who have been discontinued in the process receive letters notifying them of the decision and why. The process has left little doubt as to why each candidate is disqualified, both for staff and the applicant. We have seen no decline in the quality of applicants hired because of this process modification. If anything, the result has been more carefully screened, high qualified candidates.

In conclusion, one strategy to address the ADA standards and establish a rational, timely, and cost effective hiring process, is the use of a conditional job offer letter. If used, letters should only be made to the smallest number of applicants, based on yield ratios, to meet the immediate hiring needs of the agency. The agency should assure the conditional offer letter clearly delineates the conditions that must be satisfied by the applicant prior to a final job offer. The agency needs to be as definitive as possible as to what constitutes "pass" or "fail" for each remaining phased of the process. A time deadline on length of time the conditional offer is effective should also be considered (for example, six months, one year). (See Attachment E, sample conditional offer letter.)

E. Pre-Employment Psychological Screening - The pre-employment psychological screening or examination has engendered much ADA related debate. One side claims that this process is not a medical examination and therefore is not precluded by the ADA at the initial stages (pre-offer letter) of applicant evaluation. The purpose of the screening is not to determine if there is disqualifying psychological pathology - or to put it simply - "whether the person is crazy or not", and there is no diagnostic work-up. The process is only to determine whether the applicant's psychological traits match those needed to perform the job. (Needless to say, these psychological traits and behaviors will also have been validated as job relevant prior to use. See Zupan, et. al.)

The other side of this debate argues that any pre-employment psychological screening using traditional psychological testing tools (MMPI, California Inventory, etc.) will identify mental illness whether or not that is the intent of the testing/screening. For these reasons, it is perhaps best that any pre-employment psychological screening fall after the conditional offer letter. It is conceivable, however, that a two set process could be created to address pre-employment psychological screening. The first step occurring prior to the conditional offer letter to assess non-ADA protected behavioral traits. The second

phase would follow the offer letter to delve more deeply into issues which are more medically-related.

F. Developing Pre-Employment Medical Standards - The issues of "validated" medical standards has plagued criminal justice agencies for years. The accreditation process for the Commission on Accreditation for Law Enforcement Agencies, Inc. requires those agencies seeking accreditation to assure their entry level medical standards are valid. The Commission and it's assessors, however, are not in a position to provide the technical evaluation of whether in fact, validation has occurred. Thus, it is difficult to assess whether there has been a contribution to the research as a result of these standards.

Screening of job applicants with validated medical standards is essential under ADA to assure that disabled applicants are not summarily dismissed from the process. This step forces that agency to document what are essential functions and what are marginal job functions. Essential job functions are not necessarily correlated to the frequency of the function. For example, a corrections officer may infrequently be called upon to wrestle a struggling inmate to the ground and handcuff the inmate; but an employee's inability to do that would significantly jeopardize his or her ability to perform the job.

Medical screening will also take place in this post conditional offer phase. Placement of the medical examination in the process should be where it makes sense for the agency and where it might be most cost effective. For example, preliminary screening just after the conditional offer letter may eliminate some medical conditions (obesity, color blindness) or disabilities, thus saving further processing time and resources.

Since 1987, the City of Alexandria Office of Sheriff has requested the City to validate the entry-level medical standards used for public safety employees, including Deputy Sheriffs. The entry-level medical standards, developed in 1978, were based on available research at the time for fire, police and corrections. There had never been a study to match the entry-level medical requirements of those standards with actual required job performance. More importantly, there was and is an on-going controversy as to whether these entry-level standards are benchmarks for career fitness, as well as questions as to what medical standards should be used to evaluate an employee whose physical condition calls into question his or her ability to continue to perform the essential job functions.

Responding to this need, and concurrent with the passage of the ADA, the City prepared a request for proposal to hire a contractor to develop and validate entry level medical standards for all City positions. Phase one of this effort included all the public safety agencies, and was concluded in the summer of 1992. The final draft standards are awaiting adoption, along with adoption of the vendor's proposal as to the process by which applicants will be medically evaluated.

One of the vendor's first tasks was to search the literature for corrections-related medical standards. To no one's surprise there are no studies, reports, or literature concerning medical standards or fitness in corrections. While there has been some research on medical standards for fire fighters and police officers, the field is empty for corrections.

Attachment F, includes several examples of materials that were used by the vendor, Industrial Medical Services (IMS), a subsidiary of National Orthopaedics and Rehabilitation Hospital, Arlington, Virginia. These questionnaires, completed by staff, and followed-up by contractor visits to the work site, resulted in the medical standards currently proposed for Deputy Sheriffs in Alexandria. A sample of the final draft medical standards are included as Attachment G.

The survey instruments sought to quantify the physical demands of the job such as static strength, explosive strength, dynamic strength, trunk strength, stamina, effort, speed of limb movement, etc. The scales provided understandable benchmarks for staff in effectively responding to the survey. The survey also used the existing job task analysis to site specific corrections related duties (moving/shoving person, restraining inmates, searching inmates, firing weapon, using the computer system) and asked the staff to respond on a "level of effort" scale.

As important is the vendor's recommendation as to the process of evaluating the candidate's objective medical report to determine if he or she meets the medical standards. The process is designed to assure that the disabled are not summarily disqualified while giving latitude to the medical professional evaluating the record. This process does not rely solely on the traditional pass/fail method, but rather recommends a two step process. The first step is medical testing and evaluation by a qualified physician; and then an evaluation of this medical record by a physician who is familiar with the essential job elements. This professional is referred to by the vendor as the "Sheriff's Office physician."¹

The medical standards identify conditions as either "Category A" which are 100% disqualifying, or "Category B", which require evaluation of the medical record by the "Sheriff's Office physician" prior to disqualification or acceptance. For example, there are no dental-related medical standards listed for Category

1. This is also the approach that appears to be recommended by EEOC. The guideline discussed most often is that every case is a case of one. Blanket exclusions of disabilities -- such as blanket exclusions of epileptics, will not be acceptable under ADA as there is a wide range of capabilities of persons with that condition. The agency's physician then will be critical in matching the capabilities of a candidate with the documented physical requirements of the job.

