



FBI Law Enforcement

B ♦ U ♦ L ♦ L ♦ E ♦ T ♦ I ♦ N

January 2001
Volume 70
Number 1

United States
Department of Justice
Federal Bureau of Investigation
Washington, DC 20535-0001

Louis J. Freeh
Director

Contributors' opinions and statements should not be considered an endorsement by the FBI for any policy, program, or service.

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget.

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, D.C. 20535-0001. Periodicals postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 209, Quantico, VA 22135.

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Cover Photo

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Implementing an Asset Forfeiture Program

By VICTOR E. HARTMAN, J.D., C.P.A.



A jail sentence often represents an inadequate remedy for a subject convicted of a crime motivated by financial gain. Incarceration does not address the unjust wealth transfer to the subject, nor the expense of a victim, in the case of property crimes. The criminal views the prospect of a jail sentence as a calculated cost of generating revenue. The financial devastation of a victim can cause emotional scars, delay retirement, alter a child's education, or otherwise change a lifestyle. This victimization continues when the subject hires an attorney with the ill-gotten

gains. Recidivism is encouraged because the subject has learned that crime does pay.

Law enforcement agencies that make effective use of asset forfeiture serve their communities by punishing the subject, compensating the victim, and minimizing societal costs. Whether departments create a new asset forfeiture program or reinvigorate an existing one, administrators can take certain steps to enhance this process to include developing a mission statement, implementing forfeiture policies, and initiating asset forfeiture investigations.

DEVELOPING AND IMPLEMENTING AN ASSET FORFEITURE PROGRAM

Administrators can begin by creating a mission statement that shows how an asset forfeiture program will deter crimes, compensate victims, serve the community, and remain within legal boundaries. Within this statement, administrators should include goals that ensure quality asset forfeiture training and specific objectives (e.g., distribute policy to officers detailing the department's asset forfeiture program) that help establish procedures to determine those cases with



Special Agent Hartman serves in the FBI's Houston, Texas, field office where he served as the Forfeiture Coordinator for several years.

“ Asset forfeiture laws...allow law enforcement to use proceeds of certain seizures for equipment and other needs.... ”

asset forfeiture potential. Also, the mission statement should include methods to provide positive feedback to those officers who effectively deploy asset forfeiture and reinforce the effectiveness of this law enforcement tool.

A department must remain attentive of the resources required to operate a forfeiture program. To some extent, managers may need to adjust investigators' caseloads to compensate for the additional tasks associated with asset forfeiture. Further, administrators should create or expand analytical positions to assist with the investigation, seizure, storage, and disposition of assets. In addition, training and administrative costs also will consume resources. A department must remain prepared to demonstrate its commitment to asset forfeiture by devoting resources to the program.

Once a department has established the mission of the forfeiture program and has outlined its benefits, administrators should present

the program to investigators in a manner that encourages them to use it in their investigations. To this end, several ways exist to advance the use of asset forfeiture within a department. First, chief executives should involve all relevant individuals in the drafting of the forfeiture mission statement, goals, and objectives. Further, administrators should establish policy to review every case under investigation for asset forfeiture potential, and to acknowledge investigators, a department could publish a newsletter about successful seizures and other asset forfeiture matters. Once motivated, investigators will seek training and liaison with other agencies in an effort to help accomplish this mission.

MANAGING AN ASSET FORFEITURE PROGRAM

Although it might not constitute the most rewarding aspect of asset forfeiture, indispensable legal and procedural requirements exist that departments must meet. Because

forfeiture laws vary between jurisdictions and case law changes frequently, departments must have a knowledge of the legal requirements and a mechanism for ensuring their compliance. For example, officers should realize the need for a seizure warrant early in the investigation not only to avoid serious liability issues, but to structure the investigation in a way that will gather the necessary facts to meet the elements of the warrant. After a seizure, investigators must provide timely legal notice to subjects and interested third parties. If a subject contests a forfeiture, the investigator must work with the prosecutor to ensure that legal discovery issues do not compromise an investigation.

Once a department seizes assets, they must safeguard the property until they resolve all legal issues. This process may begin with the removal of the property from the subject's custody and usually ends with the return of the property to a victim or an innocent owner or its sale at an auction. Some of the administrative tasks may include the towing of automobiles for safekeeping and appraising, storing jewelry, counting and depositing cash into a bank account, and maintaining real estate. Prior to seizing animals, departments must remember that the maintenance of livestock, race horses, and other animals during litigation can prove problematic.

The only effective way to ensure that the department remains in compliance with the law, and its internal policies, is to develop and maintain a procedures manual. A department can benefit greatly by

reviewing the policy manual of an agency with a successful forfeiture program before developing or updating its own procedures manual.

INITIATING AN ASSET FORFEITURE INVESTIGATION

Once a department has developed a mission statement and implemented forfeiture policy, investigators can initiate forfeiture investigations. Although forfeiture laws vary, two legal theories have evolved. One, commonly known as the facilitation theory, involves a subject's use of property to facilitate a criminal act, and the other involves the proceeds of a criminal offense—commonly known as the proceeds theory.

Common investigative techniques and legal issues involve both theories. First, asset forfeiture should remain one of the investigative priorities of the case. Once officers develop an investigative strategy, the search for assets can begin. This process includes surveilling subjects, debriefing sources, issuing subpoenas, and searching public records.

At some point in the case, the investigator should brief the forfeiture attorney on the status of the case. Depending on the jurisdiction and the facts involved, the forfeiture attorney may have the option of bringing a criminal or civil forfeiture action against the property. Pros and cons exist when using either of these methods of forfeiture. A civil action generally allows for earlier seizure of assets, but risks flight by the subject. A criminal forfeiture action allows for both the seizure of assets and the arrest of

the subject, but risks dissipation of assets because this action generally occurs at the conclusion of an investigation. Although the incarceration of the wrongdoer should remain the highest priority of the investigation, officers must give careful consideration to asset seizure early in the investigation to ensure a successful outcome.

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Defense attorneys commonly use the approach that the property belongs to an innocent owner—usually a spouse. In some cases, investigators can defeat this defense by obtaining evidence that the alleged “innocent owner” had knowledge that the property was involved in the criminal conduct. Additionally, the U.S. Supreme Court has found that the prosecution of the defendant and the forfeiture of property does not constitute double jeopardy.¹

Facilitation Theory

The facilitation theory allows the government to seize property when it facilitates certain criminal conduct.² This theory proves most applicable in drug investigations and allows for the forfeiture of property involved in the

manufacture, delivery, and sale of controlled substances. In practical terms, this can include real estate used to store drugs, automobiles and boats used to transport drugs, and other facilitating property, such as cash and firearms.

Investigations involving facilitating property differ in at least two ways. First, the legal threshold to seize facilitating property usually is easier to obtain. The law requires that probable cause exists to show that the property to be seized facilitated an illegal act. Investigators can take a few additional steps to help develop adequate probable cause. For example, during surveillances, investigators should note and fully describe all facilitating property and debrief sources about the subject's use of the property. This can range from something as elementary as observing a subject drive a car to a drug transaction to having a reliable source witness drugs stored in a house.

The timing of seizures during an investigation also remains crucial. Because drug subjects often present a flight risk, investigators should consider seizing property at the time of arrest or during the execution of search warrants. If investigators structure a scenario properly, they can draw subjects and their property (e.g., their vehicle) to a common location. This enables the investigator to accomplish all of the goals in the investigation without risk of flight of the subject or dissipation of assets.

Proceeds Theory

The proceeds theory allows the government to seize property that represents the proceeds of certain

specified unlawful activities.³ This theory proves most applicable in white collar investigations and allows for the forfeiture of property representing the proceeds of various economic crimes, investments scams, and property offenses. The property subject to forfeiture often includes bank accounts, real estate, and automobiles.

Investigators must take certain steps, which often prove complex, to seize property based on the proceeds theory. Similar to the facilitation theory, investigators must identify property and prove ownership before seizure can occur. However, the government also must trace the asset to the crime itself. The investigation becomes more complicated each time the subject converts the proceeds from one form to another.

For officers to establish that an asset represents the proceeds of a criminal offense, they should initiate two investigative steps simultaneously. First, investigators should identify the assets that initiated the criminal offense and trace the proceeds forward. Second, they should identify all known assets controlled by the subject and trace the purchase money backwards. For example, in a typical investment scam the subject will deposit the victim's money into a bank account. Then, the subject usually spends the newly acquired wealth on high-dollar assets. To further complicate issues, the subject may conduct several financial transactions with the funds. By tracing the victim's proceeds forward and the subject's known assets backwards, the investigator eventually will establish that the subject's assets are proceeds of the crime.

In white collar investigations, subjects usually learn of law enforcement's involvement before the agency files criminal charges. This occurs because the investigation may become lengthy and require interviews of many parties. White-collar subjects, as a general

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...law enforcement agencies must ensure that they use asset forfeiture only when they can demonstrate the benefits to the community.
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rule, remain less likely to flee the jurisdiction. However, as the investigation continues, the potential for asset seizures greatly decreases as the subject spends the proceeds, launders the money, and hires attorneys to defend civil and criminal lawsuits. Accordingly, in white collar investigations, the seizure of assets early in an investigation remains the single greatest factor to a successful outcome.

USING ASSET FORFEITURE LAWS APPROPRIATELY

Asset forfeiture laws at the federal level, and in most states, allow law enforcement to use proceeds of certain seizures for equipment and other needs, especially when the seized property is drug related and there are no victims to compensate. Since the inception of the U.S.

Department of Justice's (DOJ) asset forfeiture fund in the mid-1980s, almost \$2.5 billion have been shared with state and local agencies.⁴ Further, asset forfeiture fosters cooperation among federal, state, and local law enforcement agencies through the use of adoption and equitable sharing.⁵ When the federal agency agrees to process the seizure under federal forfeiture provisions and remits the proceeds back to the originating agency, this process constitutes equitable sharing. In one statutory requirement for sharing, the U.S. Attorney General must assure that the sharing will encourage further cooperation between the department seizing the assets and the sponsoring federal law enforcement agency.⁶

Because asset forfeiture is not appropriate in every case, administrators should evaluate asset seizures from a policy perspective. Throughout the history of the government's use of asset forfeiture, critics have attempted to prevent law enforcement agencies from expanding their use of this effective law enforcement tool. In an effort to thwart those attempts, law enforcement agencies must ensure that they use asset forfeiture only when they can demonstrate the benefits to the community. For example, some individuals may criticize law enforcement agencies when the value of the seized asset is disproportionate to the offense committed, when the subject is a sympathetic figure (e.g., a single mother), or when a seizure creates a hardship on a third party. Because law enforcement agencies use asset forfeiture as a tool to serve communities, if the public perceives that

agencies abuse this tool, both law enforcement and the community will suffer.

