

**WHAT WILL BE THE IMPACT OF LEGISLATION ON PHYSICAL
FITNESS PROGRAMS IN MID-SIZED LAW ENFORCEMENT
AGENCIES BY THE YEAR 2006?**

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This Command College Independent Study Project is a FUTURES study of a particular emerging issue in law enforcement. Its purpose is NOT to predict the future but rather to project a number of possible scenarios for strategic planning consideration.

Defining the future differs from analyzing the past because the future has not yet happened. In this project, useful alternatives have been formulated systematically so that the planner can respond to a range of possible future environments.

Managing the future means influencing the future--creating it, constraining it, adapting to it. A futures study points the way.

The views and conclusions expressed in the Command College project are those of the author and are not necessarily those of the Commission on Peace Officer Standards and Training (POST).

INTRODUCTION

The need for physically fit police officers is widely recognized by both the public and police agencies. Unfortunately, there are long standing jokes about officers' affinity for doughnuts that imply that the public sometimes perceives officers as being somewhat overweight and possibly unfit.¹ The author recalls a poster that was popular in the late 1970's that depicted a doughnut shop whose parking lot was completely filled with marked patrol units, further perpetuating the stereotype connecting police officers and unhealthy eating. The ultimate bosses, the taxpayers, believe that public safety officers should be in reasonably good shape to do their job.² There is a public expectation that police officers will possess a level of fitness sufficiently high enough to be able to handle, without impact weapons, the average adult male who is resisting arrest.³ The public also has more confidence in officers who appear to be fit.⁴

While the public holds these opinions, recent studies show an opposite view of officers' levels of fitness. A study conducted by the Cooper Institute found that the average officer is less fit than Americans of the same age and sex. Officers were found to have higher blood pressure and cholesterol as well as

more fat and less muscle mass than their age and sex peers.⁵

Researchers in the 1992 Pennsylvania State Aging Study found that officers are below average in aerobic fitness and body fat but somewhat above average in strength and lower back flexibility. The investigations found that officers over 35 years of age scored worse against their civilian peers than did younger officers.⁶ The life expectancy of a police officer is about 15 years less than that of the general public.⁷ Police officers have also been found to have higher rates of heart disease and some forms of cancer than do the general public.⁸

With all of the above information in mind, one would assume that police agencies are attempting to counteract the negative trend through the implementation of fitness programs for their officers. A recent POST survey determined that only 23.7% of California police agencies have some type of fitness program in place.⁹ Another study concluded that few agencies require officers to stay reasonably fit.¹⁰

What is blocking police agencies from requiring minimum fitness is a complex issue. Recent legislation, such as the Americans With Disabilities Act and The Civil Rights Act of 1991, have made agencies concerned about the legality of fitness testing. Also blocking required fitness standards are the police

officer associations. Once an officer is appointed to the force, union contracts and civil service rules often preclude police chiefs from insisting that sworn officers remain in shape.¹¹

This article was designed to examine the issue of incumbent officer fitness by reviewing the past, examining the present and anticipating the future. This examination of incumbent officer fitness will identify blocks to the implementation of fitness programs and offer potential solutions.

THE PAST

Historically, fitness standards have been viewed as entry requirements and as a part of academy training. A 1930's era San Francisco Police Department recruiting film shows police trainees involved in physical training developing "brass buttons over an iron physique".¹² While some attention was given to recruit training there was no indication of interest in incumbent fitness.

From the early 1900's up to the 1970's police candidates were screened to ensure they met height and weight standards. Many agencies believed that officers should be tall, brutish males able to handle all situations. A multitude of studies and court decisions affirmed these beliefs. In his 1951 study, Leonard found that the majority of police departments had height

requirements with a range from 5'5" to 6'6". Wilson, in 1963, advocated a police officer selection system using a sliding scale with height as a criterion. Tall applicants were to receive more points, shorter applicants fewer points, with the minimum recommended height set at 5'7 1/2".¹³

A 1972 survey by the International Association of Chiefs of Police determined that 54% of responding police departments used some form of physical agility test in selection of new officers. By 1990, that number was found to have grown to 80%. These agility tests for the most part replaced the height and weight standards, although some agencies used both the agility test and height and weight standards.¹⁴

During this period there was no standard agility test. Tests were generally either athletic examinations or performance-based ability screening. The athletic examinations consisted of events such as push-ups, sit-ups, balance tests and running. These tests did not sample job tasks but were used to infer that the applicant had the physical ability to perform the job.¹⁵