A; but several for Category B, including diseases of the jaws or associated tissues, and orthodontic appliances. In addressing the vascular system, Category A medical conditions include among others, congenital or acquired lesions of the aorta and major vessels leading to (or predictably leading to) marked circulatory instability. In this same category hypertension is a Category B - to be evaluated by the "Sheriff's Office physician".

The standards are comprehensive and seek to assure inclusion of all areas of addressed by ADA. Included, for example, are psychiatric conditions, chemicals, drugs and medications, and all other physiological and medical possibilities.

The final draft listing of physical requirements of the entry-level corrections employees is included in Attachment H. Importantly, these standards may also be used in advertising the position, and placed in the conditional offer letter. This will leave no doubt in the minds of applicants as to the validated physical requirements of the position. These standards will be an addition, in the near future, to the conditional offer letter for the Office of Sheriff.

In summary, development of valid medical standards will closely follow the process of identifying the essential elements of the job. Developing medical standards will require assistance from specialists. Again, this is an area in which a jurisdictions's public safety agencies will benefit from a shared contract to perform this analysis.

Consideration of medical standards should not, however, stop with entry-level hiring. Some consideration and thought must be given to "career" fitness standards and standards for evaluating the fitness for duty of staff who develop medical conditions in the course of their career.

G. Career Fitness Standards - Hardly a more acrimonious debate will develop among criminal justice staff than what physical and medical standards apply to them as career employees. Many states, including Virginia, have a "presumptive" clause in their worker's compensation statutes that have a potentially significant long term fiscal impact on the state and locality.

Briefly stated, these statutes provide that when pre-employment medical examinations find no evidence of heart and lung disease; and if an employee is later diagnosed with heart or lung disease that precludes them from performing their duties; and in the absence of any evidence to the contrary that the job duties were not a casual factor, the employee will be presumed to have acquired this condition while employed. As such, disability payments may be initiated. Yet, how many law enforcement or corrections agency have career fitness or medical standards; how many provide medical or fitness evaluations after hire; and how many staff have been relegated to "light duty" positions because of their physical conditions?

These issues, when seen in the context of ADA, should give local and state criminal justice agencies more food for thought. How can disabled persons be denied employment when some existing staff are perhaps equally disabled by their physical condition, and remain working? Are there then posts that have been created by the agency, de facto, as "light duty" posts? Can't, then, these positions be filled permanently with staff who do not need to meet the more stringent entry-level medical standards?¹

To the unhappiness of the currently employed staff, recommendations have been made in many agencies that entry-level standards be the career fitness and medical standards, as well as standards used to evaluate fitness for duty for those specific positions. Some argue that those fitness and medical standards for the 20 to 29 year old new hires, cannot be applied to older staff. Medical "experts" sometimes take the position the duties don't change with age, and, therefore, medical and fitness standards should remain the same. As a person proceeds through a career, promotions may result in moving to different job classes (for example Sergeant, Lieutenant), all of which should have different job descriptions/essential functions, and medical standards. So we can see that the process of developing medical standards should extend beyond the agency's entry level positions to assure ADA compliance.

This paper does not propose to answer all the questions surrounding career fitness and fitness for duty medical standards, but raises them as additional considerations for a local correctional administrator during the process of achieving ADA compliance. Consideration should be given to establishing a career fitness program for all job classes, with validated standards; as well as to assuring that the agency does not create "light duty" posts. The agency also should have standards against which to evaluate an employee's illness or medical condition prior to returning to employment.

1. There does not seem to be a "right" or "wrong" answer to whether an agency should or should not have light duty posts. The best approach is have a written policy on the subject to which the agency is committed -- either no light duty posts, 10 light duty posts, etc. The policy might also address the entitlements to those posts, and who makes the decision. For example, is an employee is injured off-duty, as opposed to on-duty, is there a greater entitlement to light duty?