An analysis of the deposits made into the DOJ's Assets Forfeiture Fund (Fund) reflects how

external events impact the government's ability to conduct asset forfeiture. The passage of additional asset forfeiture legislation in the mid-1980s resulted in an increase of deposits into the Fund.⁷ In

fact, the enforcement of that legislation resulted in an increase in the dollar amount of forfeitures that lasted from the mid-1980s to the early 1990s.⁸ However, the increase in forfeitures paralleled an increase

National Code of Professional Conduct for Asset Forfeiture

1. Law enforcement is the principle objective of forfeiture. Potential revenue must not be allowed to jeopardize the effective investigation and prosecution of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens.

2. No prosecutors' or sworn law enforcement officers' employment or salary shall be made to depend upon the level of seizures or forfeitures they achieve.

3. Whenever practicable, and in all cases involving real property, a judicial finding of probable cause shall be secured when property is seized for forfeiture. Seizing agencies shall strictly comply with all applicable legal requirements governing seizure practice and procedure.⁹

4. If no judicial finding of probable cause is secured, the seizure shall be approved in writing by a prosecuting or agency attorney or by a supervisory-level official.

5. Seizing entities shall have a manual detailing the statutory grounds for forfeiture and all applicable policies and procedures.

6. The manual shall include procedures for prompt notice to interest holders, the expeditious release of seized property where appropriate, and the prompt resolution of claims of innocent ownership.

7. Seizing entities retaining forfeited property for official law enforcement use shall ensure that the property is subject to internal controls consistent with those applicable to property acquired through the normal appropriations processes of that entity.

8. Unless otherwise provided by law, forfeiture proceeds shall be maintained in a separate fund or account subject to appropriate accounting controls and annual financial audits of all deposits and expenditures.

9. Seizing agencies shall strive to ensure that seized property is protected and its value preserved.

10. Seizing entities shall avoid any appearance of impropriety in the sale or acquisition of forfeited property.

Note: The National Code of Professional Conduct for Asset Forfeiture was developed by the DOJ's Asset Forfeiture and Money Laundering Section.

in public scrutiny and legal challenges that culminated in a 1994 federal appellate court decision known as *United States v. \$405,089.23 in U.S. Currency*.¹⁰ That decision, which held that forfeiture constitutes double jeopardy under certain circumstances, had a significant chilling effect on law enforcement's efforts to pursue asset forfeiture. Although the U.S. Supreme Court ultimately reversed that opinion in 1996,¹¹ Fund deposits declined during the 2-year period when the lower federal court holding was valid law.¹²

COORDINATING FORFEITURE TRAINING AND LIAISON

Asset forfeiture training presents an excellent opportunity for a department to instruct its investigators about this law enforcement tool and develop liaison with other agencies. Joint training conferences with local, state, and federal agencies and the district attorney enable all participants to forge partnerships in their local communities. A training agenda should include topics of mutual interest such as legal issues, investigative techniques, and the mechanics of seizing and disposing of assets.

Smaller departments have the most to gain from establishing effective liaison with their state and federal counterparts because they often do not have the resources or expertise to handle complex forfeiture investigations. Also, small departments have the option of working a case jointly with other authorities or submitting the seizure to a federal agency for adoption.

This type of training and liaison also enhances the relationship between the investigator and forfeiture attorney. Depending on the jurisdiction, the forfeiture attorney may be the prosecutor or a civil attorney. Regardless of who holds the responsibility, the investigator and forfeiture attorney working in tandem remains the single most important factor in a successful forfeiture program. Also, training allows

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...asset forfeiture fosters cooperation among federal, state, and local law enforcement agencies....

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the participants to learn their role in the forfeiture process and to identify experts in the field who they can call upon to assist in forfeiture cases. The presentation of case examples provides an excellent opportunity for all participants to discuss investigative techniques used to locate assets, the legal basis to seize assets, and the legal requirements to forfeit and dispose of assets. More important, training and liaison promotes teamwork among everyone involved.

CONCLUSION

Asset forfeiture remains a powerful tool for law enforcement

agencies. It remedies many of the problems that often slip through the criminal justice system, such as addressing the issue of allowing a criminal to profit from crime, and it provides a remedy for the victim. In short, asset forfeiture deprives the subject of ill-gotten gains, compensates the victim, and serves the community.

Initiating a forfeiture program involves addressing a variety of policy issues and administrative aspects. When creating an asset forfeiture program for their department, police administrators first should develop a comprehensive mission to include specific goals and objectives. When developing these management tools, a department must consider priorities, costs, and benefits associated with the program. A department also must establish safeguards to ensure they implement asset forfeiture only when appropriate.

When developing a forfeiture program, policymakers should remain aware of various factors that impact the success of this tool. Management must also consider other benefits and associated costs of a forfeiture program when prioritizing their program, and in an effort to prevent perceived abuses, they should include measures to ensure that each asset seizure is appropriate and has a legal basis.

Administrators should ensure that their officers understand how their asset forfeiture program works and that they receive proper training on asset seizure. Additionally, they should encourage officers to establish liaison with the prosecutor's office and other individuals involved in the forfeiture process.

Finally, investigators can apply their newly acquired skills to seize criminals' assets. Regardless of which theory departments use, the results are more likely to have a successful outcome if officers seize the assets early in the investigation. When appropriate under the circumstances, investigators should seize early and seize often. ♦

Endnotes

¹ *United States v. Ursery*, 116 S. Ct. 2135 (1996).

² Under federal law, the facilitation theory for controlled substance violations is derived from 21 U.S.C. § 881.

³ Under federal law, the proceeds theory for various predicate violations is derived from 18 U.S.C. § 981 and § 982.

⁴ U.S. Department of Justice (DOJ) Justice Management Division.

⁵ DOJ agencies gain their equitable sharing authority from 21 U.S.C. § 881(e)(1)(A) and (e)(3), 18 U.S.C. § 981(e)(2), and 19 U.S.C. § 1616a.

⁶ 21 U.S.C. § 881(e)(3)(B).

⁷ The Comprehensive Crime Control Act of 1984 and the Anti-Drug Abuse Act of 1986 significantly strengthened and expanded the existing forfeiture provisions of prior law.

⁸ The DOJ's Justice Management Division reports that deposits into the DOJ Assets Forfeiture Fund increased from \$93.7 million in 1986 to \$644.3 million in 1991 and the number of seizures increased from 3,700 in 1985 to 32,400 in 1992.

⁹ Generally, real property can only be seized following an adversarial preseizure hearing. See *United States v. James Good Real Property*, 114 S. Ct. 492 (1993).

¹⁰ 33 F.3d 1210 (9th Cir. 1994).

¹¹ *Supra* note 1.

¹² The DOJ's Justice Management Division reports that deposits into the DOJ Assets Forfeiture Fund decreased from \$549.9 million in 1994 to a low of \$338.1 million in 1996, representing a 39 percent decrease.

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Computer Intrusion Investigation Guidelines

By J. Bryan Davis

This article is a condensed version of the Department of Defense's *Defense Criminal Investigative Service Computer Intrusion Investigation Guidelines*. Some steps in the guidelines may not apply to similar FBI or other law enforcement agency investigations.

The process of catching the hacker may be simple, but obtaining and analyzing the evidence can be very complex. First, the investigator needs to understand the basics of a "hack" or an "intrusion." The hacker, or intruder, essentially breaks into a number of computers or computer systems to obtain either root or user level access to a computer. A hacker does this for three reasons.

- *Storage:* the hacker finds a victim computer to store tools and programs that can be used to exploit other computers;
- *Protection:* the hacker typically establishes a number of "jumps," or stepping stones in route to a particular computer or computer system. This

process hides the location of the hacker, including protecting the original Internet provider (IP) of the hack; and

- *Exploitation:* the hacker wants to exploit a computer or computer system to obtain information or vandalize the computer.

The investigator can track the hacker by implementing three investigative techniques:

- *Operations:* the investigator goes undercover;
- *Sources:* the investigator develops sources that provide information about hackers and their activities; and
- *Investigation:* the investigator uses various methods to legally obtain computer records (normally security and audit logs). These records are then examined in an effort to surface evidence. These records give the investigator the opportunity to track, or trace, back the hacker. This should not be confused with "hacking back," which is illegal.

INVESTIGATION BASICS

As with any investigation, investigators have many leads to follow. In the computer intrusion investigation, the initial steps are the same. This is because most computer intrusions are remarkably similar in nature. When hackers break into a government computer system, the Department of Defense (DOD) typically learns of it through intrusion detection systems, from other law enforcement agencies, or by obvious Web page defacement. Computer intrusion cases are directed to the DOD's Defense Criminal Investigative Service's Computer Crimes Investigation Program. Hackers make a number of jumps from their computer through various other computers or computer system. For technical reasons, the number of these jumps is limited, but each of these jumps is probably a victim.

To track down these hackers, federal agents must obtain and review various logs from each of the jumps or victims. If these logs are obtained in a timely fashion, the investigation will lead quickly to either the hacker or a dead end. Generally, the dead end often results when hackers jump through or from

foreign countries. Sometimes, the dead end occurs because the investigator could not obtain the computer logs.

It should be noted that, due to the nature of the hacker culture, hackers commonly share their exploits with other hackers. This means that it is very common to find out that more than one hacker has broken into a particular computer or computer system. Although the intrusion may have just occurred, it is typically at least a few hours or a few days old.

Most investigations begin when the investigator receives a call or complaint from a DOD Computer Emergency Response Team (CERT); a systems administrator or computer security personnel; or a witness or confidential or registered source. The initial phases of a computer intrusion investigation can be broken down into 12 steps.

THE TWELVE STEPS

Step One

Obtain the identifying data on the caller.

Step Two

Obtain the identifying data on the victim computer. What is the victim IP? What agency does it belong to? Who is the system point of contact (POC)? Is the victim computer “mission critical?”

Step Three

Obtain the known particulars of the intrusion. This is sometimes called the “ticket” information. What is the source IP? When did the incident occur? What method of intrusion was used? Was it a root or user level intrusion?

Step Four

Determine if the victim computer has been secured (i.e., has it been taken off line and stored to protect the evidence). Has the system administrator

removed all hacker programs, sniffers, and tools? Have the appropriate security patches been installed?

Step Five

Meet with the system administrator and determine if the victim computer should be taken off-line and taken into evidence or if the victim computer can be left on-line and used to monitor the hacker’s future activity.

Step Six

Arrange to have the computer seized as evidence, or have a mirror image made of the victim computer’s hard drive.

Step Seven

Determine the appropriate method of obtaining computer records from the source (e.g., the source computer/computer system/network). Depending on the type of computer or computer system, investigators can use five methods

to obtain computer records. The method the investigator uses is determined by the Stored Wire & Electronic Communications Act. The five methods are—

- official request;
- inspector general subpoena;
- grand jury subpoena;
- court order; or
- search warrant

Step Eight

Contact the source and obtain its computer logs.

