MEMORANDUM OF LAW

DATE: March 7, 1996

TO: Jerry Sanders, Chief of Police, San Diego Police Department

FROM: City Attorney

SUBJECT: Americans with Disabilities Act and Police Selective Placement Program

QUESTION PRESENTED

Does the Police Department's proposed plan to end the Selective Placement Program and replace it with an aggressive rehabilitation alternative comply with the Americans with Disabilities Act ("ADA")?

SHORT ANSWER

Yes. So long as the plan is properly applied on a case-by-case basis, a plan of aggressive rehabilitation of disabled employees complies with the ADA.

BACKGROUND

Since 1981, the San Diego Police Department ("SDPD") has had in place the Selective Placement Program. Under this program, permanent light-duty positions within the department are identified and studied by the Personnel Department ("Personnel"). Positions are then designated by Personnel as positions specifically adaptable for sworn personnel who for medical reasons cannot perform the full duties of Police Officer I, Police Officer II, Police Officer II/Detective, or Police Agent. This program has been selectively administered, with some officers being offered accommodation, while others were not. Currently, there are twelve officers in the program, but only three are in budgeted positions.

The SDPD is concerned that this program may lead to a large number of officers unable to fulfill the full range of duties required of the class of officers. This potentially could have an adverse affect on public safety, particularly during times of heightened alert.

The SDPD intends to modify its Selective Placement Program, offering Industrial Disability retirements to affected officers currently holding light duty positions. In the future, the SDPD would like to replace the Program with an aggressive rehabilitation program, encouraging officers who would have qualified for the old program to rehabilitate into other positions in the City, even if those positions are outside law enforcement.

You have asked me to research the effect of the Americans with Disabilities Act, 42 U.S.C. Sections 12101 through 12213, on the SDPD's plan to replace the Selective Placement Program.

DISCUSSION

Any Plan Must Be Applied Individually.

Before proceeding with an analysis of the provisions of the ADA and how they may affect the SDPD's plans, it is important to point out that the ADA is designed to be applied to individuals on a case-by-case basis. Any attempt to devise a policy which will comport with the law in all circumstances is doomed to failure. The effect of the law may vary considerably depending on the facts of each separate case.F

This memorandum reasserts an analysis previously conducted by the City Attorney in a Memorandum of Law ("MOL") issued August 18, 1993. That MOL analyzed the definitions of "qualified individual with a disability" and "essential functions" with particular attention to whether those definitions could be applied class-wide or on a case by case basis. A copy of the MOL is attached for reference.

An Overview of the ADA.

The ADA was adopted and signed into law on July 26, 1990. It has five titles dealing with all aspects of program and place accessibility for persons with disabilities. Title I deals exclusively with employment and is, therefore, the only title relevant to this analysis.

Title I of the ADA mandates that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. Section 12112(a). To analyze whether the proposed changes will comport with the law, this memorandum will dissect the provisions of Title I of the ADA, and identify areas where the current system and the proposed new system may conflict with it.

A. Is there a "Disability?"

The first issue is whether the individual involved has a disability as that term is defined by the ADA and the administrative regulations and case law interpreting it. If the person is not "disabled" as that term is used in the ADA, the ADA's protections do not apply.

To be disabled, a person must be "substantially limited" in performing a "major life activity" such as walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, or working.F

In addition to actually having a disability, a person is also protected by the Act if he or she has a record of impairment or is regarded by the employer as having an impairment. 29 C.F.R. ' 1630.2(g).

These activities are not related to the particular job the person holds or wishes to hold. Instead, major life activities are those activities which the average person in the general population can perform. 29 C.F.R. 1630.2(j)(1)(i).

If the person is claiming a disability due to being substantially limited in the ability to work, he or she must be

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. Section 1630.2(j)(3)(i) (emphasis added).

Case law provides some additional guidance. For example, in Tudyman v. United Airlines, 608 F.Supp. 739 (D.C. Cal. 1984),F

Tudyman was decided on the basis of the Rehabilitation Act of 1973, 29 U.S.C. ' 701-796. The definition of disability in the Rehabilitation Act and the ADA are the same, and courts have applied the definition as interpreted under the earlier Act in interpreting the ADA. See, e.g., United States Equal Employment Opportunity Commission v. AIC Security Investigation, Ltd., 820 F. Supp. 1060, 1064 (N.D.Ill. 1993).

the court held that a bodybuilder, who was outside the weight guidelines for an

airline flight attendant, was not disabled within the definition. He was not limited in a major life activity, only from having a particular job.