III. SUMMARY OF RECOMMENDATIONS

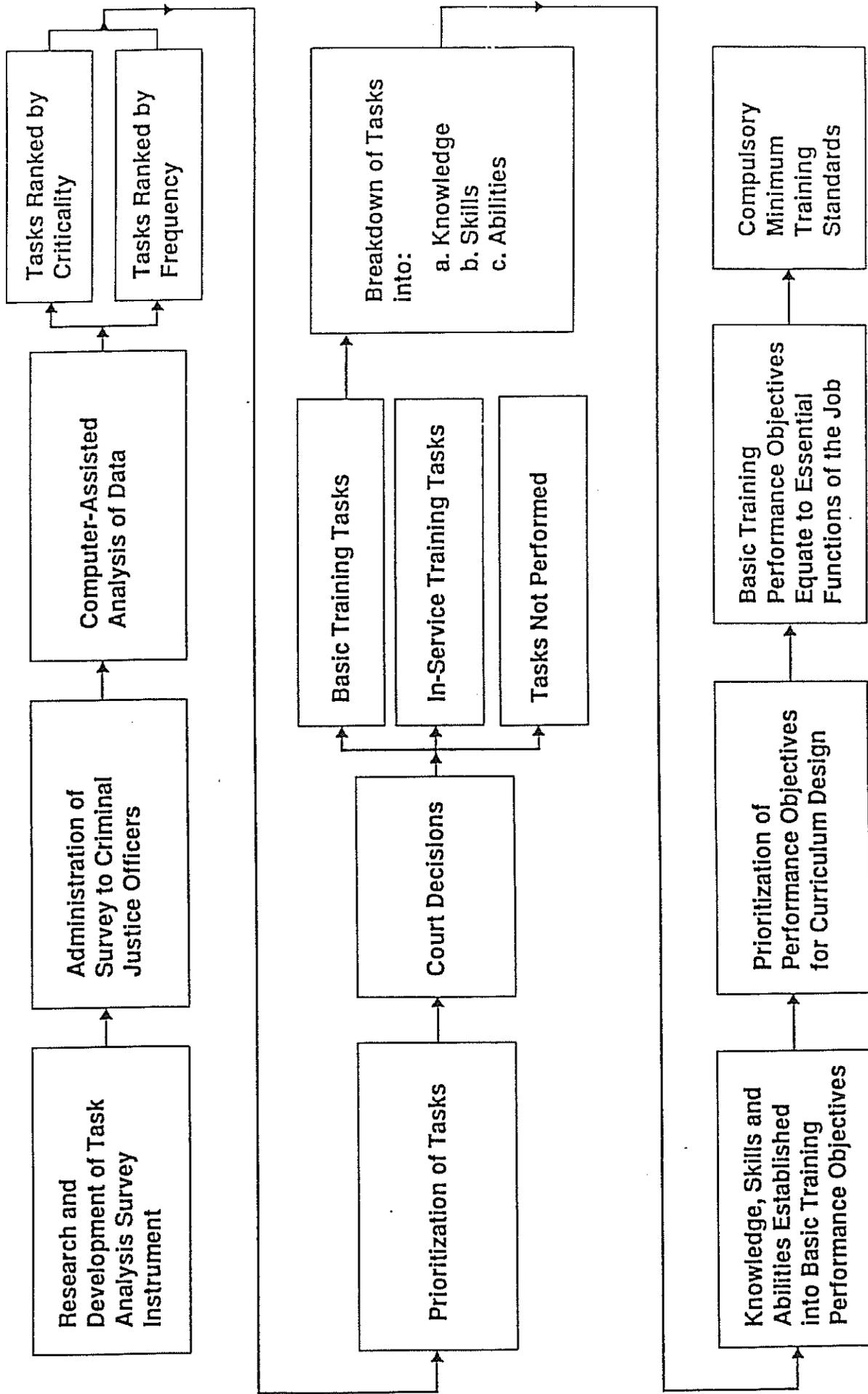
The following are suggested questions that corrections administrators can ask themselves to evaluate their agency's compliance with ADA mandates:

1. Determine your local or state government's response. Be sure you have a representative on any committee or task force working on jurisdiction-wide ADA issues. Has your jurisdiction's personnel agency begun working on modifying any essential job functions, job descriptions or medical standards? Has your jurisdiction's primary legal representative issued any decisions or guidance memos on ADA?
2. Determine the status of ADA compliance in your jurisdiction's other public safety/criminal justice agencies? Be sure to check on any additional staff training they may be planning.
3. Review all the job task analysis and essential functions for all positions in your agency. How long ago were they updated? Are they sufficiently detailed, objective and quantifiable to provide a basis for medical standards?
4. Review any medical standards for your staff. When was the date they were updated and validated? Are there career fitness standards? Has your staff ever been evaluated medically, or for fitness level since they were hired?
5. Carefully review all posts in the agency. Have permanent, or semi-permanent "light duty posts" be created? Do you need personnel doing those jobs who possess the physical abilities as all other staff? How would you defend that decision?
6. What is your agency's, or your local or state government's, process for evaluating the ability of current staff whose physical ability to do their job is in question (fitness for duty)? This does not include temporary disabilities such as a broken leg or pregnancy. Do you have some staff whom you believe put themselves in physical danger, or others in danger, because of their physical condition?

Corrections administrators can be leaders or followers in ADA compliance issues. As with other similar mandates, ignorance of the law will not excuse the administrator from failing to comply. ADA compliance will sharpen an agency's ability to do their job better, particularly in personnel related matters. Clarification expected in the near future should ease some of the burden of the different advice now available.

DCJS Process

Establishing Essential Functions of the Job



Component 02: Personnel/Vehicle/Equipment/Building Inspection and Maintenance

33. Conducts informal and formal inspections of cruisers, equipment, uniforms and personnel.
34. Reviews vehicle maintenance check forms prepared by subordinates.
35. Submits reports on all inspections conducted on deputies' equipment and uniforms.
36. Conducts inspections of building, supplies, and equipment.

Component 03: Policy Program Preparation/Evaluation

37. Writes directives to cover unwritten Office policies.
38. Reviews policies prepared by others and makes recommendations before final policies are adopted.
39. Writes proposals for changes in policy.
40. Writes official policies for specific unit or location, but not for adoption on an Office of Sheriff basis.
41. Writes manuals defining work responsibilities for various subordinate positions.
42. Evaluates facts gathered during inspections of operation and makes recommendations for any needed changes.
43. Reviews the operation of new plans or procedures to determine if they are functioning according to plans.
44. Reviews operational problems with affected units.

Component 04: Inmate Management

45. Supervises the processing of inmates at the Correction Center.
46. Supervises all booking procedures, including warrant and arrest documentation.
47. Reviews information on incoming inmates, including criminal records, current charges, possible suicidal tendencies, and any medical problems.

8. Gathers information (evidence, witnesses) in regard to incidents and crimes within the jurisdiction of the Sheriff.
69. Reviews inmate records and files, for thoroughness.
70. Insures inmate counts prior to shift change.
71. Insures quantity and quality of inmate meals.
72. Insures inmates have adequate opportunity for physical activity.
73. Directs routine or special searches of all parts of Correction Center for contraband and/or evidence of attempted breaks.
74. Processes and responds to, in writing, inmate grievances and requests.
75. Directs movement of prisoners throughout correctional facility.
76. Oversees and coordinates operation of food service, medical service, volunteers and other programs.