Step Nine

Make arrangements to have the victim system examined. The forensic analysis of a computer system is called a “system autopsy.”

The System Autopsy

There are essentially two types of system autopsies: 1) an abbreviated autopsy, which identifies

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...it is very common to find out that more than one hacker has broken into a particular computer or computer system.

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the basics of the intrusion and begins to establish probable cause for court orders and search warrants and 2) a comprehensive autopsy, or forensic analysis, which is acceptable for criminal trial. The abbreviated autopsy should be accomplished within a few days of the intrusion. The comprehensive autopsy can take weeks or even months.

Available Resources

An expert in the field of system analysis should perform the system autopsy. Various resources available for assistance include:

- the DOD's Computer Forensics Laboratory;
- the DOD CERT; and
- Other federal law enforcement agencies (including the FBI, the MCIO's and the NASA OIG).

In addition, investigators can use a number of automated tools to perform the system autopsy.

The Analysis Process

The system autopsy is the process of finding out what the hacker did to a given computer and what the hacker left behind. This can usually be accomplished using these 10 investigative techniques:

- 1) Examine the computer's log files and backups working with a mirror image of the victim system. Keep in mind that these logs may have been altered by the hacker(s). Reviewing system backups and comparing these to the victim machine's logs may help identify any alterations. Examine "Wtmp" files, history logs, message logs, the "syslog" fire wall logs, router logs, and proxy server logs.
- 2) Examine all files run by "cron" and "at." System administrators usually automate the



"Although the intrusion may have just occurred, it is typically at least a few hours or a few days old."

logging processes. Cron is the utility used to do this automation. Hackers sometimes use cron to automate their processes as well.

3) Examine the "/etc/passwd" file for alterations. The "/etc/passwd" file contains the encrypted passwords of all users. Look for alterations, blank entries, and empty password fields.

- 4) Check the system for unauthorized services, such as backdoor versions of "finger," "rsh," "rlogin," "ftp," or other services.
- 5) Check the system for sniffer programs.
- 6) Check the system for trojanized programs.
- 7) Look for "setuid" and "setgid" files, which may provide the hacker with root access to the system.
- 8) Look for "+" entries which signify that all incoming connections are from trusted computers. Look for nonlocal host names.
- 9) Look for unusual and hidden files.
- 10) Review all processes currently running on the system.

Step Ten

Review computer system and attempt to determine the next jump back.

Tracking Back

In principle, tracking the hacker is simple. Once an intrusion is reported, the investigator has a "victim." This is the first victim, or the final site or last jump taken by the hacker. A review of computer security and audit logs usually surface the first jump back—typically the second victim. After evaluating the known facts about this second victim, the investigator can determine the method best required to

obtain the victim's security and audit logs. The review of the second victim's security and audit logs can surface information that identifies the next jump back—usually the third victim.

Possible Conclusions

The investigator continues this process of tracing back the hacker's jumps. This investigative process leads to one of three conclusions:

- The hacker is located. At this point, traditional law enforcement techniques such as arrest warrants, search warrants, trap and trace, or other techniques come into play.
- The trace back leads to a foreign country. Depending on the particulars, this case may now fall into the area of foreign counterintelligence. It may lead to a joint investigation with foreign law enforcement organizations. Or, it may result in an investigative dead end.
- The trace back leads to a dead end within the United States. This typically happens when one of the victim sites cannot provide useful records, when records could not be obtained in a timely manner, or when the hacker was able to "spoof," or fake, the IP address.

Step Eleven

Make arrangements to have the source logs examined.

Step Twelve

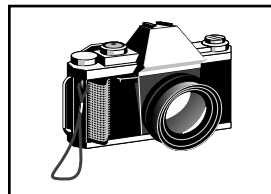
Conduct appropriate interviews.

CONCLUSION

As computer intrusion crimes increase and hackers become more efficient, the investigator's role and task will become more difficult. However, these guidelines should help answer some basic questions encountered at the onset of any computer intrusion investigation. ♦

Special Agent Davis serves with the Defense Criminal Investigative Service, Department of Defense, in Arlington, Virginia. To obtain a copy of the DCIS Computer Intrusion Guidelines in its entirety, contact Special Agent Davis 703-607-6488 or via e-mail at jdavis@ncr.disa.mil or jdavis@dodig.osd.mil.


Wanted: Photographs



The *Bulletin* staff is always on the lookout for dynamic, law enforcement-related photos for possible publication in the magazine. We are interested in photos that visually depict the many aspects of the law enforcement profession and illustrate the various tasks law enforcement personnel perform.

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When Casino Gambling Comes to Your Hometown

The Biloxi Experience

By TOMMY MOFFETT and DONALD L. PECK, M.S.

A man, wanted on a federal fugitive warrant, makes threatening telephone calls to his former girlfriend in West Virginia. The calls follow an argument they had when he shot and seriously wounded her and then fled the state in a stolen car. FBI agents from the Huntington, West Virginia, resident agency traced the call to a pay phone near a gift shop in a casino in Biloxi, Mississippi. Within several minutes, FBI agents in nearby Gulfport, Mississippi, drove the short distance to the gift shop and confronted a man fitting the description. They positively identified him as the fugitive and arrested him without incident.¹

Tourists and other visitors have long been attracted to Mississippi's Gulf Coast area around Biloxi for the sandy beaches, warm weather, and great seafood, but the recent legalization of casino gambling has increased Biloxi's popularity dramatically. Only a few of the new visitors, like the fugitive in the opening scenario, will raise concerns for local authorities; however, as criminals increase, they will place new responsibilities on those charged with protecting the public.

Undoubtedly, casinos have produced a boom for the local economy over the last 9 years and they have forever changed the city and the Biloxi Police Department (BPD). This industry now attracts more than 40,000 additional visitors per day to Biloxi and generates slightly more than \$17 million a year in revenue for the local government, as well as an additional \$6 million to the county and \$57 million a year to the state.²

As Biloxi managers look ahead, they naturally focus on future challenges. But as the police department plans for an upcoming move to a new \$10 million public safety building, officials can look back and appreciate the changes that have occurred. These dramatic changes have produced valuable lessons in successful community planning, organizational leadership, change management, and the role of the police executive.

THE WAVE THEORY

Domestic lotteries first surfaced in the 1740s, primarily to finance public works projects in the colonies. They generally had become accepted by some of the

colonists when the crisis of the Revolutionary War forced the Continental Congress to authorize a national lottery to raise funds.³ This period in American history, sometimes characterized by an acceptance of gambling "for worthy causes," is referred to as the first of three waves of legal gambling in the United States.⁴

By the end of the Civil War, many states had legalized some form of gambling—often state lotteries—to stimulate the depressed economies in the south and the west. The lotteries soon began to disappear for a variety of reasons, and by 1878, only one remained in Louisiana. Even after a serious corruption scandal involving the Louisiana lottery in the 1890s, it still took federal legislation to force local officials to end the lottery. By the turn of the century, this second wave had ended.⁵

While some historians have traced the origins of the current wave of legal gambling to the start of the Great Depression in the early 1930s,⁶ others believe that the

present day growth of legal gambling resulted from the decision by New Hampshire in 1964 to reintroduce the state lottery.⁷ That decision, probably more than any other, set in motion a series of events that exposed most Americans to some form of legal gambling. This industry has grown as more people consider gambling an entertainment and not a vice, and an increasing number of state governments view gambling as a source of jobs and revenue.

AMERICAN GAMBLING

In preparing for change, the BPD examined the history of legal gambling in this country and studied past efforts to handle law enforcement issues. Long before the arrival of casinos in Biloxi, the history of legal gambling in the United States seemed to be a cycle of government prohibition against gambling followed by some national crisis. The government would then promote some form of legal gambling to solve the crisis and subsequently return to a general



Chief Moffett heads the Biloxi, Mississippi, Police Department.



Special Agent Peck is an instructor in the Investigative Training Unit at the FBI Academy.

prohibition. New prohibitions often came as the result of some scandal related to the administration of the gambling initiative, which ultimately discouraged many cities on the whole industry.⁸

Some individuals believe that issues like legal gambling, and the accompanying forms of 24-hour entertainment, have historically divided the different cultures and geographic regions that make up the United States. Even in today's environment, legal gambling of any kind divides many communities because some individuals often perceive it as socially destructive and morally wrong.

As early as 1988, casino gambling was legal in Nevada and New Jersey. Now, Utah and Hawaii are the only states without some form of legal gambling.⁹ While Mississippi has become one of the major centers in the growth of the casino industry, most Americans now live only a short drive away from some form of legal gambling. Early recognition of the impact that casinos can have on local services, coupled with good planning by the BPD, prevented many of the problems other communities with casinos underwent. The projected revenue estimates from the proposed casinos made it difficult for the police and other local officials to look beyond such windfalls. However, the willingness of officials to focus on the changes that would occur ultimately proved the reason for Biloxi's success.

MISSISSIPPI GAMBLING

Casino gambling came back to Mississippi in 1987 when "cruises to nowhere" departed Biloxi and

treated passengers to onboard gambling as soon as the ship reached international waters in the Gulf of Mexico.¹⁰ The state of Mississippi initially fought this gambling initiative in the courts, but by 1989, it had become the first state to allow gambling in state waters on cruise ships in transit to or from international waters.¹¹

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Police managers need to assure the community that their department vigorously enforces gambling laws....

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By the next year, the Mississippi legislature had passed a comprehensive law that legalized dockside casino gambling and created a state gaming commission. This 1990 law enabled the voters of 14 counties along the Mississippi River and the Gulf Coast to decide, by referendum, if they wanted dockside casinos in their communities.¹²

As local voters prepared to decide this issue in 1990, Biloxi found itself nearly bankrupt and 6 months behind in repaying its debtors.¹³ The police department's equipment was deteriorating, and the city could not afford to replace officers who left the department. This countywide issue divided voters in Harrison County and the major cities of Biloxi, Gulfport, and Long Beach.

Few options seemed to exist for the future of Biloxi, but the voters of Harrison County overwhelmingly rejected this initiative. A change in the state law enabled the voters in each city in the counties to decide the issue for their locality, and in 1991, voters in Biloxi approved the new referendum and the first of nine dockside casinos opened in Biloxi in 1992.¹⁴ Mississippi now has 29 casinos in operation, and it has become the third largest gaming center in the country.¹⁵

Legalizing gambling did not come without a price to the citizens of Biloxi. According to BPD data, crime figures for Biloxi show an increase in reported crimes since the first casino opened in 1992.¹⁶ To help allay fears about this increase in crime in those localities approving casino gambling, Mississippi law mandated that 20 percent of the casino revenues returning to the community would supplement the local public safety budget.

