

Code Blue:

Legal Implications of Police Psychological Fitness-for-Duty Examinations

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Police officers with known or suspected behavioral problems present challenging issues for administrators of municipal police departments and the elected officials who are ultimately accountable for the supervision of local law enforcement.

The subject requires a careful balancing of the municipality's obligation to protect the health, safety, and welfare of its employees and the public with the individual rights of the officer. A mishandling of these circumstances can have dire consequences that could destroy careers and relationships, and result in costly and disruptive litigation.

Municipal officials should be aware that the Americans with Disabilities Act (ADA) prohibits employers from requiring medical examinations or inquiring about medical conditions of an employee unless the inquiry or examination is shown to be job-related and consistent with business activity.ⁱ

The ADA's requirement that a medical examination be consistent with business necessity is an objective one.ⁱⁱ Even a "good faith" mandatory medical examination by an employer may still give rise to liability if a court determines the examination was unwarranted.ⁱⁱⁱ

In *Pennsylvania State Troopers Ass'n v. Miller*,^{iv} the court held that law enforcement agencies may require fitness-for-duty evaluations. The Court explained that "members of law enforcement agencies often face volatile circumstances that require sharp faculties and decisive resolve; thus, supervisors must verify that officers are physically, psychologically, and emotionally fit for these duties" upon return from an extended sick leave.^v

Agencies must make *narrowly tailored* inquiries to prevent unnecessary intrusion into an employee's medical information and to serve the asserted business necessity.^{vi}

According to Equal Employment Opportunity Commission policy guidance, the phrases "job-related" and "consistent with business necessity" mean that an employer "has a reasonable belief ... that an employee's ability to perform essential job functions will be impaired by a medical condition; or an employee will pose a direct threat due

to a medical condition."^{vii} There must be sufficient evidence to doubt whether an employee is capable of performing the job, and the examination must be limited to determining an employee's ability to perform essential job functions.^{viii}

The Law in Practice

The need to implement clearly defined protocols that deal with these issues cannot be overstated. Municipalities should be guided by the *Psychological Fitness for Duty Guidelines* (FFDE) issued by the International Association of Chiefs of Police (IACP).^{ix}

The IACP defines a FFDE as a "formal, specialized examination of an incumbent employee that results from objective evidence that the employee may be unable to safely or effectively perform a defined job and a reasonable basis for believing that the cause may be attributable to a psychological condition or impairment."

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When does a police officer's "bad attitude" or "insubordination" demonstrate a mental impairment?



The IACP guidelines say that "referring an employee for an FFDE is indicated whenever there is an objective and reasonable basis for believing that the employee may be unable to safely and/or effectively perform his or her duties due to a psychological condition or impairment. An objective basis is one that ... derives from direct observation, credible third-party report, or other reliable evidence.

"When deciding whether to conduct an FFDE, both the agency and examiner should consider its potential usefulness and appropriateness ... and the agency should consider whether other remedies (e.g., education, training, discipline, physical FFDE) might be more appropriate or useful instead of, or in addition to, a psychological FFDE."

The Pre-Referral Conference

Drawing distinctions between the need for discipline, training, and/or an FFDE can present dilemmas. For instance, when does a police officer's "bad attitude" or "insubordination" demonstrate a mental impairment?^x And, which municipal official should be authorized to order an FFDE? A failure to have an action plan that addresses these issues could trigger allegations of discriminatory treatment and violations of due process.

To avoid these pitfalls, the governing body should engage a qualified police psychologist to confer with the police chief on whether an FFDE is warranted.

The governing body and psychologist should have a written engagement letter that clearly defines the doctor's role and how he or she will communicate. A municipality's reliance on the psychologist's recommendations *before* an FFDE is ordered should alleviate concerns raised by the officer or union about the municipality's motives and should also bolster a defense against claims of discrimination or retaliation.

The municipality's protocol should also clearly provide that the governing body serves as the final decision maker on ordering the FFDE.

To ensure that the FFDE order is issued with informed judgment, elected officials should, in

private executive session, give strong consideration of the chief's views, coupled with the information provided by the police psychologist during the pre-referral conference.

