



THE ELEVEN LEGAL CONCERNS
YOU *MUST* BE AWARE OF WHEN CONSIDERING
PHYSICAL FITNESS STANDARDS & PROGRAMS

*“A physical fitness program with
standards is not only a good idea,
it is essential to achieve optimal
service to the public.”*

Why is this report on physical fitness standards and programs necessary?

At FitForce™, we have the experience of developing and installing physical fitness standards and programs for local, state, and federal law enforcement agencies. These agencies share a common mission: to protect citizens, property, and the laws they enforce. These agencies also share a set of common misunderstandings that can become impediments to the installation of programs and standards. As an information company, FitForce™ has undertaken a leadership role in keeping the community *we serve* well informed.

When considering standards and programs, ask the question “Why have them in the first place?” Unfortunately, the answer is often lost among the pantheon of concerns an administrator must address. The rationale for physical fitness standards and programs should be as central as the mission of the department itself. The rationale starts with the fact that

law enforcement officers are called upon to perform important, often critical, physical job functions.

This is inherent in the mission statement of any department, even those with priorities not clouded by a lot of contemporary culture and politicization. All too often however, this is the point where administrators and others get caught up in the politics of standards and act or don't act due to litigation or the fear of it. Furthermore,

the officers' physiological capabilities and readiness directly relate to their effectiveness, their safety, and the safety of co-workers and citizens.

This factor has a profound impact on the economics of a department: the cost of a failure to perform duties, as well as the direct cost of injury or loss of life – sworn or non-sworn.

It is absolutely essential for the administrator to understand that the 'Bottom line' is **the development and maintenance of a fit and capable work force**. Please note: *the key vehicle for accomplishing this objective is **the physical readiness program***. The implementation of job-related standards is but a part of the broader fitness promotion effort within the agency. There will also be associated health and longevity benefits, but the main objective is to have a reasonable assurance of safe, effective job performance.

At this point, the astute police administrators have to ask themselves "Am I currently doing everything I reasonably can to ensure my officers can do the job?" If the answer is "No.", then one should consider what a fitness program and standards can do for a department.

As noted, a component of the program is identification of **expected job performance requirements**. An agency may express those requirements as 'goals' in a voluntary program, or as 'standards', if compliance is mandatory. Regardless of approach, experience demonstrates that an agency must establish some **minimum fitness levels for recruits to ensure training capabilities and eventual job performance**. Those levels of fitness must be job-related to ensure defensibility if challenged.

The starting point then is to identify **fitness as a job-related factor** and to develop a battery of tests and standards that **predict the ability to perform essential officer functions** at a minimum level of safety and effectiveness.

The physical performance standards and testing battery can be viewed as a tool for assessing the ability of applicants and recruits to master job training and the

ability of incumbents to perform the essential, often critical, physical job tasks safely and effectively. The **standards evaluate an individual's fitness for training or the job**. A test battery and standards also provide the agency with a tool to evaluate the effectiveness of the agency's fitness program.

Succinctly, a fitness program and standards help to ensure that a recruit or incumbent has the physical capacity and fitness to:

1. **Learn and perform the essential physical job-tasks that are frequent**
2. **Learn and safely and effectively perform the essential physical job-tasks that are critical and may represent strenuous physical demand**
3. **Minimize known physical risks affecting job performance, injury, and disability**
4. **Minimize known health risks affecting absenteeism and disability.**

Given the purpose and function of programs and standards, one has to ask, "Why don't more agencies have them?" The reasons (or excuses) are myriad, some seemingly legitimate while others are more apparently unfounded.

1. "A validation study is too expensive."

While it is true the initial expense may be a hurdle, this outlay pales in comparison to the potential claims throughout the entire career of one individual. Consider:

- Civil rights or other violations for indefensible selection standards

- Failure to train or failure to protect (due to negligent hiring or deliberate indifference to standard operating procedures) throughout an officer's career
- Ever increasing health care premiums, which can further increase due to an absence of a program
- Worker's compensation rates which may rise in the absence of a program
- Disability claims which will rise in the presence of an unfit workforce and no intervention
- Premature death, often attributable to preventable causes such as health.

2. "There have been no clear court cases, I'll just sit tight until they happen or direct me."

See Item #1.

In addition, there is some direction from the courts including those decisions under Title VII of the Civil Rights Act of 1964, negligence in training (see *Parker v D.C.*) as well as poor hiring and retention practices (*O'Fallon*). All of which have resulted in expensive decisions.

3. "Our collective bargaining group/agreement will never allow it."