THE IMPACT ON CRIME

As senior staff members at the BPD prepared for the inevitable changes, they had the advantage of access to past studies by academicians and practitioners. In a 1976 report, the U.S. Commission on the Review of the National Policy Toward Gambling had cautioned about corruption and the incompatibility of revenue raising and crime control when jurisdictions legalize gambling.¹⁷ Crime figures reported to the FBI in the 9 years after the first casino opened in New Jersey in 1977 showed that the incidence of all crime combined had increased 138 percent.¹⁸ This crime problem, and the anticipated increase of

citizen participation in legal as well as illegal gambling, raised a concern in the 1988 report of the New Jersey Governor's Advisory Commission on Gambling.¹⁹ These historical studies convinced Biloxi officials that their city would suffer from an increase in crime as well.

CHANGES AT THE BILOXI POLICE DEPARTMENT

Biloxi officials attribute the city's success since the arrival of casinos to a good partnership between the police department and the community and good planning by government officials at all levels. As a result of the influx of new revenue to the city, the police department hired additional officers and increased their starting salary. At the same time, the department's budget more than tripled.²⁰ Part of this new money also enabled the city to build a new public safety building for the police and fire departments.

Within a very short period after the arrival of legal gambling, an additional 11,000 jobs linked directly to the casinos came to the area around Biloxi. In addition to those positions, another 18,000 jobs associated indirectly with the casinos became available in the community. The unemployment rate declined from about 8 percent before the casinos to about 3 percent today.²¹

In 1990, Biloxi, a congested peninsula, covered approximately 25 square miles with a population of 46,319. Officials estimate that Biloxi's population has grown during the last decade to more than 53,400. In 1999, Biloxi annexed a small area to the north and added approximately 34 square miles and

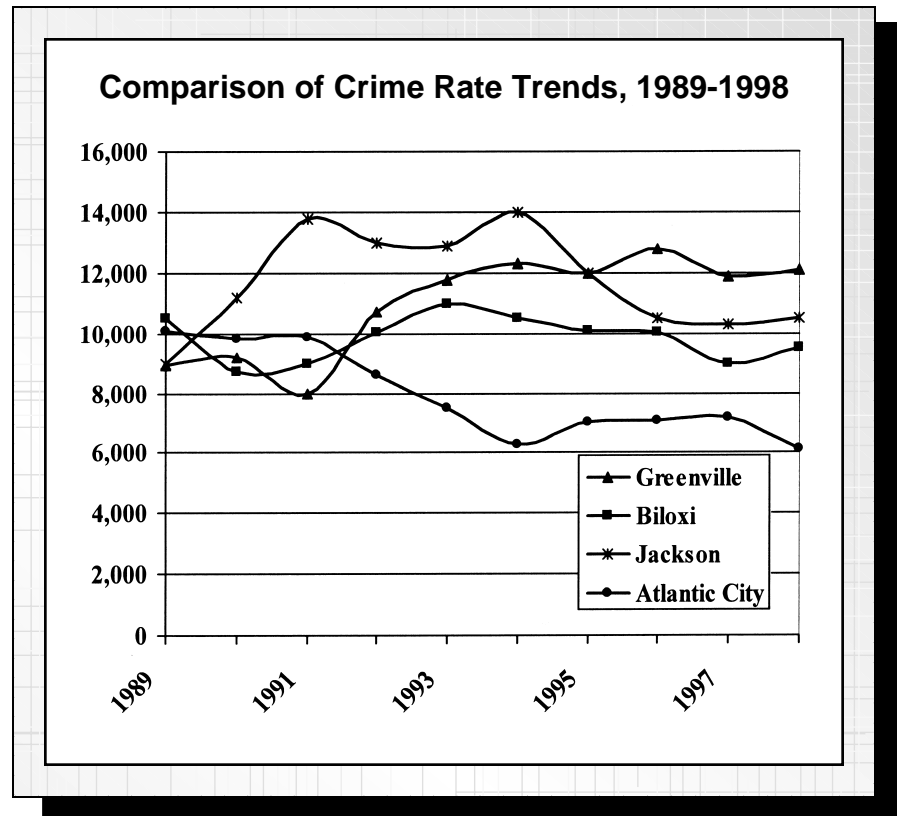
an additional 4,000 individuals to the city.²² This growth, primarily due to casino gambling, forced officials to face the challenges of policing the new Biloxi.

BPD managers tried to recognize the many positives, as well as the negatives, of casino gambling and began to focus on the various changes the department needed to make. Besides anticipated new crime problems, managers realized that casino gambling also would impact the department's employees. Past corruption scandals associated with casino gambling evoked images in the public's mind of the arrival of organized crime figures near the casinos, bribery scandals involving elected officials, and corrupt police officers.²³ Police

officials had to put forth a dedicated effort to negate this perception and ensure that it did not become reality in Biloxi. The first efforts involved four stages and dealt with personal conduct issues, traffic enforcement priorities, department reorganization, and interagency partnerships.

Personal Conduct for Employees

During the first stage of a review of departmental policies, managers revisited ethics and personal conduct issues. Police managers recognized that the employees at the department remained just as susceptible to gambling-related problems as anyone else in the community. To address this issue, BPD managers restated the agency's standards. The department had to



prevent or respond to any problems that surfaced from its employees who patronized the casinos. Many departments have established Employee Assistance Programs (EAP) to augment programs available through insurance companies. Because insurance benefits are often limited, the establishment of an EAP received high priority.

Additionally, the department had to reinforce policy guidelines on the critical relationship between the role of investigators and maintaining the integrity of investigations. One of the first policy amendments made to manage perceptions prohibited police employees from engaging in any off-duty employment at the casinos. Policy forbid anyone who regularly patronized the casinos from conducting criminal investigations at the casinos. Additional guidelines prohibited officers in uniform from taking meal breaks in the casinos.

Traffic Enforcement Priorities

Next, the department made a priority of the enforcement of general traffic offenses and, particularly, driving under the influence violations. Biloxi could expect more than 40,000 visitors each day, and the police department had to ensure that the city remained safe for residents and visitors alike.

Hurricane evacuation plans also came under this review. Biloxi's position on the coast always has made hurricane evacuation plans a priority for city officials. Now that Biloxi had become more of a vacation destination for families and large groups, contingency plans would have to account

for tens of thousands of additional visitors during this period. The limited number of evacuation routes from the coast always has presented a challenge to traffic and emergency services planners. Every season they must prepare new plans that require evacuating more people and staging larger emergency shelters inland.

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...the willingness of officials to focus on the changes that would occur ultimately proved the reason for Biloxi's success.

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Department Reorganization

The third area of review involved recognizing that gambling and gamblers attract many of the traditional vices (e.g., prostitution, pornography, loan-sharking, and extortion). The department reorganized its vice and narcotics unit into separate units to more effectively investigate the increased violations. The department anticipated that pawn shops would experience more activity with casinos in town, and within a year, the number of pawnshops had doubled. Within the next 4 years, the number had doubled again to more than 30. While this did not necessarily indicate that more people were pawning stolen

property, it did require that the department dedicate resources to monitor this increased activity to avoid future problems.

Partnerships Between Agencies

The BPD had always fostered working relationships with other law enforcement agencies in the area, but the introduction of casinos required a renewal and rededication of these efforts. The last major issue involved developing a Casino Crimes Task Force with the FBI and other federal, state, and local agencies. The task force would target those groups involved in check and credit card fraud, prostitution, money laundering violations, and pornography occurring in and around the casinos. The task force helped generate successful prosecutions of these complex investigations. The gaming commission and the police department continued to investigate regulatory violations and some cheating cases at the casinos, but the task force remained dedicated to the investigation of organized criminal groups.

In addition to crimes at the casinos, the police department experienced an increase in the investigations of robberies, check and credit card fraud, property crimes, domestic abuse, and alcohol-related violations. The dramatic increase in the local population fueled the increases in reported crimes.

LESSONS LEARNED

Organizational change proves both healthy and inevitable, but the changes associated with the impact of casino gambling on a community accelerate everything for the police

executive. In addition to managing growth issues and changes within the department, police executives must deal with changes in attitudes that, if left unchecked, can have a negative impact on the community.

Some studies have shown a link between the sometimes widely held view that illegal gambling is a victimless crime and the influence that it can have on police officers.²⁴ Even the advocates who oppose any legal gambling sometime downplay the importance on gambling-related crimes when the police have more serious crimes to investigate. Officials must realize that legal gambling will attract an unsavory element that can jeopardize the safety and well-being of the city's residents and the many visitors who come to gamble.

Police managers need to assure the community that their department vigorously enforces gambling laws like they would any other laws. The citizens of Biloxi want casino gambling to prove successful, and the role of law enforcement remains critical to that success.

Last, the police department learned the importance of having a voice on local boards to prevent some seemingly trivial or unrelated matter from becoming a future police problem. The police should participate in any discussions between planners, developers, and representatives from the local government. For example, designs for new road patterns around the casinos in Biloxi were sometimes

hastily made. Input from the police department proved critical to avoid creating nuisance traffic or critical problems in the event of an evacuation. Looking at this issue in hindsight, officials agree that this area should have received a higher priority during the early planning stages.



With the ongoing changes at the police department, amendments to the local zoning ordinances and building codes and issuing construction permits did not initially seem like a police priority. However, it did not take long to realize that the placement of large signs, the location of parking lots and parking spaces, and the design of major area roads quickly would become a problem for both the public and the police.

The police can bring a needed perspective to any policy discussion by city engineers and other local government leaders. After all,

officers must deal with citizens who complain about the nighttime construction noise, flashing lights from business signs, or other seemingly minor issues that citizens consider important.

CONCLUSION

The city of Biloxi remains forever changed by the legalization of casino gambling in Mississippi. Although controversy always will exist over casino gambling, the benefits it provides to the community are undeniable. People who work, live in, and visit Biloxi receive a much higher level of service and protection, in part due to the revenues generated by the legalization of casino gambling. The community can now attract and retain more qualified police officers, which has given the department the stability and experience that it will need in the future.

The experience that Biloxi managers gained during this period in dealing with the various issues affecting the police department and the community proved invaluable. While Biloxi's experience centers around the impact of legal casino gambling, reaching a balance on issues and dealing with change remain paramount for any successful police executive. ♦

Endnotes

¹ The Jackson, Mississippi, FBI field office conducted this investigation in February 2000.

² Gaming tax revenue figures compiled by the Biloxi Police Department from state gaming commission records.

³ Ronald J. Rychlak, "The Introduction of Casino Gambling: Public Policy and the Law," *Mississippi Law Journal* 64 (1995): 300.

⁴ Scott M. Montpas, "Gambling On-line: For A Hundred Dollars, I Bet You Government Regulations Will Not Stop The Newest Form of Gambling," *University of Dayton Law Review* 22, (1996): 165. The study of the three waves is attributed to a study by I. Nelson Rose of the Whittier College School of Law.

⁵ *Ibid.*, 165.

⁶ *Supra* note 4, 165.

⁷ *Supra* note 4.

⁸ *Supra* note 3, 291.