The performance-based ability screening consisted of events that simulated actual job events or activities. The events included simulated body drags (moving a dummy of a specified weight for an established distance), obstacle courses/wall

climbs, and stair climbs. These events were taken directly from the job of a police officer and were believed to be job valid.¹⁶

In the 1970's many of the agility tests were legally challenged on the basis of gender discrimination. Court decisions ruled that if a department's agility test discriminates against a protected class, the test must be validated or a business necessity must be established, and the department must show that no other acceptable test or procedure could accomplish the same purpose with lesser adverse impact.¹⁷

To avoid the specter of gender discrimination, some agencies moved to a health-based physical agility screening. Health-based screening is accomplished by comparing the candidates' results on selected tests against established industry norms for someone of their age and gender. Health-based screening virtually eliminated sex and age-based discrimination problems by incorporating gender and age-based norms. Health-based screening was upheld by the courts, which ruled that health-based norms sufficiently eliminated or reduced the gender-based biased nature of departments' physical agility testing.¹⁸

The health-based screenings were dealt crippling blows by the passage of two pieces of legislation, The Civil Rights Act of 1991 and the Americans With Disabilities Act (ADA). The Civil

Rights Act of 1991 specifically prohibited testing based on age or gender norming.

In the 1980's the California Commission on POST developed a model physical agility test. The tasks tested were all job-valid and unisex standards were selected. The tasks include a 550 yard run, a 99 yard obstacle course, climbing a six foot solid wall, climbing a six foot chain link fence and dragging a 165 pound dummy a specified distance (body drag). Since 1985, all basic academy trainees have been required to pass this test as a condition for graduation. The tests and the minimum passing score have been found to be job-related.¹⁹

In the early 1980's, police agencies began to examine the fitness levels of incumbent police officers. The then Lieutenant Robert Williams, who was in the California Commission on POST Command College Class 1, studied the issue of police officer fitness. Lieutenant Williams developed a voluntary health-based fitness program for his department based on the standards established at the Cooper Clinic in Dallas, Texas. It was Williams' belief that the future might require mandated fitness programs for all public safety personnel.²⁰ Williams' program became a model for many agencies throughout California. Steven Loyd, attending Command College Class 13, studied the

implementation of mandatory fitness programs for the retention of patrol officers. Loyd's work was completed at the time the Americans With Disabilities Act (ADA) was becoming law. He recommended that further study needed to be done based on the impact of the ADA and similar legislation on fitness programs.²¹

PRESENT

Before one can examine the present state of fitness programs in law enforcement, some parameters must be set. For this article, the present is not only defined as today, 1996, during the writing of this article, but will include the recent past, to encompass the passage of legislation that has had an impact on the issue.

In the early 1990's two pieces of legislation were passed that had direct impacts on fitness programs in law enforcement, the Americans with Disabilities Act (ADA) and The Civil Rights Act of 1991.

The ADA prohibits discrimination against qualified individuals with disabilities in all aspects of employment, including training, compensation, promotion and other benefits and privileges of employment. The Americans with Disabilities Act requires that employers identify essential functions that are intrinsic to the employment position that the individual holds or

desires. It is permissible to use physical agility tests to screen out disabled individuals if the employing agency can show that the tests are shown to be job-related for the position and are consistent with business necessity. Qualification standards, such as passing physical agility tests, may be used if there is a requirement that an individual must be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others.²²

The Civil Rights Act of 1991 makes it unlawful to discriminate on the basis of race, color, religion, sex, or national origin. This law makes it unlawful to use different sets of standards for different genders if the results will be used for employment decisions.²³

The result of these two pieces of legislation is that fitness programs that are health-based appear to fail to comply because those tests do not "look like the job". Proponents of these tests state that, while they do not resemble the job, the underlying abilities measured by the tests are significantly predictive of the necessary job performance abilities.²⁴ In light of these legislative acts, the physical ability testing, or task

simulation testing, appear to be the tests of choice due to their having the same appearance as the job to be performed.

As previously mentioned, less than 25% of California's police agencies currently have any type of fitness program. Of those agencies that do have a fitness program only 35% mandate their program.²⁵ This raises a large question. If agencies require applicants to pass a physical abilities test, purporting it to be job related, why are incumbent officers not held to the same standard?