In some locales this may be the single greatest impediment to the development and implementation of standards. Consider however, the notion a public safety agency has a responsibility (not just a right) to respond to the nature of its mandate. The courts (see *SEPTA*) and arbitration bodies this author has appeared before have upheld public safety agencies' ability to modify employment requirements. Further, it is unlikely a judicial body is going to allow an agency's defense that it was forever held captive by a temporary (and negotiated) agreement.

4. “There are so many legal considerations; I’m just going to stick my head in the sand.”

In response to this ‘*management approach*’, we have identified the following concerns. In addition to the issues, we have crafted responses based on the best **legal**, **scientific**, and **practical** information and experience. These then are the

ELEVEN ISSUES YOU MUST CONSIDER WHEN DEVELOPING AND APPLYING PHYSICAL FITNESS STANDARDS.

Issue #1 : Accommodating people with disabilities.

There is an enormous amount of confusion and misinformation about the Americans with Disabilities Act (ADA).

What your agency should know:

The purpose of the ADA is to ensure people who can perform the essential functions of the job are not denied employment. Lack of fitness is not a qualifying disability.

FitForce Position:

Valid fitness standards can be upheld even if they discriminate. We believe a person who can’t meet the fitness standards would have a very difficult time proving they’re both disabled and able to perform all of the essential functions of the job.

Issue #2 : Adverse Impact.

If the passing rate of a protected class is less than 80% of the most successful group, the test demonstrates a *prima facie* case of adverse impact.

What your agency should know:

Valid absolute fitness standards may likely demonstrate adverse impact against females. Inability to meet fitness standards is a training issue, not a gender issue.

Our experience indicates however, this is more likely to occur when inadequate training and preparation has impacted on performance results.

FitForce Position:

Diversity in the workplace, reflected in hiring and retention, is an important and appropriate public policy concern. If the agency can show that this fitness standard is 'job related' and 'consistent with business necessity', it can be legally defended. In *Lanning, et al v SEPTA*, the fitness standard resulted in adverse impact. However, the court found for the defendant because the standard was 'shown to measure the minimum qualifications necessary for successful performance...'

FitForce can assist agencies to find solutions to these important concerns.

Issue #3 : Age Discrimination.

Mandatory retirement ages are routinely enforced by law enforcement agencies in the United States. Individuals who could perform the essential functions of the job are forced to retire due to chronological age.

What your agency should know:

The Age Discrimination in Employment Act (ADEA) prohibits such a requirement. The EEOC commissioned Penn State Study found: the inability to perform the essential functions of the job was a better predictor than age of when a person should be forced to retire.

Further, research has shown that fitness is a 20- year factor. That is a fit 60-year- old officer can perform at the same level as an unfit 40 -year -old officer.

FitForce Position:

While some confusion remains as to public safety's exempt status with regard to this law, agencies can enforce a validated fitness standard regardless of the officer's age.

Issue #4 : Agency Accountability.

Agencies have responsibilities to the public they serve as well as to their officers. Allowing unfit officers to serve meets neither of these responsibilities.

What your agency should know:

In *Parker v DC*, the Washington D.C. police department was found negligent for not having a fitness program. In *Parker*, the officer involved had had no physical training for four years prior to the incident.

FitForce Position:

Many agencies have chosen not to implement fitness standards due to concern with incumbent officers. We believe there is significant potential for litigation for NOT implementing standards and programming.

Issue #5 : Continuity of Standards.

There should be linkage between applicant, cadet, and incumbent standards.

What your agency should know:

Many agencies have fitness requirements for academy entrance and exit. In order to be defensible, a standard must be 'job-related' and 'consistent with business necessity'. Your agency will have a very difficult time defending an academy standard as job related if it is not required of the incumbents.

FitForce Position:

Although it may be unlikely your agency will be sued by an applicant, it is not out of the question. Therefore, applicant and academy standards should be linked to the incumbent standard. They can be lower, but not higher.

Issue #6 : Generalizability of Standards.

If an agency 'looks like' another agency that has validated fitness standards, it seems reasonable that the second agency can adopt those validated standards.

What your agency should know:

The most defensible standards are those that have been validated specifically for the agency.

FitForce Position:

Several options exist: a validation study, pooling of similar agencies for a validation study, or a transportability study.

Issue #7 : Negligence.

There are two main areas of concern with regard to negligence: organizational and individual.

What your agency should know:

As shown in *Parker*, an agency can be found for negligent training; it can also be found for negligent deployment or negligent retention. Maintaining an appropriate level of fitness is as much of an individual's responsibility as qualifying with a weapon, neat appearance, and coming to work well rested enough to perform.