⁹ Robert Goodman, "Legalized Gambling and the Real Costs (para)," *The Wilson Quarterly* 19, no. 4 (autumn 1995): 24; and Stephanie Martz, "Legalized Gambling and Public Corruption: Removing the Incentives to Act Corruptly, or, Teaching an Old Dog New

Tricks," *Journal of Law and Politics* 13, (Spring 1997): 458.

¹⁰ *Supra* note 3, 307.

¹¹ *Supra* note 3, 307.

¹² *Supra* note 3, 308.

¹³ *Supra* note 3, 317.

¹⁴ Barbara Marquand, "Legalized Gambling: What Police Have to Win and Lose" *Law and Order*, November 1994, 86; and Edward Walsh, "Two Sides of Casinos' Coin: Success Opens Rift In Mississippi Politics," *The Washington Post*, July 12, 1998, A1.

¹⁵ *Ibid.* (Walsh).

¹⁶ Biloxi Police Department.

¹⁷ John Warren Kindt, "Increased Crime and Legalizing Gambling Operations: The Impact on the Socio-Economics of Business and Government," *Criminal Law Bulletin*, November-December 1994, 540.

¹⁸ *Ibid.*, 544.

¹⁹ *Supra* note 17, 544.

²⁰ Statistics compiled by the Biloxi Police Department revealed that personnel increased from 92 to 157 officers. In 1991-1992 the starting salary for a police officer was \$15,707. By 1999-2000 it increased to \$24,255. During the same period, the police department's budget grew from slightly more than \$3.4 million in 1991-1991 to more than \$12 million in 1999/2000.

²¹ Figures from local statistics compiled by the Biloxi Police Department.

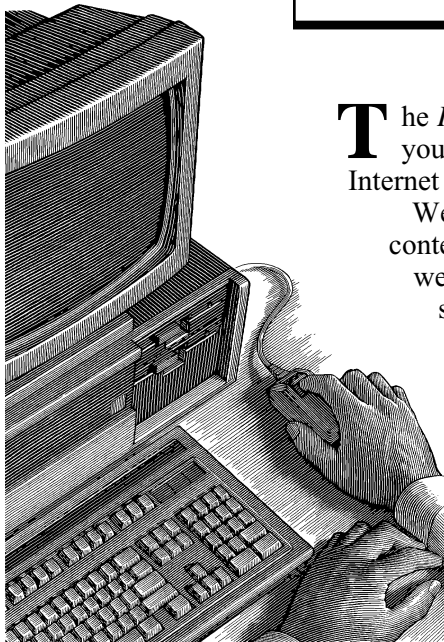
²² Information provided by the Biloxi Police Department.

²³ *Supra* note 9 (Martz) 460.

²⁴ *Supra* note 9 (Martz) 461.

The author thanks Dr. John Jarvis, Behavioral Science Unit, FBI Academy, for his assistance in preparing this article.

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International Community Policing Partnership

By Dennis Hanwell



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Located approximately 45 minutes south of Cleveland, Medina, Ohio, encompasses nearly 11 square miles and has a population of about 25,000 residents. As with other small communities located near metropolitan areas, citizens of Medina face many of the same threats to their peaceful lifestyles as those encountered by residents of large cities. To strengthen its commitment to safeguarding the public and serving its citizens' needs, the Medina Police Department adopted the community policing philosophy in January 1995. Since that time, the department has received over \$1 million in federal grants for its community policing efforts and has won local, state, and national recognition for these strategies.

To share its experiences and successes, the department began an international community policing partnership with the Ballymena Neighborhood Policing Unit of the Royal Ulster Constabulary in Northern Ireland. This partnership has developed into an ongoing exchange of information and ideas that has benefitted both agencies.

Background

In April 1998, the mayor¹ of Medina took a personal vacation to the United Kingdom. While visiting Northern Ireland, he shared a few days with a local family who took him to visit the Borough of

Ballymena in County Antrim. The borough has a population of about 57,000 and covers nearly 200 square miles. About half of the borough's population resides in the town of Ballymena. Agriculture represents the borough's main industry, with the retail establishments of the town providing additional employment. The mayor noted several similarities between the town's retail center and the downtown shopping area of Medina.

While touring the town, the mayor met a local 19-year veteran constable. During their conversation, the constable asked the mayor about community policing strategies in the United States. The mayor advised the constable that he would contact the Medina Police Department and have it forward information on its community policing initiatives and operations. Thus, a partnership began between the Medina Police Department and the Ballymena Neighborhood Policing Unit.

Partnership Developed

When the mayor returned from his trip, he provided me with the constable's business card and requested that I contact him to exchange community policing ideas and strategies. For the next 2 years, Constable Bob Young and I worked together via telephone, mail, and e-mail to share what has worked

Chief Hanwell leads the Medina, Ohio, Police Department.



in our community policing efforts, steps taken to implement these initiatives, improvements made since these efforts began, and future ideas we want to explore. As we worked together, we realized that it would benefit both agencies if I visited Ballymena to better understand his agency's requirements and help him implement some of our successful initiatives. The mayor concurred and supported my request to travel to Northern Ireland.

I arranged the trip for April 2000 and scheduled visits to area schools, businesses, police agencies, community groups, government institutions, courts, and local religious organizations. At Constable Young's invitation, I stayed the 2 weeks with his family. This arrangement exposed me to more of the differences between American and Irish cultures and gave the two of us more time to share our thoughts and ideas.

Northern Ireland Explored

On the afternoon of my arrival, Constable Young gave me a tour of his police station where I met several officials. Later, I attended a meeting between the police and about 12 high school students who discussed issues of concern, areas where they would like to see more police presence, and suggestions for improving youth activities and police services relating to area youth.

For the next 2 weeks, I attended meetings with Royal Ulster Constabulary Police personnel, particularly the Ballymena Neighborhood Policing Unit. We discussed problem-solving techniques, differences in laws and policing practices, and community policing initiatives. I attended various in-service training sessions with the constables, including problem solving, operating a motor vehicle while under the influence, riot control, and canine handling. I visited the basic training academy and spoke with recruits and the academy training staff, regarding community policing principles.

In addition to my law enforcement contacts, I spent a considerable amount of time talking with

community and religious leaders, local media representatives, and business owners, both individually and in groups. Besides discussing community policing efforts, I also took part in a domestic violence forum and several local community meetings.

The preplanned media contacts occurred during the first week of my visit, but due to the attention my visit drew, more requests for media interviews spilled over into the second week. Both local newspapers interviewed me, along with both local television

channels and a radio station. While the interviews focused mainly on my visit, they also provided me with a chance to discuss the concept of community policing with a wide and diverse audience.

Lessons Learned

I have found this international community policing partnership very beneficial and informative. The Royal Ulster Constabulary, especially the Ballymena Neighborhood Policing Unit, has made great strides in partnerships and

collaboration within its community. This stands as no easy achievement with the unrest and militant activities that have occurred for decades in Northern Ireland. While the political climate has calmed recently, vast differences still exist in comparison to American policing. For example, I learned that England makes all of the laws, which may not have the same relevance in Northern Ireland. England also appoints court judges, which limits or restricts their accountability to the citizens. Further, for security purposes, the police must use radios with scrambled frequency and employ ear speakers to avoid unauthorized monitoring. Many police officers cannot discuss where they work for fear of harm to themselves or their families, and each police station must have a cafeteria because police personnel cannot eat safely in public. Since 1969, the Royal Ulster Constabulary has had over 300 members killed and nearly 10,000 members injured in the line of duty, all from a total sworn membership of approximately 13,000. To develop, maintain, and improve community policing

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Medina Police Department Community Programs

Bicycle and Foot Patrols

Officers patrol not only in cruisers but on bicycle and foot as well.

School Resource Officers

Three officers work in area schools as liaison between the department and school personnel, students, and parents.

Neighborhood Watch

The department helps citizens start and maintain Neighborhood Watch groups to reduce crime and violence.

Tip Line

The department monitors an anonymous tip line that residents can call to report incidents or pass along information.

Bicycle Safety Rodeos

Officers teach bicycle safety and riding skills to children, inspect their bicycles for safety, and register them for bicycle licenses.

Vacation Watch

Residents fill out a simple form to have officers check periodically on their homes when they are out of town.

Behind the Badge

Officers appear on a monthly cable television show that highlights various aspects of the police department and covers a variety of law enforcement-related topics of interest to the community.

Community Police Academy

This program provides area residents with firsthand information about how their police department works, acquaints them with law enforcement's role in the criminal justice system, and provides increased understanding of the tasks police officers face in their daily work.

WON Cards

Officers leave WON (Watching Our Neighborhoods) cards at residences after patrolling the area to advise residents of their presence and notify them of any problems.

Juvenile Diversion

This program serves as an option for juvenile offenders who are monitored on a regular basis while having to abide by certain rules and guidelines. Infractions can result in having charges filed.

STRIVE Camp

Each summer, the department conducts the STRIVE (Students Taking Responsibility for Initiative, Responsibility, and Excellence) camp for at-risk youth.

Liaison Officers

Two officers handle liaison with the subsidized housing apartment complexes, hold monthly meetings with residents, issue newsletters, and help organize special events.

Seminars

Officers conduct seminars about the dangers and downfalls of drug abuse and gang involvement, school violence, road rage, women's assault survival, and fraud and scam activities.

Areas of Responsibility

Officers have geographical areas of the city assigned to them and are responsible for getting to know the residents and their problems and concerns.

Adopt-A-Senior

This program encourages officers on patrol in their assigned areas of responsibility to visit seniors who may experience difficulties living on their own.

efforts in such an environment illustrates the agency's commitment to the public it serves.

Constable Young has kept me informed of continuing developments that have occurred as a direct result of my visit. For example, the Ballymena Neighborhood Police Unit has implemented our department's bicycle patrol program by using bicycles as a means of patrolling areas and developing closer ties with local citizens. Also, the unit has begun using our WON (Watching Our Neighborhoods) program. This concept employs cards which officers leave at dwellings to notify residents that the police were patrolling their neighborhoods in case no one saw them at the time. Most encouraging, Constable Young recently informed me that the unit will receive additional constables to help with its community policing effort.

Conclusion

The international community policing partnership between the Medina Police Department and the Royal Ulster Constabulary constitutes one of the best training experiences of my 19-year law enforcement

career. I have made local and state presentations on my visit to Northern Ireland to share my invaluable experiences with law enforcement professionals, civic groups, and other community organizations. More important, Constable Bob Young of the Ballymena Neighborhood Police Unit has accepted my invitation to visit the Medina Police Department in the near future and actively participate in our community policing efforts.

If given the opportunity to partner with another law enforcement agency, officers should welcome the chance to exchange and share policing principles and methods. Such an effort can prove a very enriching and positive experience to observe, compare, and witness policing in other areas, as well as cultural differences both inside and outside the United States that can influence how officers interact with the citizens they are sworn to protect. ♦

Endnote

¹ James S. Roberts' official title is Mayor/Safety Director because he oversees both the fire and police departments of Medina, along with performing his mayoral duties.