Component 05: General Report Preparation and Review

77. Completes brief incident reports by consolidating and summarizing information.
78. Completes status report on weekly or monthly basis, consolidating information from reports on shorter time periods.
79. Writes correspondence to answer questions, provide information, request information, etc.
80. Drafts written strategies or operational guidelines to be followed in specialized or major situations, emergencies, etc.
81. Reviews incident-type reports, records, or activity logs to evaluate contents for completeness, accuracy, legibility, neatness, and proper documentation.
82. Reviews reports, memos, directives, in order to disseminate information.
83. Reviews reports to make written recommendations to superiors for changes in operational procedures.

- utilizes individual and group time effectively
- suggests procedures to facilitate individual and group activities
- develops coordinated plans for handling items and issues

Leadership: Ability to initiate actions and to effectively guide an individual or a group to accomplish a task or goal. Ability to produce positive results from competing factions or positions, through conflict resolution.

- makes suggestions to get a job done
- sees to it that necessary activities are accomplished
- attempts to positively influence people and events
- obtains support of others for own ideas and positions
- takes positive action rather than simply responding to events

Oral Communication: Ability to verbally transmit information and ideas in a clear and concise manner. (This includes articulation, grammar, volume, and appropriate non-verbal communications such as gestures and eye contact.)

- speaks in a clear, articulate manner
- uses appropriate volume
- speaks in a concise style
- uses well-constructed sentences
- easily understood
- does not use slang

Written Communication: Ability to write in a clear and concise manner to insure understanding of communication by others. (This includes grammar, spelling, punctuation, etc.)

- writes in a clear manner
- uses correct grammar, spelling, etc.
- writes in a concise manner
- does not omit important details

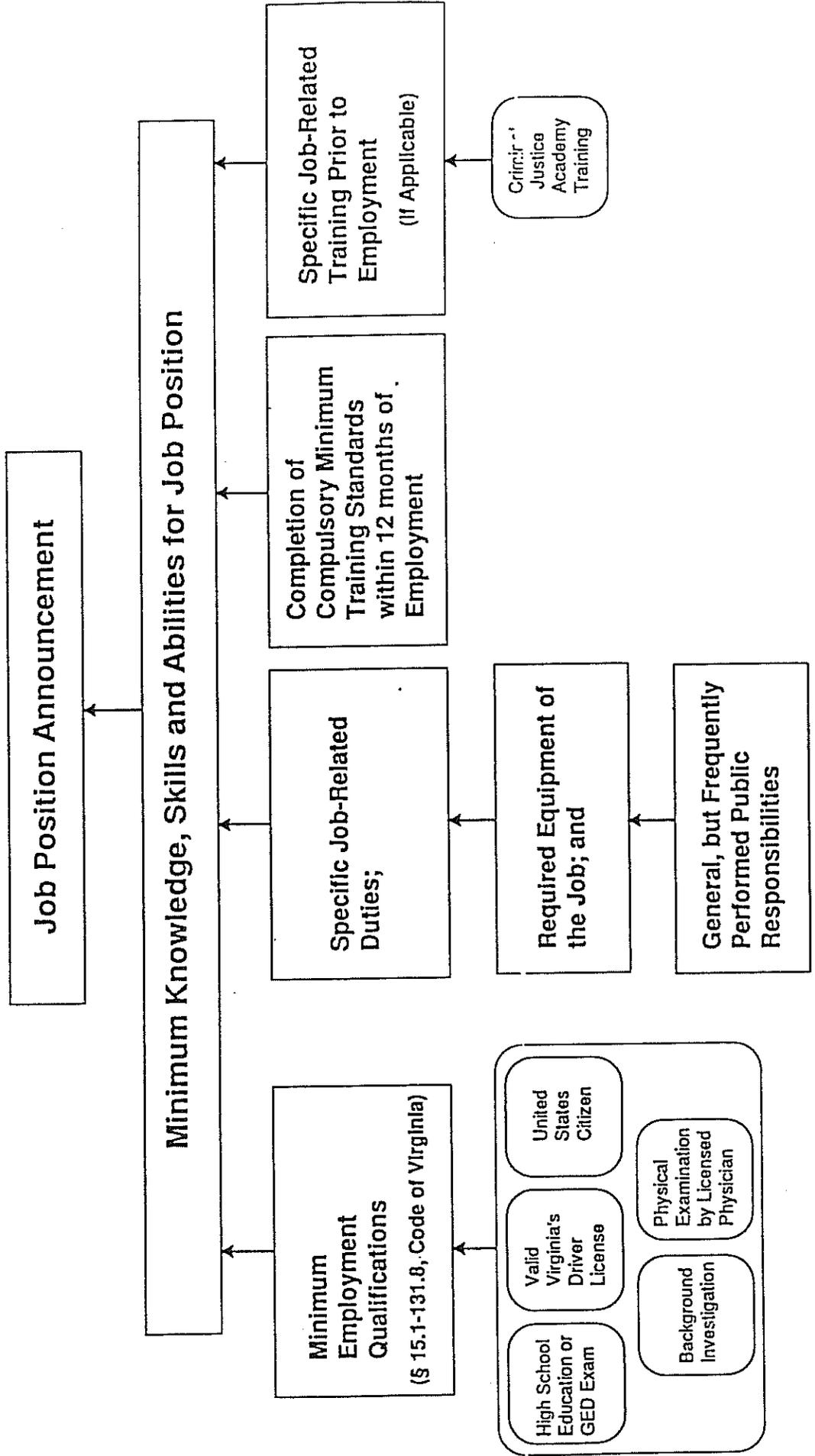
Job Knowledge: Possession of the necessary technical and/or process information to perform the job effectively.