Clear Communication

In the event an FFDE is deemed necessary, the officer should be issued a written directive by the chief – as authorized by the governing body – to attend the FFDE with sufficient information to ensure the officer's informed consent. The IACP guidelines recommend:

- A description of the nature and scope of the evaluation;

- The limits of confidentiality, including any information that may be disclosed to the employer without the examinee's authorization;
- The party or parties who will receive the FFDE report, and whether the examinee will receive a report or explanation of findings;
- Potential outcomes and probable uses of the examination, including treatment recommendations, if applicable; and
- Other provisions consistent with legal and ethical standards for mental health evaluation conducted at the request of third parties.

In the event involves an officer's

neglect of duty or unbecoming conduct, these issues should be addressed *separately* from the FFDE process.

Importantly, fair employment laws do not shield an officer from disciplinary action where the officer has a mental impairment. Accordingly, the disciplinary process should, in most cases, proceed concurrently with the FFDE process.

While these cases are highly fact-specific, it is generally not advisable to "wait and see" what happens with the examination before addressing the officer's neglect or unbecoming conduct. In fact, waiting to

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take disciplinary action could conceivably fuel a claim of retaliation in the event the officer is diagnosed with a disabling condition.

Action Upon Receipt of the FFDE Report


The findings and conclusions from the psychologist should be kept in strict confidence and shared only with the examinee, the governing body, and police chief. The following IACP Guidelines are of note.

“When an examinee is found unfit for unrestricted duty, it is advisable that the report contains, at a minimum, a description of the employee’s functional impairments or job relevant limitations

unless prohibited by law, agency policy, labor agreement, terms of the employee’s disclosure authorization, or other considerations. It is recognized that some examiners may be asked to provide opinions regarding necessary work restrictions, accommodations, interventions, or causation. Whether a recommended restriction or accommodation is reasonable for the specific case and agency is a determination to be made by the employer, not the examiner.”^{xi}

A copy of the written report should be provided to the examinee. The municipality’s report should be kept by the police chief in a secure confidential file for the duration of the officer’s employment and for at least two years after the officer’s separation date.

Since the foregoing issues could turn into a minefield of litigation, consultation with an experienced labor attorney is recommended.

About the Author: Christopher Gerber, Esq., is an attorney with Siana, Bellwoar & McAndrew, LLP. He concentrates his practice in labor and employment law, civil rights, and municipal law. You can reach him at cpgerber@sianalaw.com. This article may not be reproduced without the express written permission of Siana, Bellwoar & McAndrew, LLP. This article is designed to provide general information relating to the covered subject matter. None of the information is offered, nor should be construed, as legal advice. Although prepared by professionals, this publication should not be utilized as a substitute for professional services in specific situations. 

ⁱ 42 U.S.C.A. §12112(d)(4)(A).

ⁱⁱ *Tice v. Centre Area Trans. Authority*, 247 F.3d 506, (3d Cir. 2001).

ⁱⁱⁱ *Id.*; *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 193 (3d Cir. 1999).

^{iv} 621 F.Supp.2d 246, 256 (M.D. Pa. 2008).

^v *Id.* at 256-57 [citing *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007)].

^{vi} *Id.* at 259.

^{vii} EEOC Policy No. 915.002.

^{viii} *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 813 (6th Cir. 1999).

^{ix} The IACP Police Psychological Services Section developed these guidelines to educate and inform public safety agencies that request fitness-for-duty evaluations and the practice of examiners who perform them. *Psychological Fitness-for-Duty Evaluation Guidelines*, ratified by the IACP Police Psychological Services Section Philadelphia, Pennsylvania, 2013.

^x The Americans with Disability (ADA) rule defines “mental impairment” to include “[a]ny mental or psychological disorder, such as . . . emotional or mental illness.” Examples of “emotional or mental illness[es]” include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders.” EEOC Notice No. 915.002.

^{xi} This article does not address the implications of reasonable accommodations, which may be required by the ADA.