Snap Shots

Captured Calf

An officer in the Wisner, Nebraska, Police Department was on patrol when he received a call that a calf was running through the main street business district. The calf had gotten loose from a local sale barn. The officer bulldogged the calf, tied its legs, and returned it to the sale barn unharmed.

Submitted by Terry L. Soden, Wisner Police Department



© Kathleen Gagne

The Americans with Disabilities Act ***A Practical Guide for*** ***Police Departments***

By THOMAS D. COLBRIDGE, J.D.



The Americans with Disabilities Act (ADA)¹ is a difficult statute to understand and implement in the workplace. The statutory definition of a disability is confusing and subject to infinite variations. Determining who is disabled, and therefore, protected by the act, is difficult at best. Defining what is or is not a reasonable accommodation for employees' disabilities is extremely difficult. To make matters worse, the Equal Employment Opportunities Commission (EEOC), the agency

charged with enforcing the ADA, and the courts often disagree on the statute's meaning.

This article will focus on providing practical advice to police administrators regarding the ADA's impact on departmental operations. It will discuss how the ADA impacts police hiring practices and day-to-day operations when departments are faced with disabled applicants and employees. Specifically, it will provide guidance regarding the questions that may be asked of applicants and employees, what

tests may be administered at the various stages of the employment process, and what reasonable accommodations should be made for applicants' and employees' disabilities.

THE ADA PHILOSOPHY AND PRACTICAL REALITIES

The purpose of the ADA is to ensure that Americans with disabilities are given equal employment opportunities and equal access to all the benefits of the workplace. In short, the statute aims to ensure that employers judge the disabled on their abilities, rather than their disabilities. To accomplish that laudable goal, the ADA divides the employment process into three distinct stages: the application/interview stage; the postconditional offer stage; and the working stage. At all of these stages, the statute attempts to strike a balance between the interest of the disabled in being judged fairly and the interest of employers in finding the most qualified workers and running an efficient enterprise. At the application/interview stage, the interest of the disabled clearly wins, because employers are severely limited in their prerogatives. At the postconditional offer stage, employers' interests are paramount, because there are few restrictions imposed by the statute on employers. During the working stage, a delicate balance is struck between the interests of disabled workers and the employers. Overlaying all of the employment stages is the employers' reasonable accommodation obligation.

The ADA has practical implications in three major areas. The first area is in the nature of



Special Agent Colbridge is a legal instructor at the FBI Academy.

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...the statute aims to ensure that employers judge the disabled on their abilities, rather than their disabilities.

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“disability-related inquiries” employers may make at the different employment stages. The second area is what kind of “medical examinations” employers may conduct at the various stages. The last area is the kind of “reasonable accommodations” employers are required to make at all stages.

DEFINITIONS

“Disability-related inquiry,” “medical examination,” and “reasonable accommodation” are terms of art under the ADA. Understanding how the ADA defines these terms is key to understanding what restrictions the ADA places on police managers.

Disability-related Inquiry

The EEOC defines a disability-related inquiry as a question or series of questions likely to elicit information about a disability.² A disability is any physical or mental impairment that substantially limits a major life activity, having a record of such an impairment, or being regarded as having such an impairment.³ Disability-related inquiries

include not only questions likely to elicit information regarding the existence of a disability, but also information regarding the nature of a disability and its severity. The definition includes employers’ questions asked directly to applicants and employees, as well as inquiries directed to third parties and surreptitious searches for information.⁴

Medical Examinations

The EEOC defines medical examinations as procedures or tests that seek information about individuals’ physical or mental impairments or health.⁵ It is not always clear whether an examination or test is medical for purposes of the ADA. The EEOC suggests the following guidelines:⁶

- If the examination or test is administered or interpreted by health care professionals, it is likely to be considered medical in nature.
- If the examination or test is normally given in a medical setting or is administered using medical equipment, or is

invasive, it is likely a medical examination.

- If the employer is trying to determine the nature or extent of applicants’ or employees’ disabilities, or the test or examination is designed to reveal impairments or disabilities, it is likely a medical test.
- If the examination or test measures individuals’ responses to performing tasks, rather than simply their ability to perform tasks, it is likely to be considered medical.

Reasonable Accommodation

Reasonable accommodation is a change in the workplace environment or in the way of doing business that permits the disabled to enjoy equal employment opportunities and benefits.⁷ The disabled have a fundamental statutory right to have their disabilities accommodated unless it would create an undue hardship on the employers or they pose a direct threat.⁸ Employers’ duty to accommodate the disabled extends to all facets of the employment relationship, from the hiring process to termination, and includes not only employment opportunities, but also access to job benefits.⁹

PRACTICAL CONSIDERATIONS FOR POLICE MANAGERS

The complexity of the ADA makes it a difficult statute for the police manager to apply to the workplace. However, the requirements of the ADA become less overwhelming when they are considered in terms of the stages of the

employment relationship: the application/interview stage; the post-conditional offer stage; and the working stage. The following discussion will set out in broad terms ADA “dos and don’ts” for police managers during these three stages.¹⁰ It will explore what inquires and examinations are permissible and what reasonable accommodations may be appropriate at each stage.

The Application/Interview Stage: Disability-related Inquiries

The impact of the ADA begins with employers’ decisions to fill a vacancy. Congress found that many applicants with disabilities were being denied employment based upon “stereotypic assumptions not truly indicative of the individual ability” of disabled persons.¹¹ To avoid the danger of stereotypic thinking, Congress, through the ADA, limits the application/interview process to exploration of only nondisability qualifications of applicants. The practical impact of this limitation has been great.

Employers must consider all potential applicants equally, including those with disabilities, and even those who have relationships with the disabled.¹² Nothing in job postings or vacancy notices should discourage the disabled from applying for open positions.

During the application/interview process, the ADA bars employers’ disability-related inquiries (i.e., those that are likely to elicit information about disabilities.)¹³ Consequently, applications and interviews should not include direct

questions regarding the existence of disabilities, or their nature or extent. Employers may not ask if applicants will need reasonable accommodation to do the job for which they have applied, because the response is likely to reveal information regarding disabilities.¹⁴ The ban includes asking questions concerning the applicants’ workers compensation history, because any response is likely to include disability-related information.¹⁵ Because employers are prohibited from directly asking applicants about disabilities at this stage, they may not solicit the same kind of information from third parties.¹⁶

“
The EEOC defines a disability-related inquiry as a question or series of questions likely to elicit information about a disability.
”

The application/interview stage is entirely separate from the post-conditional offer and employment stages under the ADA. Therefore, while employers may not ask if applicants will need reasonable accommodation to do the job, they may ask if applicants will need reasonable accommodation to complete the application/interview process.¹⁷ Employers should describe the process (written tests or job demonstrations), and ask if

reasonable accommodation is needed. If it is, the employer may ask for documentation for the need if the disability is not obvious.¹⁸

Employers may ask applicants about nonmedical qualifications and skills required to perform the job: education, work experience, and mandated certifications and licenses.¹⁹ Certain questions about attendance are permissible. For example, employers may state their attendance requirements and ask if the applicant can meet them. However, employers should avoid questions about the number of sick days the applicant has taken in the past, because the answer is likely to disclose disability-related information.²⁰ Applicants may also be asked to reveal their arrest or conviction records because the request is not likely to raise disability issues.²¹

While broad questions likely to reveal the existence of disabilities are prohibited during this stage, narrowly tailored questions concerning the performance of specific job functions are not.²² For example, police recruiters may describe the functions of police officers and ask applicants if they can perform those functions, or to describe how they would do them, if all applicants are asked. In addition, applicants may be asked to demonstrate how they would perform these functions if all applicants are asked. If applicants reveal that they need reasonable accommodation for the demonstration, employers must provide the accommodation unless it would create an undue hardship.²³

Questions concerning drug use are difficult. Addiction to drugs,

both past and current, is a disability under the ADA,²⁴ so direct questions pertaining to addiction are prohibited. Therefore, questions such as “Are you addicted to drugs?” and “Have you ever been treated for drug addiction?” are impermissible. Current illegal drug²⁵ use, however, is not a disability under the ADA, even if the current use results from addiction.²⁶ Consequently, employers may ask applicants if they currently use illegal drugs. Past casual illegal drug use is not a disability, so questions regarding such use are permissible: “Have you ever used illegal drugs?;” “When was the last time you used illegal drugs?;” “Have you used illegal drugs in the last 6 months?”²⁷ It would violate the ADA, however, to ask applicants to list all medications they currently take because the question is likely to illicit information concerning disabilities. There is one exception to this prohibition against inquiring about current medication use. As noted below, employers are permitted to test applicants for current illegal drug use. If the drug test is positive, employers may validate the test by asking applicants about lawful drug use or other possible explanations.²⁸

Like drug addiction, alcoholism is a disability under the ADA if it substantially limits a major life activity.²⁹ Consequently, employers are prohibited from asking applicants questions that are likely to elicit information about their addiction to alcohol.³⁰ However, employers may ask if applicants drink, as long as the questions are not aimed at discovering how much they drink.³¹

The Application/Interview Stage: Medical Examinations

Medical examinations are prohibited during the application/interview stage.³² Tests for illegal drug use are not considered medical examinations under the ADA, so employers may test applicants for current illegal drug use.³³ However, the EEOC has ruled that tests for alcohol use are medical in nature, and violate the ADA at this stage of the employment process.³⁴

“
The EEOC defines medical examinations as procedures or tests that seek information about individuals’ physical or mental impairments or health.
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Two other kinds of tests may also be given at this stage. Physical agility tests that demonstrate the ability to do actual or simulated job-related tasks, with or without reasonable accommodation, are permissible if given to all applicants.³⁵ Examples of such tests for police applicants are the trigger pull test, obstacle courses simulating police chases and vision tests designed to determine if applicants can distinguish objects or read license plates. Employers may also require that applicants take physical fitness tests that measure their ability to do

physical tasks such as running and lifting, so long as all applicants must do so.³⁶ Neither test is considered a medical examination under the ADA unless applicants’ physiological or psychological responses to the tests are measured.³⁷ It does not violate the ADA to require that applicants certify that they can safely perform these tests.³⁸ If such a certification is required, employers should describe the tests to the applicant, and simply have their physician state whether or not they can safely perform the tests. It is also important to understand that if either physical agility or fitness tests screen out or tend to screen out disabled applicants, employers must be prepared to defend the tests as both job-related and consistent with business necessity.³⁹

Applicants may also be given psychological tests that are not aimed at uncovering recognized mental disorders.⁴⁰ Psychological tests that measure such things as honesty, tastes, or habits are not considered medical examinations under the ADA.⁴¹

Polygraph examinations of applicants at the application/interview stage do not violate the ADA if no disability-related questions are asked during the exam.⁴² However, to ensure accurate results, examiners generally must ask examinees prior to the exam if they are taking any medications that might affect the results. Such a question could violate the ADA because the answer is likely to elicit information regarding disabilities. Consequently, it may be wise to postpone the polygraph examination to the post-conditional offer stage. Before

administering any polygraph examinations, however, police administrators should consult with their legal advisors regarding their legality under state law and local labor contracts.⁴³

The Application/Interview Stage: Reasonable Accommodation

The ADA's statutory obligation to reasonably accommodate disabilities applies to the interview/application stage.⁴⁴ Employers must accommodate all applicants' known disabilities unless it would create an undue hardship on them. Employers may become aware of applicants' disabilities because it is obvious, or because the applicants disclosed their disabilities in response to the employers' inquiry for the need to accommodate them during the application/interview process.