FitForce Position:

Fitness programs give the agency and the individual officers reasonable assurance that they can perform the essential functions safely and effectively. This greatly enhances the agency's liability protection.

Issue #8 : Past Patterns and Practices.

If an agency policy or practice is challenged, the courts will consider how the agency traditionally dealt with the issue.

What your agency should know:

The Lanning case tells us that an agency doesn't have to live with no or low standards just because that's the way it has always been.

In *Lanning*, the judge said,

“This court will not accept the proposition that employers are restricted from raising standards and that they are bound in their hiring by the level of performance of it's incumbent work force.”

FitForce Position:

We recommend developing a fitness program following a logical progression to include at least a two -year phase- in period.

Issue #9 : Physical Fitness v. Job-task Simulation Testing.

In general, law enforcement agencies use either fitness – push-ups, sit-ups, running, or job-task simulation tests (JTST) – ‘obstacle course’ tests.

What your agency should know:

At first glance, JTST are easier to recognize as job-related, fitness testing is less intuitively related.

FitForce Position:

Both tests have advantages and disadvantages and both can be validated. We recommend an agency consider the pros and cons and make a decision based on its needs and resources.

Issue #10 : Relative v. Absolute Standards.

Relative standards are adjusted for age and or gender. Absolute standards are the same for everyone doing the same job.

What your agency should know:

This is another issue agencies struggle with, often due to the best of intentions. The logic is that diversity goals are better met with gender-adjusted standards. **The tool to meet this goal has historically been age- and gender-adjusted NORMS incorrectly used as standards.**

Section 106 of the Civil Rights Act of 1991 prohibits the use of gender to alter or adjust scores on employment related tests. It also prohibits the use of different cutoff scores on such tests.

In *O'Fallon*, the judge upheld the plaintiffs' contention that because their standard was higher than women's, they were being illegally discriminated against.

Further, the ADA defines a qualified individual with a disability as 'an individual...who, with or without reasonable accommodation, can perform the essential functions of the employment position that (he) desires at the minimum level of safety and effectiveness.

All of which implies one job – one standard, not 8 or 10 standards.

FitForce Position:

By the letter of the law (ADA and CRA '91) relative standards are illegal – not to mention illogical which is implied when different people performing the same job are held to different standards.

Issue #11 : Standards Compliance & Incentives or Sanctions.

Several implementation options exist including voluntary participation, mandatory participation, as well as voluntary and mandatory compliance, with and without sanctions or incentives.

What your agency should know:

Generally, the officers participating in a voluntary program are the fit officers. The rest will need support, education, and perhaps ultimately, standards.

FitForce Position:

The bottom line objective is to change behavior – the lifestyle behaviors of the officers to include diet, exercise, and smoking habits. A comprehensive program should be developed and implemented to achieve it.

Legal Concerns with Standards & Programs

- Accommodating People with Disabilities
- Adverse Impact
- Age Discrimination
- Agency Accountability
- Continuity of Standards
- Generalizability of Standards
- Negligence
- Past Patterns & Practices
- Physical Fitness v. Job-Task Simulation Testing
- Relative v. Absolute Standards
- Standards Compliance & Incentives/ Sanctions

Final thoughts on our report

Public safety administrators and leaders face many difficult challenges, particularly as they relate to personnel issues. Statutory and other anti-discrimination mandates, demands for diversity in hiring and retention, and in some instances a diminishing applicant pool represent some of these issues. At the same time collective bargaining units and agreements, inter- and intra-agency political concerns, and government influences all struggle to assert precedence. Leadership must fulfill its mandate, very often with limited personnel and financial resources. This process must begin with a legitimate, well-informed, and dispassionate analysis of the real issues – not the resultant, apparent or contrived ones. The *visionary administrator* then crafts,

commits to and executes the response that will help them fulfill their agency's mandate. Valid fitness standards (and programs) represent a critical part of that response while providing the agency with assurance of a capable workforce prepared to safely and effectively perform its duties.

About FitForce

FitForce™ is committed to finding Physical Readiness Solutions for the public safety community we serve. Our pledge is to provide our clients with the very best scientific, legal and practical training and education, validation of selection and retention standards, policy and procedure analysis and development, as well as ongoing administration, arbitration and litigation support.

FitForce™ and its consultant team together have 70 years of public safety physical fitness experience. This includes: over 100 articles, columns, chapters, books and technical reports, experience with nearly 300 agencies and their representatives, over 215 validation studies and a database of over 4000 randomly selected law enforcement officers at agencies for whom we've developed standards. *If you would like to discuss how we can be of assistance to your agency, please call us at 978.745.3629.*