- is aware of regulations, procedures, and policies which affect work activities
- understands technical aspects of the job

Dependability: Can be relied on to appropriately complete a task or assignment, without constant supervision.

- completes a task without having to be reminded or prodded

Establishing the Job Position Announcement



Source: Alexandria, Virginia Office of Sheriff

October 29, 1992

&Name&
&Address&
&State&

Re: Conditional Offer Of Employment

Dear &Salutation&:

Your application for the position of Deputy Sheriff with the City of Alexandria Office of Sheriff is being processed, and in accordance with the Americans With Disabilities Act (ADA) of 1990, we hereby tender to you a Conditional Offer of Employment. The pay rate for this position is \$26,665 per year, along with the standard benefits package as provided by the City of Alexandria Office of Sheriff appointees.

This offer of employment is conditional upon your successfully completing each phase of the selection process as identified below. Successful completion is defined in the standards cited in the written job description for the position, the polygraph and background disqualification statements (enclosed here), the psychological job compatibility testing, and physical condition requirements established by the Office of Sheriff and City of Alexandria as well as all applicable federal and state statutes and administrative regulations:

- [] A polygraph examination conducted by a qualified polygraph examiner.
- [] A psychological screening for job compatibility conducted and interpreted by a licensed psychologist or psychiatrist.
- [] A background investigation conducted according to guidelines set forth by the City of Alexandria for its Office of Sheriff appointees.
- [] A comprehensive medical examination by a licensed physician contracted by the City of Alexandria for this purpose, to be administered according to guidelines set forth by the City of Alexandria for its Office of Sheriff appointees.
- [] Interview with Sheriff or designee.

You will be notified when and where to appear to complete the processes outlined above. Should you fail to complete any of the above requirements due to any provisions protected by the ADA,

the Office of Sheriff will investigate the circumstances to determine whether a reasonable accommodation can be made that will permit you to perform the essential job functions required of the position without undue hardship or disruption to the employer. If such accommodation is not possible or practical, or if you fail any requirement imposed by State or Federal law or regulation, this offer of employment will be withdrawn.

If you successfully complete the above requirements, you will be placed on an eligibility list for future hire as vacancies occur. A second polygraph examination may be conducted if your confirmation of employment is more than six (6) months after the successful completion of the initial polygraph exam. Your eligibility will expire twelve (12) months from the date of your final interview with the Sheriff or his designee.

New Deputy Sheriffs will sign a Letter of Agreement addressing the following:

1. All staff of the Office of Sheriff are appointed by and serve at the pleasure of the Sheriff.
2. Initial assignments are to the Operations Bureau, Security Division. Deputies who have completed Academy minimum standards training and served their probationary period are eligible to apply for transfer opportunities in other areas of the Office.
3. This Office provides new Deputy Sheriffs with initial on-the-job training. Deputy Sheriffs are then eligible to attend the Northern Virginia Criminal Justice Academy (NVCJA), pending successful completion of the Field Training Program and a review of performance. The Academy's program certifies Deputies in law enforcement, corrections, civil process, and court services. This training includes firearms training - an area in which Deputies must develop and maintain a specific level of proficiency.

As the Office is making this substantial investment in each Deputy Sheriff and in his/her career, we require that new Deputy Sheriffs agree to remain an employee of this Office for a period of one year following completion of NVCJA training. If a Deputy Sheriff chooses to leave the employ of this Office prior to that time, he or she is required to reimburse this Office for all of their training expenses on a pro-rata basis. At the time of separation from service from the Office, if arrangements are not made for payment of the amount due, a 9% annual interest charge will be added to the unpaid balance. In the event payment is not made, the Deputy agrees to pay reasonable attorney fees and court costs incurred by the Office in collecting the unpaid balance.

4. To fulfill provisions of the Code of Virginia, Deputy Sheriffs are required to maintain a valid driver's license.
5. Deputy Sheriffs are encouraged to maintain the physical fitness level prescribed by the Office of Sheriff Fitness Program.
6. The Office of Sheriff strongly encourages all employees to pursue a Bachelor's Degree. We encourage this career development and will facilitate enrollment in higher education programs. The level of an employee's post-secondary education is one factor used in making promotional decisions.
7. All employees of this Office must agree to abide by the Office of Sheriff General Orders, Standard Operating Procedures, applicable City Administrative Regulations, and other lawful orders and directives.
8. Deputy Sheriffs must agree to carry out their duties impartially, to the best of their ability, and to not discriminate against any person because of their race, religion, sex, or country of national origin.

If you are employed with us, you will be required to serve a probationary period of twelve months. You will be terminated if your performance is unsatisfactory.

Sincerely,

James H. Dunning
Sheriff

JHD:rlh

Enclosure

I have read this Conditional Offer of Employment and I agree to accept the provisions cited above.

Signature

Date

Witnessed and explained by:

Signature

Date

Knowledges, Skills, Abilities, and Other Characteristics
(KSAOs)

Analysis: Ability to identify problems, determine their probable causes, and obtain information relevant to the problems. Ability to analyze data and situations and to size-up the problems and possible interrelationships.

- notes critical interrelationships among data
- asks appropriate questions to obtain relevant information
- identifies existing and potential problems
- determines the relative importance of various factors
- pays attention to important details
- Takes steps to obtain relevant information not currently available

Decisiveness: Ability to make necessary decisions and commitments without deferring actions when a decision can and should be made.