Once the need for accommodation is demonstrated, the parties should decide what accommodations are appropriate. Typical accommodations at this stage include changing testing dates to accommodate doctors' appointments, changing testing sites to those accessible by the disabled, and giving applicants with reading disabilities more time to complete written examinations. The forms of accommodation are as varied as the imaginations of employers and applicants.

As can be seen from this discussion, the ADA limits the application/interview stage to employer inquiries and examinations designed to judge all of the non-disability related qualifications of applicants. But what if employers know at this stage that applicants are disabled?

Must they ignore the disabilities entirely, even if they reasonably believe the disabilities will impact the applicants' ability to do the job?

There are several ways employers could lawfully become aware of applicants' disabilities. The disability may be obvious, such as a lost limb, or the use of a wheelchair. The applicant may have voluntarily disclosed the disability through a request for reasonable accommodation during the application/interview stage, or in response to employers' inquiries about their ability to perform job functions.



The EEOC has stated that when employers reasonably believe that applicants will need reasonable accommodation to perform job functions, they may discuss with applicants if accommodation will be needed, and the form that accommodation may take.⁴⁵ After these discussions, employers may decide that they cannot accommodate the disability because the applicants cannot perform the essential functions of the job, or pose a direct threat, or because the accommodation needed is unduly burdensome.

If employers do not extend an offer to disabled applicants because of their disability, they must be prepared to defend their decisions against claims that they failed to hire the applicants because of the need to reasonably accommodate their disabilities.⁴⁶

Once employers have judged applicants based upon their non-disability related qualifications during the application/interview stage, found them qualified, and made bona fide job offers to them, the ADA permits employers to face the issue of disabilities. Employers may now inquire about disabilities, require medical examinations, and condition their employment offers on the results of these medical examinations.

The EEOC considers job offers bona fide if they are made after employers have evaluated all of the relevant nonmedical information it reasonably could have gotten and analyzed before making the offer.⁴⁷ Conditional offers do not have to be limited to current vacancies. Conditional offers are still bona fide if they are made in reasonable anticipation of future vacancies. The number of offers may even exceed the number of current and anticipated vacancies if employers can demonstrate that a percentage of offerees will likely be disqualified or drop out of the pool.⁴⁸

The Postconditional Offer Stage: Disability-related Inquiries

After making a conditional offer of employment, employers may ask applicants if they have disabilities and will need

reasonable accommodation to perform the job.⁴⁹ There is no restriction on the nature of questions that may be asked. Consequently, employers may ask all of the questions prohibited during the application/interview stage: questions regarding the existence of disabilities, workers' compensation histories, sick leave usage, drug and alcohol addiction, as well as questions regarding general physical and mental health. The only conditions imposed on employers by the ADA are that all offerees be asked these questions, and that information gathered in response to the questions be kept confidential.⁵⁰

If inquiries uncover disabilities, employers are bound by the basic requirements of the ADA. They reasonably must accommodate the disabilities unless the accommodation would pose an undue hardship or the person poses a direct threat.⁵¹ If the inquiries result in conditional offers being withdrawn because of the disabilities, employers must be prepared to show that the exclusionary criteria is not discriminatory based upon disability, or is job-related and consistent with business necessity,⁵² or they could not reasonably accommodate the disability,⁵³ or because the offeree poses a direct threat to the health or safety of others.⁵⁴

The Post-Conditional Offer Stage: Medical Examinations

The ADA permits employers to require medical examinations after bona fide job offers have been made to applicants. The only conditions on these examinations are that

all applicants be subject to the examinations and the results be kept confidential.⁵⁵

All of the medical examinations barred at the application/interview stage are now permitted. There are no restrictions on the nature of these examinations, not even a requirement that they be job-related or matters of business necessity.⁵⁶



As with post conditional offer disability-related inquiries, if medical examinations given at this stage reveal a disability and result in the offer being withdrawn, employers must be prepared to defend their decision because it does not discriminate against the disabled, or the disability could not be accommodated, or because the criteria upon which the decision was based is job-related and a matter of business necessity, or because the offeree poses a direct threat to health or safety.

The Postconditional Offer Stage: Reasonable Accommodation

Because the ADA requires employers to reasonably accommodate

disabilities at all stages of the employment process, accommodation must be made for the offerees' disabilities unless it creates an undue burden. It is impossible to specify all accommodation possibilities. Examples may include reformatting a written psychological tests for blind or dyslexic offerees, or rescheduling examination times to accommodate medical appointments.

Once the post-conditional offer stage is over, and offerees are officially employees, the ADA reimposes restrictions on employers' prerogatives. These restrictions apply to both disability-related inquiries and medical examinations. In addition, the full impact of the employers' reasonable accommodation obligation is felt at this stage.

The Working Stage: Disability-Related Inquiries

The ADA permits employers to make disability-related inquiries of employees only if the inquiries are job related and consistent with job necessity.⁵⁷ Consequently, employers are generally barred from asking employees about the existence of disabilities, or their nature and extent.⁵⁸ The prohibition includes questions concerning workers' compensation histories, questions about current or past prescriptions, and broad questions about impairments likely to elicit information about disabilities.⁵⁹ The statute does permit inquiries regarding employees' ability to perform job-related functions,⁶⁰ as well as current illegal drug use, because current illegal drug users are not protected by the ADA.⁶¹ Information received from

employees in response to these questions must be kept confidential.

Disability-related inquiries are job-related and consistent with business necessity when employers have a reasonable belief, based upon objective evidence, that employees' ability to do their jobs is impaired, or that employees pose a direct threat because of the condition.⁶² That objective evidence generally comes in three forms: a deterioration in employees' work performance or attendance records; an employees' request for accommodation for a disability; or if employees are returning to work from medical or workers' compensation leave. In all three cases, employers may have legitimate concerns regarding the employees' abilities to perform the essential functions of their jobs, so inquiries are permissible if limited to issues of job performance, and responses are kept confidential.⁶³

The EEOC recognizes that public safety employees are in a unique position. Because of that, police managers are sometimes given additional flexibility. For example, while asking employees about prescription medication use is generally prohibited, police officers taking certain medications may pose a direct threat to the public and other officers. Consequently, departments may require officers to report when they are taking certain medications that may impair their judgment or ability to use a firearm.⁶⁴

Employers are also permitted to make disability-related inquiries of their employees if required to do so by federal law.⁶⁵ The EEOC cites

federal safety regulations governing the transportation and airlines industries.

Another exception to the ban on posing disability-related questions to employees is when they are asked as part of a voluntary employee health program.⁶⁶ If the program is truly voluntary, such measures as blood pressure screening, weight control counseling, and cancer detection are permissible, if confidentiality is maintained.⁶⁷

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Employers may ask applicants about nonmedical qualifications and skills required to perform the job....

”

The Working Stage: Medical Examinations

As with disability-related inquiries, medical examinations of employees only may be required when the examination is job-related and a matter of business necessity,⁶⁸ meaning when employers reasonably believe employees cannot perform job-related functions.

Objective evidence of the employees' inability to perform is the same as discussed above: deterioration in employees' performance or attendance records, as part of a reasonable accommodation request, or upon employees' return to work after medical or workers'

compensation leave. Employers also may require medical examinations to comply with federal regulatory requirements; or as part of a voluntary wellness program.

The EEOC and the courts have decided that periodic medical examinations of public safety personnel, even with no objective evidence of current job-related problems, are permissible under the ADA, because undetected medical problems of public safety personnel may pose a direct threat.⁶⁹ The EEOC has ruled that such examinations for public safety positions are permissible when tailored narrowly to address specific job-related concerns and are consistent with business necessity.⁷⁰ In *Watson v. City of Miami*,⁷¹ a police officer challenged the city's required periodic testing of its police officers for tuberculosis. The federal Court of Appeals for the 11th Circuit decided that such testing was permissible under the ADA. If such tests reveal a disability, police managers reasonably must accommodate it. If the disability cannot be accommodated, they must be prepared to demonstrate that officers cannot perform their essential functions, or that they pose a direct threat.

The Working Stage: Reasonable Accommodation

The full impact of the ADA's reasonable accommodation obligation occurs when current employees become disabled. Failure to reasonably accommodate employees' disabilities is clearly discrimination under the ADA, unless employers can demonstrate an undue hardship,⁷² or that disabled employees

cannot perform essential functions,⁷³ or would pose a direct threat.⁷⁴

It is impossible for police manager to identify all reasonable accommodations for employees' disabilities. However, it is possible to set out a general approach to the problem recognized by the courts and the EEOC.

Once employers become aware of employees' disabilities, they should begin to explore what, if any, reasonable accommodations are available. It is important to remember that only otherwise qualified employees who can perform the essential functions of the job sought or desired, with or without reasonable accommodation, are entitled to reasonable accommodation. Once it is decided that employees are entitled to ADA protection, certain logical steps should be followed.

Accommodation in Place

The first form of accommodation that should be considered is accommodation of employees in their current positions. The statute itself suggests certain kinds of appropriate accommodations: implementing part-time or modified work schedules; acquiring or modifying equipment or devices; restructuring jobs; and making existing facilities readily accessible to and usable by disabled employees.⁷⁵

Modifying work schedules may be an easy solution to the problem. For example, ensuring that disabled employees get scheduled days off when they have doctors' appointments may be reasonable. Changing shifts or permitting

employees to use sick or vacation time are other considerations. Employers are not required to consider these options, however, if they are unduly burdensome. For example, if employers can demonstrate these accommodations are too costly because of the need to hire temporary workers, or too disruptive because of the need to reassign the absent employees' work to others, the accommodation may be unreasonable

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Employers must
accommodate all
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”**

and therefore not required.⁷⁶ Providing additional leave beyond that given to other employees is not required.⁷⁷

Employers may also consider buying devices that will permit the disabled employee to perform the job. It may be as simple as buying a different chair, or braille materials that can be read by blind employees. The accommodation may also include making the disabled workers' space accessible by adding a ramp or widening doors. As always, this form of accommodation is subject to undue hardship limitations of cost and disruption to the workplace.