A case with facts closer to the Department's concerns is Smaw v. Commonwealth of Va. Dept. of State Police, 862 F.Supp 1469 (E.D. Va. 1994). In Smaw, a state trooper was fired because she repeatedly failed to bring her weight inside the department's guidelines. She was allowed to stay on with the state as a dispatcher. Id. at 1471. She filed suit under the ADA, but the court held she was not disabled. "'An impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not substantially limiting within the meaning of the statute.'" Id. at 1473 (quoting Jasany v. United States Postal Service, 755 F.2d 1244, 1248 (6th Cir. 1985)(emphasis in original). In Cook v. Rhode Island Dept. of Mental Health, Retardation, and Hospitals, 10 F.3d 17 (1st Cir. 1993), the court held that:

> there is a significant legal distinction between rejection based on a job-specific perception that the applicant is unable to excel at a narrow trade and a rejection based on a more generalized perception that the applicant is impaired in such a way as would bar her from a large class of jobs. Id. at 26.
>
> In the former type of case, courts have uniformly held that the employer's actions did not violate the law.

Id. at 26.

Officers currently eligible for the Selective Placement Program may be, but are not necessarily, disabled as defined in the ADA if their disability precludes them from the broad class of police officer. If they are unable to do only certain police jobs, eligibility is reduced significantly. An argument can be made that police work may be a broad enough category of work to qualify under the definition, where it is the only type of work an individual has been educated for and trained to do. There is, however, no guarantee such an argument would be successful, because the individual may still be employable in a number of other jobs. Offering them additional training may be a "reasonable accommodation" (discussed below), but this is not relevant to the threshold issue of whether an individual is disabled. This would come

into play only if it is determined that the person is both disabled and "qualified."

B. Is the disabled person "Qualified."

In addition to being disabled, the person must be "a qualified individual with a disability" as defined under the ADA. The term "means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. Section 1211(8). Making this determination is a two step process.

> First, we must determine whether the individual could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue. Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions.

Chandler v. City of Dallas, 2 F.3d 1395, 1393-94 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994).

1. Ability to perform "Essential Functions."

The essential functions of a job are determined on a case-by-case basis.F

For a full discussion of this point, see attached MOL 93-76.

> For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. Section 1211(8).

Additional factors may include: the amount of time spent actually performing that function; the consequences of not requiring the person

to perform the function; the terms of a collective bargaining agreement; and, what past or present holders of the job have been required to do. 29 C.F.R. Section 1630.2(n)(3).

There is some case law which supports a broad definition of the essential functions of a police officer. In Ethridge v. Alabama, 860 F.Supp. 808 (M.D. Ala. 1994), the court found that an officer applicant who was unable to shoot in a "Weaver stance" was not a "qualified individual" because this ability was essential to his being a police officer. Id. at 816.

In Champ v. Baltimore County, 884 F.Supp 991, (D.Md. 1995), the Baltimore County Police Department argued that the ability to make a forcible arrest, drive a vehicle under emergency circumstances, and qualify with a weapon were all essential functions of every sworn officer regardless of rank. Champ, 884 F.Supp. at 997. Champ argued that several positions existed where there was no expectation that the officer would be called on to do these things. The department argued that, even though such positions did exist, those performing the jobs were still expected to be able to perform those essential functions. Officers were often pulled from such duty in emergencies. Id.

> Colonel Blevins testified that although the ability to make a forcible arrest does not fall within the normal course of an officer's duties while assigned to research, "if you're out on lunch break or you're out of the building or transferring between one building to another, you're out doing a research project and a crime is committed in your presence, you're required to take action . . . the agency's position is that a police officer is a police officer, trained and capable of responding 24 hours a day to any demand where their services are required."

Id. at 999 (citation omitted).

The court granted the County's motion for summary judgment. In doing so, the court agreed with the department's contention that all officers must be able to perform the full range of duties.

However, it is not clear by any means that all courts would agree. District court cases outside our circuit are not binding on local courts. Even the Champ court provides some room for doubt:

> A blanket exclusion of all disabled police officers clearly constitutes unlawful discrimination on the basis of a disability because it is based on generalizations or stereotypes about the effects of a particular disability on an individual. . . . To combat such behavior, the ADA requires that the determination of whether an individual is otherwise qualified for a position rests on a case-by-case basis.

Id. at 996 (citation omitted).

Additionally, the past practices of SDPD and the size of the police force may be used to show that the Department does not believe that all sworn officers must be able to perform functions like those in Champ.