- does not defer action when a decision must be made
- makes decisions, when necessary and possible, rather than delaying or "passing the buck"
- assumes decisive position, rather than wavering

Decision Making: Ability to determine possible actions and to reach sound, logical decisions with respect to the situation. (This includes developing or choosing among alternatives and preparing contingency plans where necessary.)

- considers possible courses of action and determines the best possible solution
- makes sound, logical decisions
- evaluates implications and impact of decisions
- develops contingency plans and alternative actions

Planning and Organizing: Ability to develop procedures to effectively and efficiently accomplish a goal or solve a problem. (This includes prioritizing own work and that of subordinates, scheduling personnel and resources, and organizing information so that it can be effectively utilized.)

- prioritizes assignments in terms of importance and due dates
- plans and organizes data so that it can be effectively utilized

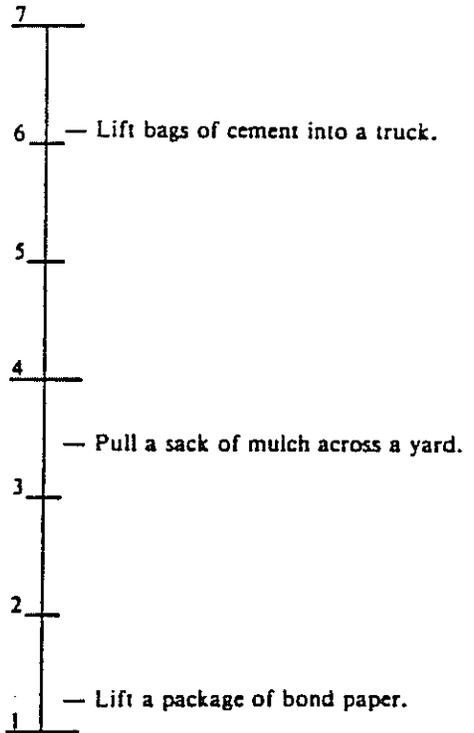
13. **MOVING OBJECTS** — Working on or about moving machinery or equipment, in the vicinity of vehicles in motion, or near any object that changes place or position whereby the well-being of the worker may be jeopardized.
- (0) **NO EFFECT** — Is not a condition of the Study Job.
 - (1) **LITTLE** — Possibility of injury from the moving object is slight if ordinary precaution is taken.
 - (2) **MODERATE** — Reasonable precaution above ordinary must be observed to prevent body injury to self or to others.
 - (3) **GREAT** — Worker must be especially watchful and quick to notice moving objects whose speed, velocity, or sudden appearance in the work area may result in severe injury to self or to others.
14. **VIBRATION** — Exposure of the body, particularly the arms and legs, to sudden jerks and jars or vibration.
- (0) **NO EFFECT** — Is not a condition of the Study Job.
 - (1) **LITTLE** — Minor strain or vibration for short periods of time.
 - (2) **MODERATE** — Some strain or vibration for moderate periods of time.
 - (3) **GREAT** — Pronounced continuous strain or vibration to body, arms, and legs.
15. **NOISE** — Working condition in which sound is produced as part of the work process or is a part of the job.
- (0) **NO EFFECT** — Is not a condition of the Study Job.
 - (1) **LITTLE** — Low sound or occasional fairly loud sounds.
 - (2) **MODERATE** — Steady and fairly loud noises.
 - (3) **GREAT** — Intermittent or continued loud and insistent noise.
16. **BURNS** — Possibility of injuries to the body caused by heat, fire, chemicals or electricity.
- (0) **NO EFFECT** — Is not a condition of the Study Job.
 - (1) **LITTLE** — Possibility of superficial burns, especially on arms or legs.
 - (2) **MODERATE** — Possibility of burns of the second degree affecting large areas, or small burns of the third degree.
 - (3) **GREAT** — Possibility of large third degree burns or any fourth degree burn.

PART III
PHYSICAL ABILITIES

SURVEY FORM

1. Static Strength

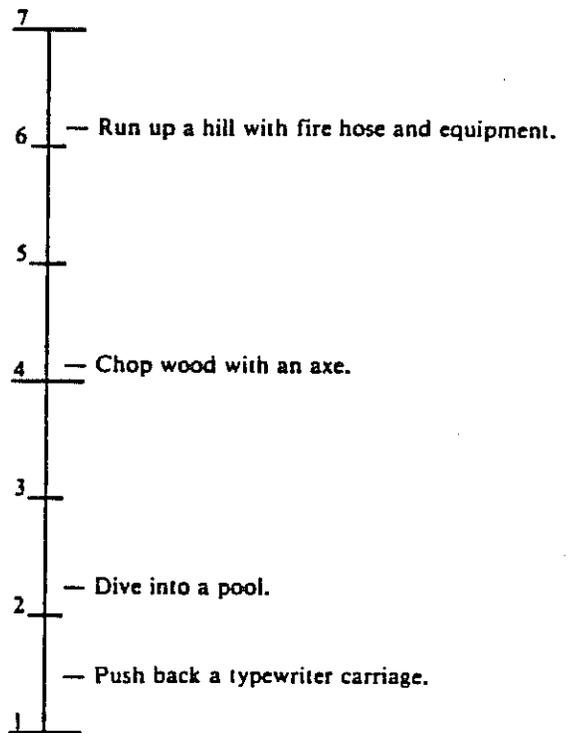
Requires use of all the muscle force possible to lift, carry, push or pull a very heavy object.



Requires use of a little muscle force to lift, carry, push or pull a light object.