Agencies that require applicants to pass a physical abilities test as a condition of employment, claiming that the test is job valid, but do not require officers to maintain the same standards, open themselves to legal challenges. If incumbent officers are not required to maintain a minimal physical standard, then unsuccessful applicants, whose failure is based on physical performance, have a legitimate grievance. The courts will not allow departments to establish criteria for applicants that cannot be met by all incumbents who receive adequate performance evaluations.²⁶

Failure to provide fitness training exposes agencies to additional civil liability. Physically fit officers tend to be more confident in their abilities to handle situations and are

less likely to resort to excessive force.²⁷ A survey conducted by the Sparks Police Department in Nevada revealed that 38% of respondents said that the police officer or their agency should be held liable if their use of excessive force resulted in critical injury because the officer was physically unfit.²⁸ Agencies have been found to have shown a pattern of deliberate indifference for failing to provide adequate physical training resulting in the use of deadly force. The officer's lack of physical condition was cited as part of the pattern of deliberate indifference on the part of the agency (Parker v. District of Columbia, 1988).²⁹ Another area of potential liability is having a legal action brought against the agency by the officer or their family for injuries received due to lack of fitness.

FUTURE

What the future holds concerning fitness programs in law enforcement is anyone's guess. The recent trends of legislation and court decisions only help to further cloud the issue. While laws, such as the Americans with Disabilities Act, seem to put limits on fitness programs, especially concerning what type of testing is allowed, liability caused by incumbent officers' lack of fitness seems to dictate the need for incumbent fitness programs.

To assist in forecasting a potential future, the author met with a panel of knowledgeable individuals. This panel brought together experts from the fields of law enforcement, labor, fitness, human resources and risk management. The panel helped the author not only identify the potential future, but also sought to identify potential problems and solutions. The panel consisted of:

Deputy Robert Alcaraz: Wellness coordinator for the Los Angeles County Sheriff's Department.

Dr. Lawrence Blum: Psychologist who specializes in the field of law enforcement.

Captain Arl Faris: Los Alamitos Police Department.

Lieutenant Mike Grossman: Head of the Los Angeles County Sheriff's Department Force Training Unit.

Mr. Martin Mayer: Attorney at Law. Represents police management throughout California.

Sergeant Jim Orr: Downey Police Department and member of the Downey Police Officers Association Board of Directors.

Mrs. Nancy Ralston: Personnel Analyst with the City of Downey.

Mr. Leo Tamisiea: Attorney at Law. Labor attorney.

Ms. Judi Ulrey: Fitness consultant.

Mr. Lowell Williams: Finance Director and Risk Manager for the City of Downey.

The panel felt the following is a likely future to occur within the next ten years:

There will be an increased demand for improvements in the fitness levels of incumbent police officers. Fitness will be minimally required to enable officers to participate in the use of force training. Agencies will find that their civil liability exposure will increase in those incidents in which officers resort to an escalation of force because they are not fit enough to handle situations. The officers and their families will also seek to hold the agency liable for injuries that can be related to their lack of fitness.

Regarding legislation, it was felt that there will be changes in both the federal and state laws. The Americans with Disabilities Act was viewed as having an increasing effect on both recruitment and incumbent fitness. The panel concluded that within the next ten years there will be a strong move to exempt public safety from the dictates of the Americans with Disabilities Act. On the state level there will be changes in Workers' Compensation laws especially as they relate to fitness and presumptive injuries.

A major change that the panel foresees is a mandating of minimal fitness standards for incumbent police officers. These

mandates will be developed by either the California Commission on Peace Officer Standards and Training (POST) or by legislation. Incumbent officers will be expected to maintain the levels that are minimally acceptable for graduation from a basic academy. Officers failing to meet standards will be subject to discipline up to and including termination from their position as a sworn police officer.

CONCLUSION

The issue of incumbent fitness, as is described in the present and future sections of this article, places agencies in a "Catch-22" type situation. If agencies desire to demand incumbent fitness they must ensure that their program is not only in compliance with current laws but does not violate existing Memoranda of Understanding (negotiated labor agreements). Should agencies choose not to be concerned with incumbent fitness, they run the risk of civil liability from a wide spectrum of foes, including unsuccessful applicants, the public, persons on whom unnecessary force has been used and injured officers and their families.

How can this issue be approached? It is the author's opinion that the issue of incumbent officer fitness is too important to be ignored. A two-pronged approach to the problem is recommended.