> Champ's case thus differs from the situation in Valdez v. Albuquerque Public Schools, 875 F.Supp. 740 (D.N.M. 1994) and Taylor v. Garrett, 820 F.Supp. 933 (E.D. Pa. 1993). In both cases, the employer had reassigned its employee to light-duty following the employee's disabling injury. After the employer terminated the employee, the latter filed suit. The district court in each case framed the question of the employee's qualifications as "whether a plaintiff asserting a claim of discrimination on the basis of disability under the ADA must be qualified to perform the position for which he was originally hired, or whether he need only be qualified for the light-duty position to which he was reassigned after becoming disabled." Valdez, 875 F.Supp. at 744; see also Taylor, 820 F.Supp. at 937-38. Finding that the essential functions of the light-duty job differed from those of the position for which each employee has been hired, the court in each case decided that it need only look at the essential functions of the light-duty position to which the employee had been reassigned when determining whether the employee was a qualified individual with a disability. In contrast, the defendants have maintained throughout this case that the

> essential functions of a police officer apply with equal force to all positions held by a police officer in the police department.

Champ, 884 F.Supp. at 998 n.3.

If an officer is reassigned to light duty, their qualification for the job may be determined by the requirements of the light duty position. This is less likely if light duty positions are clearly designated as temporary positions to accommodate a temporary disability. That the prior practice of the SDPD was to reassign at least some injured employees to light duty positions that are essentially permanent will make it harder to argue that the essential functions of an officer are the same across all sworn positions.

Additionally, while the Class Specifications for Police Recruit, Police Officer I, Police Officer II, and Police Agent appear to require a great deal of physical skill, the higher level specifications, those for Police Sergeant, Police Lieutenant, and Police Captain, do not stress such skills. Those positions appear to stress training and management skills which require a lower level of physical readiness. A court would examine each individual job depending on the position of the disabled individual. The individual job is likely to be given greater weight than broad job classifications. Thus, while a Police Officer I may be forced to retire because he or she has disabilities that limit his or her ability to perform some aspect of the job, the same disability might not be determined to prohibit a sergeant or lieutenant from performing the full range of duties of a sergeant or lieutenant position.

2. Duty to provide "Reasonable Accommodations."

Even if an individual cannot perform the essential functions of the job, there remains the question of whether he or she would be able to perform the essential functions if the employer made "reasonable accommodations." Under the statute, reasonable accommodations may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. Section 12111(9)(B).

The burden is on the disabled employee to show that with reasonable accommodations he or she could perform the essential functions of the job. "Once the plaintiff produces evidence sufficient to make a facial

showing that accommodation is possible, the burden shifts to the employer to present evidence of its inability to accommodate." White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995).

What is reasonable is again a question of individual cases. "The employer is not required to make an accommodation that changes the nature of the job or is excessively costly. The employer is also not obligated to find or create a new position if, after accommodation, the plaintiff cannot perform the essential functions of the position." Bombrys v. City of Toledo, 849 F.Supp. 1210, 1217 (N.D. Ohio 1993) (citing School Board of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987)).

The employer is not required to reallocate essential functions. Reassignment to a vacant position, however, is a reasonable accommodation. The regulations provide some guidance:

> In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. . . .
>
> . . . Employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. . . .
>
> An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. An employer, however, is not required to maintain the reassigned individual with a disability at the salary of the higher graded position if it does not so maintain reassigned employees who are not disabled. It should also be noted that an employer is not required to promote an individual with a disability as an accommodation . . . .

29 C.F.R. Section 1630.2(o).

Assuming that the individual is disabled (as defined) and is otherwise qualified for the essential functions of the job, if a reassignment into a vacant equivalent position is possible, that is a reasonable accommodation. Not moving the disabled person into that position may be a violation of the Act. An aggressive rehabilitation program designed to move such a person into another position outside police work may also violate the Act, unless there are no suitable alternatives. It is also possible that even if the pay were the same in both positions, the difference in benefits between safety and general employees may make that alternative not a reasonable accommodation.

II. Possible Defenses

A. "Undue Hardship."

The employer is not required to take steps to accommodate a disabled employee if such steps would cause undue hardship to the employer. This is defined by the statute as steps "requiring significant difficulty or expense." 42 U.S.C. Section 12111(10)(A). Factors include: (i) the nature and cost of the accommodation; (ii) the financial resources, size, and impact on the operations of the employer; and (iii) the type of business the employer is in. 42 U.S.C. Section 12111(10)(B). In the case of SDPD, the size of the force, and the differentiation of its tasks, would tend to show that reassignment in an individual case is not an undue hardship.

Additionally, the current practice of accommodating some disabled officers in permanent light duty positions would make it very difficult for the SDPD to successfully argue that reassignment, if an available option, would present an undue hardship. In Howell v. Michelin Tire Corp, 860 F.Supp. 1488 (M.D. Ala. 1994), the court found a genuine dispute existed, sufficient to preclude summary judgment, whether to accommodate the plaintiff would have been an undue hardship, where the employer had accommodated at least two other employees with light-duty. Id. at 1492-93. Even if the current light-duty positions are phased out through attrition, the SDPD may still be required to explain why the positions now require abilities which were not previously considered essential.