2. Explosive Strength

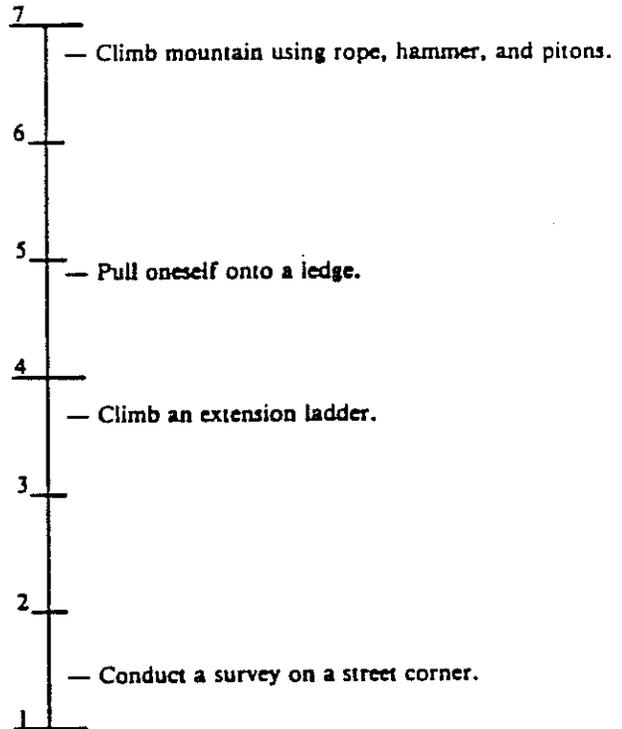
Requires bursts of all the muscle force possible to propel one's own body weight or objects.



Requires bursts of a little muscle force to move one's own body weight or objects.

3. Dynamic Strength

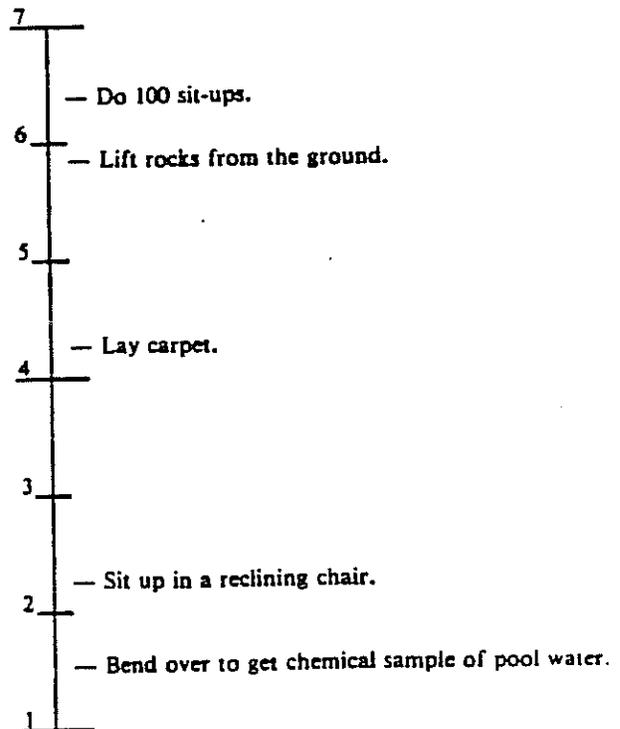
Requires use of all muscle force possible to hold up or move the body weight for long periods.



Requires use of a little muscle force to hold up or move the body weight for a short time.

4. Trunk Strength

Requires use of all the stomach and lower back muscle force possible to hold up or move part of your body for as long as possible.



Requires use of a little stomach and lower back muscle force to hold up or move part of your body for a short time.

PART III - ANSWER SHEET

ALEXANDRIA SHERIFFS
PHYSICAL ABILITIES

Amount Import. Freq.
(1 - 7) (1 - 7) (1 - 7)

1. Static Strength - Use of maximal muscle force to move a heavy object without pausing

Moving/shoving person _____

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2. Explosive Strength - Short bursts of force to move yourself or an object

Inmate restraint/separating people fighting _____

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3. Dynamic Strength - Repeated, continuous movement without muscle fatigue

Shakedowns of cell _____

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4. Trunk Strength - Use of strength of low back or abdominal muscles to move or support part of your body continuously and repeatedly without muscle fatigue

Lifting/carrying people _____

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5. Stamina - Physical exertion of whole body for prolonged time without getting out of breath

Chasing suspects _____

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6. Effort - Combination of strength and stamina of whole body

Wrestling/restraining inmates _____

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Amount Import. Freq.
 (1 - 7) (1 - 7) (1 - 7)

7. Extent Flexibility - Moving body, or body part, into unusual positions

Getting property down off high shelves _____

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8. Dynamic Flexibility - Many fast, repeated movements

Searching inmates/Shakedowns _____

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9. Mobility - Continuously moving your body over distance

Security rounds/patrol _____

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Escorting workers/prisoners _____

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10. Speed of Limb Movement - Moving arms or legs quickly

Emergency braking in vehicle _____

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Self defense _____

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11. Gross Body Coordination - Coordination of all body parts to perform difficult movements

Defensive tactics, take-down moves _____

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12. Gross Body Equilibrium - Keeping your balance in unstable positions

Walking catwalks in jail house _____

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13. Arm-Hand Steadiness, both during arm movement, and while holding hand and arm still

Firing weapon _____

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Fingerprinting _____

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A-5-3.1 Category A medical conditions:

- (a) Hearing deficit in pure tone thresholds in the unaided worst ear:
- (1) Greater than 25 Db in three out of four frequencies:
 - (i) 500 Hz, (ii) 1000 Hz, (iii) 2000 Hz, (iv) 3000 Hz
 - (2) Greater than 30 Db in any one of the three frequencies:
 - (i) 500 Hz, (ii) 1000 Hz, (iii) 2000 Hz; and an average greater than 30 Db for the four frequencies (Hz):
 - (i) 500, (ii) 1000, (iii) 2000, (iv) 3000.
- [Inability to hear sounds of low intensity or to distinguish voice from background noise, leading to failure to respond to imminently hazardous situations.]