First, it is recommended that agencies take a proactive approach to incumbent fitness. The agency needs to work with the employee groups to develop a fitness program that will test incumbent officers and will bring them into compliance with established academy minimums. Second, law enforcement must work with other public safety entities (Fire departments, Fish and Game, and other like agencies) to lobby for changes in both federal and state laws that have an impact on an agencies' ability to require incumbent fitness.

Concerning the first approach, law enforcement must take a proactive approach to incumbent officer fitness. While nobody has a crystal ball and can say with any certainty that fitness will be mandated in the future, it is most certain that the issue will not go away. It is also certain that any program that makes fitness testing in an agency mandatory will be treated with suspicion, if not outright opposition, by the affected employee groups.

Should an incumbent fitness program be a part of the collective bargaining agreement between the agency and the concerned employee groups? Ayers and Cole maintain that a police administrator's primary obligation is to the protection of life and property. To meet this obligation, the administrator needs

certain management rights.³⁰ Some of the management rights that could be affected by including a fitness program in the collective bargaining agreement include:

1. Planning, directing and controlling department operations.
2. Disciplining and firing officers.
3. Determining performance standards.
4. Training and determining criteria.³¹

Managers who cannot discipline and even fire employees who refuse to conform to departmental directives cannot maintain the public's trust.³²

While the blessing of the police officers' association (POA) may not be required to institute a fitness program, it is the author's opinion that a plan that all parties agree upon is in the best interest of the agency. To that end the following steps are recommended:

1. Involve the POA in the development of the program. The POA must be convinced that this program is not meant to get rid of personnel, even though that may occur, but is meant to improve both the department's level of service and the officers' quality of life. Management must also "buy-in to" this plan. The inclusion of management will assure the POA that the need for

incumbent fitness is a department-wide value and is essential to quality service delivery.

2. Choose a test that has been validated as being job related. The POST agility test is an example of such a test. The standards that POST has established as the minimum requirement for graduation should be established as a minimal passing score.

3. For ease of test administration and practice, a local testing facility should be established. It is not feasible or practical to administer the test at a regional testing facility. The POST test requires minimal equipment and some open space. City park authorities or the local high school district could be approached regarding allowing the law enforcement agency to construct an agility course. Having the course local will provide officers with an opportunity to practice the events prior to the administration of the annual test.

4. Provide for on-duty workout time. By not allowing officers to workout on-duty but requiring them to maintain a level of fitness the agency may be required to compensate the officers for their time spent in off-duty workouts. In addition, by having them workout on-duty, the workouts may be supervised to ensure that the officers are working out in a safe and proper manner.

5. The program should be phased in. The author is recommending that each officer be required to pass the POST agility test yearly. The agency should do a pre-test medical assessment before beginning the program. Officers should be given a specific course of action to help them obtain the minimal level of fitness needed to successfully pass the test. There should be no sanctions attached for failing to pass the test for an agreed-upon period of time. Once that agreed-upon time has been reached, officers who cannot pass the test should be considered unfit for duty and given a time frame in which they must come into compliance or be disciplined up to and including termination.

Concerning law changes, it is essential that law enforcement work with other public safety entities, such as fire service, correctional officers and federal officers' to seek relief from laws that have an impact on their ability to require minimal fitness for those who are entrusted with protecting the public. Those laws that should be modified or provide exemptions include the Americans with Disabilities Act, the Civil Rights Act of 1991, and certain portions of the laws governing Workers' Compensation.

Agencies by themselves do not have much of a voice. By using the power of organizations such as the International Association

of Chiefs of Police, California Police Officers Association, California Chiefs of Police, California Sheriff's Association, California Correctional Officers Association and other associated organizations there is great power to effect change.

Law enforcement must be careful in this effort. Challenging the Americans with Disabilities Act may make it appear that law enforcement wants to discriminate against the disabled. It is the challenge of law enforcement to convince our disabled public that it is not law enforcement's goal to discriminate against the disabled, but rather to ensure that those working in public safety are fit enough to provide for the safety of the public.

The issue of incumbent fitness is one that must be addressed. To fail to do anything because of difficulties caused by existing laws is unacceptable. By not taking steps to ensure that officers are at least minimally fit according to the requirements to perform the job, exposes agencies to liability for deliberate indifference. Most of all, failing to be concerned with the physical well being of incumbent officers causes law enforcement to under-utilize its most important resource - its personnel.

END NOTES

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