In Taylor v. Secretary of the Navy, 852 F.Supp. 343 (E.D. Pa. 1994), the court found the Navy's prior policies made it difficult to argue undue hardship. "The fact that, from 1977 until at least 1985, PNSY the Navy had a policy of reassigning workers with permanent or indefinite medical restrictions to appropriate permanent jobs is substantial evidence that such a policy is a reasonable accommodation and does not create an undue hardship." Id. at 353. Much the same

could be said of the Department's Selective Placement Program.

The plaintiff in Champ made a similar argument unsuccessfully. Champ, 884 F.Supp. at 999-1000. However, in that case, "the Police Department maintained that it does not in fact have any permanent light-duty positions, let alone a vacant one into which defendants could transfer Champ . . . ." Id. at 1000. The court reiterated that it was essentially a moot point anyway since, as Champ was unable to perform the essential duties of a police officer as it defined them, he was not a "qualified individual with a disability," and the A.D.A. did not apply. Id. Since the SDPD has had a program in which it has successfully placed disabled officers, it would be difficult to argue either that officers in the Selective Placement Program were unable to perform the essential duties of an officer or that to reassign an officer into a vacant like position would be an undue hardship.

B. "Direct Threat."

Another defense to the reasonable accommodation requirement is that if the individual, with or without the reasonable accommodation, would "pose a direct threat to the health or safety of other individuals in the workplace" (42 U.S.C. Section 12113(b)) ADA protection does not apply. The SDPD believes that an increased number of sworn personnel who cannot fully perform all the functions of an officer would pose a "direct threat" to public safety, particularly in emergency situations.

This is a legitimate concern, but misinterprets SDPD's responsibilities under the Act.

First, the direct threat defense applies on an individual basis. The issue is whether that particular person, qualifying in all other respects under the Act, poses a danger to his or her coworkers. For example, in Lassiter v. Reno, 885 F.Supp. 869 (E.D. Va. 1995), a U.S. Marshal, diagnosed as having a paranoid personality disorder, sued under the Rehabilitation Act. Since the court found he could not safely be allowed to carry a gun, and that carrying a gun was an essential function of being a marshal, it held he was not "otherwise qualified." Id. at 874. The court found that "plaintiff's medical history establishes that permitting plaintiff to carry a firearm would pose a 'reasonable probability of substantial harm' to plaintiff and to others." Id. He personally posed a "direct threat."

Second, there is no provision in the Act which would require the SDPD to diminish public safety to accommodate disabled employees. Each individual case is to be viewed alone. If no current positions are available for that individual, which they are otherwise qualified to

hold, the SDPD is not required to create such a position. For example, if a street officer becomes disabled, the SDPD is not required to bump nondisabled officers from nonstreet jobs into street assignments. Neither is the SDPD required to promote a lower level officer to a higher level because those jobs might be physically less demanding. The SDPD may be required to offer existing light-duty assignments within that officer's level to the disabled officer if they are available within a reasonable period of time.

Finally, while it would not be prudent to rely too heavily on the Champ case, the case is significant because it points out some of the unique physical qualities required of police officers. There are valid public safety reasons for these requirements. Courts are more likely to take these concerns into consideration, rather than those of other organizations not charged with public safety. However, this analysis is more appropriately couched in terms of the "essential functions" of the job rather than the "direct threat" defense.

CONCLUSION

The SDPD may implement its proposed new program for injured officers. However, certain essential provisions of the ADA must be adhered to for purposes of compliance. The most important aspect of the ADA as it applies to the SDPD's plan is that each case be handled on its individual merits. If an employee has an injury, he or she may be disabled. A person is only disabled if they are substantially limited in a major life activity. If not, the ADA does not apply.

If the person is disabled, he or she must still be able to perform the essential functions of the job. Those essential functions must also be judged on a case-by-case basis. If he or she cannot perform the essential functions, he or she may request that the employer make reasonable accommodations so that he or she may be able to perform the essential functions of the job. This may include job restructuring or reassignment if another job is available. If the person cannot perform the essential functions of the job, either with or without reasonable accommodations, he or she is not a "qualified individual with a disability," and the ADA does not apply.

When it comes to making reasonable accommodations, because of past or current practices, it may be difficult for the SDPD to argue it is an undue hardship to reassign a disabled employee if a selective placement position is available. It will also be difficult to argue that all officers are required to have a similar level of physical ability.

Nevertheless, if the new program is administered on a case-by-case

basis, mindful of the provisions of the ADA, there is no legal reason why the SDPD will be unable to replace the current system.

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By
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Attachment
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