When an otherwise excellent candidate is borderline on this hearing test, consideration may be given to performing "speech audiometry" testing. While this study allows a better assessment of the candidate's functional hearing, it generally requires the services of a qualified audiologist and is therefore not suitable as a screening tool.

A-5-3.2 Category B medical conditions:

- (a) Auditory canal - atresia, severe stenosis, or tumor.
[Inability to hear sounds of low intensity or to distinguish voice from background noise, leading to failure to respond to imminently hazardous situations.]
- (b) Severe external otitis (e.g., recurrent loss of hearing).
[Inability to hear sounds of low intensity or to distinguish voice from background noise, leading to failure to respond to imminently hazardous situations.]
- (c) Auricle, severe agenesia or traumatic deformity (e.g., interferes with ability to wear protective equipment or with hearing acuity). [Inability to properly wear protective equipment; inability to hear sounds of low intensity or to distinguish voice from background noise, leading to failure to respond to imminently hazardous situations.]
- (d) Mastoid, severe mastoiditis or surgical deformity. [Inability to properly wear protective equipment inability to hear sounds of low intensity or to distinguish voice from background noise, leading to failure to respond to imminently hazardous situations.]
- (e) Meniere's syndrome or labyrinthitis (e.g., severe). [Potential for sudden incapacitation; inability to perform job functions due to limitations of balance.]

- (f) Otitis media, (e.g., chronic). [Frequent episodes of pain or inability to perform work; inability to hear sounds of low intensity or to distinguish voice from background noise, leading to failure to respond to imminently hazardous situations.]
- (g) Any other ear condition that results in a person not being able to perform as a deputy sheriff.

A-5-4.2 Category B medical conditions:

- (a) Diseases of the jaws or associated tissues (e.g., incapacitating or preclude ability to use protective equipment). [Inability to properly wear protective equipment.]
- (b) Orthodontic appliances (e.g., precluding ability to use protective equipment). [Inability to properly wear protective equipment.]
- (c) Oral tissues, extensive loss (e.g., precludes satisfactory post-orthodontic replacement or ability to use protective equipment; inability to properly wear protective equipment). [Inability to communicate effectively due to oropharyngeal dysfunction.]
- (d) Relationship between the mandible and maxilla which precludes satisfactory post-orthodontic replacement or ability to use protective equipment. [Inability to properly wear protective equipment; inability to communicate effectively due to oropharyngeal dysfunction.]
- (e) Any other dental condition that results in a person not being able to perform as a deputy sheriff.

A-5-5.1 Category A medical conditions:

- (a) Tracheostomy. [Inability to properly wear protective equipment; inability to perform job functions due to limitations of endurance; inability to communicate effectively due to oropharyngeal dysfunction.]
- (b) Mutism, regardless of cause. [Inability to communicate effectively due to oropharyngeal dysfunction.]
- (c) Anosmia. [Inability to smell smoke or hazardous materials resulting in failure to respond to imminently hazardous situation.]

VI. FITNESS REQUIREMENTS

Physical fitness has a number of components, but for the purposes of this limited study we will divide them into four general areas:

- 1) aerobic, or cardiovascular fitness
- 2) muscular fitness
- 3) body composition
- 4) flexibility

The muscular dimension can be further divided into elements of strength, muscular endurance, and power.

6-1 Aerobic or cardiovascular fitness

6-1.1 A moderately high level of aerobic fitness is imperative. A discussion of the methodology and rationale for these tests can be found in Appendix A.

6-1.2 Aerobic capacity will be measured using a multi-lead exercise test.

6-1.3 A fitness level of 13 METS will meet job requirements and provide a margin of safety for the future. The minimum level should be 12 METS. This corresponds to completing 11 minutes of the Bruce protocol.

6-1.4 Aerobic capacity - 12 METS (or 42.0 ml/kg/min)
Work Tolerance Test - 11 minutes Bruce Protocol
(Symptom limited maximal test)

6-2 Musculoskeletal

6-2.1 Neuromuscular fitness will be assessed through factor analysis of various capacities and capabilities.

6-2.2 **Muscular strength** - is the ability to exert maximal force through the recruitment of muscle fibers. We can measure strength as a function of the force generated, such as the total mass lifted, or as the amount of force generated against a calibrated resistance. Strength can be "dynamic", where the mass or weight is moved, or "static" (isometric), where nothing moves and a gauge is used to determine force.

Static strength

a. **Hand grip** (Use high quality dynamometer such as that produced by Jamar/Asimow Engineering) Two trials each hand. Best value recorded in KG Force.

b. **Curl Test** (Use high quality digital force gauge such as that produced by American Therapeutics) Two Trials. Best value recorded in KG Force.

c. **Pull Down Test** - Two trials. Best value recorded in KG Force.

d. **Push with Legs** - Two trials. Best value recorded in KG Force.

Dynamic strength

a. **Bench Press**. Record maximum weight (resistance) candidate can lift into full arm extension for 5 repetitions (record in LBS).

6-2.3 Muscular endurance.

Push-ups (Maximum in 2 minutes)

Sit-ups (Maximum in 2 minutes)

Record average of push-ups and sit-ups as the Muscular Endurance Index.

6-2.4 Power Testing

Vertical jump. Measured from height at maximal standing reach to fingertips with maximal vertical jump. Two Trials. Best value recorded in inches to nearest 1/2".

6-3 Body Composition Assessment (% Body Fat) [See Section 12]

Males: less than or equal to 20%

Females: less than or equal to 25%

6-4 Flexibility Assessment:

Sit and Reach Test - Two trials. Best value without lunging or bouncing that is held for >1 second. Record in inches to the nearest 1/2".