Job restructuring means changing the job itself to accommodate the disability. This involves analyzing the various functions of the job, determining which functions disabled employees cannot do, and eliminating those functions if they are not essential to the job, or changing when or how a job function is done.⁷⁸ Both the courts and the EEOC have recognized that employers need not eliminate essential job functions as part of the reasonable accommodation process.⁷⁹ Job restructuring is also subject to the undue hardship limitation. If restructuring entails hiring additional workers to cover eliminated functions or unduly burdening other employees, it may be unreasonable.

Reassignment

If disabled employees cannot be accommodated in their current positions, employers should consider reassignment to jobs they can perform. They need only consider current vacancies or vacancies that will occur in the near future, and jobs for which the disabled worker is qualified.⁸⁰ Employers do not have to “bump” employees to make room for a disabled worker, nor are they required to promote a disabled worker in order to keep them in the company.⁸¹ Employers should first attempt to reassign disabled workers to positions with equivalent pay and benefits. If it is not possible to do so, employers are not required to pay the disabled worker more than the position requires.⁸²

Police departments often create “light duty” jobs for injured officers. While the practice is laudable, it is not required by the

ADA.⁸³ The practice may have unintended consequences if employees stay in the position too long. For example, if disabled employees are transferred to newly created light duty positions with no understanding that they are temporary, courts may decide the disabled employees are entitled to ADA protection in the new positions.⁸⁴ To avoid this situation, departments should create only light duty temporary positions to be filled by injured employees during their convalescence.⁸⁵

It is currently unclear whether employers are required to reassign disabled workers to vacant positions when they have a more qualified applicant for the same position, or when the reassignment would violate a company policy. The EEOC takes the position that the disabled worker must be reassigned, not simply permitted to compete for the position.⁸⁶ The Commission also takes the position that a company policy to the contrary must be modified to allow the reassignment.⁸⁷ Some courts have agreed.⁸⁸ However, a recent court decision disagreed with that position, holding that disabled workers do not have to be given preference in reassignment to another position where employers had better non-disabled applicants, a policy of giving jobs to the best applicants, and the employees' disability played no role in the decision.⁸⁹ Most courts have found that employers need not assign disabled workers to vacant positions when the reassignment would violate seniority rights established under a collective bargaining agreement.⁹⁰

Termination

If all forms of reasonable accommodation for employees' disabilities have been considered and proven ineffective or unduly burdensome, employers are under no legal obligation to continue employing disabled workers. The ADA does not prohibit termination of workers who cannot do the essential functions of the jobs they hold or seek, with or without reasonable accommodation.⁹¹



CONCLUSION

The ADA has a profound impact on the way police administrators manage their workplaces. To ensure that employers judge disabled applicants and workers fairly, the ADA strikes a balance between the interests of the parties. At the application/interview stage, employers are restricted to only asking questions and administering examinations aimed at exploring the non-disability-related qualifications of applicants.

Once applicants have been considered qualified, and the conditional offer of employment made to them, employers may fully examine the issue of offerees'

disability. If disabilities are discovered, employers must accommodate them if it is reasonable to do so. If the disabilities cannot be reasonably accommodated, or the disabled applicant poses a health or safety risk, the offer may be withdrawn. If the offeree fails tests or examinations that are job-related and matters of business necessity, the offeree need not be hired.

Once offerees become employees, the ADA reimposes restrictions on employers. They are again limited regarding the kind of questions they may ask employees, and the kind of examinations they may require employees to take. If workers become disabled, employers are required to reasonably accommodate them unless it is unduly burdensome, or the employees pose a risk. ♦

Endnotes

- ¹ 42 U.S.C. 12101, *et. seq.*
- ² EEOC, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, 10/10/95.
- ³ 42 U.S.C. 12102(2).
- ⁴ *Supra* note 2; *Doe v. Kohn, Nast & Graf, P.C.*, 866 F.Supp. 190 (E.D. Pa. 1994).
- ⁵ *Supra* note 2.
- ⁶ *Supra* note 2.
- ⁷ 29 CFR Pt. 1630 App. 1630.2(o).
- ⁸ 42 U.S.C. 12112(b)(5)(A) and (B).
- ⁹ 42 U.S.C. 12112(a).
- ¹⁰ Police managers are urged to consult their legal advisors regarding specific ADA questions. Most states have enacted their own statutes regarding disability discrimination, which may differ from the provisions of the ADA.
- ¹¹ 42 U.S.C. 12101(a)(7).
- ¹² *See* 42 U.S.C. 12112(b)(1)-(7).
- ¹³ 42 U.S.C. 12112(d)(2).
- ¹⁴ *Supra* note 2.
- ¹⁵ *Supra* note 2.
- ¹⁶ *Supra* note 2.
- ¹⁷ *Supra* note 2.
- ¹⁸ *Supra* note 2.

¹⁹ *Supra* note 2. Employers should be aware that these types of qualification standards are also subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*). Managers should consult their legal advisors regarding the possible impact of this antidiscrimination statute.

²⁰ *Supra* note 2.

²¹ *Supra* note 2. Employers should consult their legal advisors regarding the impact of Title VII on this qualification standard.

²² *Supra* note 2.

²³ *Supra* note 2.

²⁴ *Supra* note 2.

²⁵ Illegal drugs are those described in schedules I through V of the Controlled Substances Act, 21 U.S.C. 812; 29 CFR 1630.3(a)(1).

²⁶ 42 U.S.C. 12114.

²⁷ *Supra* note 2.

²⁸ *Supra* note 2.

²⁹ See 42 U.S.C. 12114(c)(4); *Bekker v. Humana Health Plan, Incorporated*, 2000 WL 1419610 (7th Cir. 2000); *Martin v. Barnesville Exempted Village School District Board of Education*, 209 F.3d 931 (6th Cir. 2000).

³⁰ *Supra* note 2.

³¹ *Supra* note 2.

³² 42 U.S.C. 12112(d)(2)(A).

³³ 42 U.S.C. 12114(d)(1).

³⁴ *Supra* note 2.

³⁵ *Supra* note 2; 29 CFR 1630.14(a); 29 CFR, App., Pt. 1630.14(a). Employers should also consult their legal advisors on the impact of Title VII of the Civil Rights Act of 1964, as amended, on the use of physical agility and physical fitness tests as selection criteria.

³⁶ *Supra* note 2.

³⁷ *Supra* note 2.

³⁸ *Supra* note 2.

³⁹ 42 U.S.C. 12112(b)(6). In addition, employers must be prepared to meet challenges to these tests under Title VII of the Civil Rights Act of 1964, as well as other discrimination statutes.

⁴⁰ Recognized mental disorders are listed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM).

⁴¹ *Supra* note 2; *Barnes v. Cochran*, 944 F.Supp. 897 (S.D. Fla. 1996), affirmed 130 F.3d 443 (11th Cir. 1997).

⁴² *Supra* note 2.

⁴³ In 1988, Congress passed the Employee Polygraph Protection Act (EPPA), 29 U.S.C. 2001 *et seq.* This law prohibits the use of polygraph screening by most private sector employers. It does not apply to federal, state, or

local government employers. However, it does not preempt more restrictive state laws or collective bargaining agreements. Police administrators should consult their legal advisors concerning the use of the polygraph.

⁴⁴ 42 U.S.C. 12112 (b)(5)(A).

⁴⁵ *Supra* note 2.

⁴⁶ 42 U.S.C. 12112(b)(5)(B).

⁴⁷ *Supra* note 2.

⁴⁸ *Supra* note 2.

⁴⁹ *Supra* note 2; 29 CFR Pt. 1630, App. 1630.14(b).

⁵⁰ *Supra* note 2.

⁵¹ 42 U.S.C. 12112(b)(5)(A).

⁵² 42 U.S.C. 12112(b)(6); 42 U.S.C. 12113(a).

⁵³ 42 U.S.C. 12112(b)(5)(A).

⁵⁴ 42 U.S.C. 12113(b).

⁵⁵ 42 U.S.C. 12112(d)(3). The only exceptions to the confidentiality requirement are that supervisors may be informed about job necessary restrictions because of the medical condition, that safety personnel may be told if the condition may require emergency treatment, and that government compliance officials be given relevant information on request.

⁵⁶ *Supra* note 2; 29 CFR Pt. 1630, App. 1630.14(b).

⁵⁷ 42 U.S.C. 12112(d)(4)(A); 29 CFR 1630.14(c).

⁵⁸ EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act, Notice no. 915.002 (7/27/00).

⁵⁹ *Id.*

⁶⁰ 42 U.S.C. 12112(d)(4)(B).

⁶¹ 42 U.S.C. 12114(a); EEOC, Enforcement Guidance, *supra*, note 58.

⁶² EEOC, Enforcement Guidance, *supra*, note 58.

⁶³ 29 CFR Pt. 1630, App., 1630.14(c); *Watson v. City of Miami*, 177 F.3d 932 (11th Cir. 1999).

⁶⁴ EEOC, Enforcement Guidance, *supra*, note 58.

⁶⁵ EEOC, Enforcement Guidance, *supra*, note 58. Employers should consult with their legal advisors regarding the impact of state laws on this exception.

⁶⁶ 42 U.S.C. 12112(d)(4)(B).

⁶⁷ 29 CFR Pt. 1630, App., 1630.14(d).

⁶⁸ 42 U.S.C. 12112(d)(4)(A).

⁶⁹ EEOC, Enforcement Guidance, *supra* note 58.

⁷⁰ EEOC, Enforcement Guidance: Psychiatric Disabilities and the Americans With Disabilities Act (March 25, 1997). In addition,

such tests are subject to challenges under Title VII of the Civil Rights Act of 1964, as amended. Departments should consult with their legal advisors to ensure that such periodic exams do not discriminate against protected Title VII classes.

⁷¹ *Supra* note 63.

⁷² 42 U.S.C. 12112(b)(5)(A).

⁷³ *Id.*

⁷⁴ 42 U.S.C. 12113(b).

⁷⁵ 42 U.S.C. 12111(9).

⁷⁶ 29 CFR Pt. 1630, App. 1630.15(d).

⁷⁷ EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (3/1/99). Employers also should consult their legal advisors regarding the impact of the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*

⁷⁸ *Id.*

⁷⁹ *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995), *supra* note 77.

⁸⁰ *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011 (8th Cir. 2000).

⁸¹ *Id.*

⁸² *Supra* note 77.

⁸³ *Hoskins v. Oakland County Sheriff's Department*, 2000 WL 1043238 (6th Cir. 2000).

⁸⁴ See *Haysman v. Food Lion, Inc.*, 893 F.Supp. 1092 (S.D. Ga. 1995).

⁸⁵ See *Shiring v. Runyon*, 90 F.3d 827 (3rd Cir. 1996).

⁸⁶ *Supra* note 77.

⁸⁷ *Supra* note 77.

⁸⁸ *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999).

⁸⁹ *Equal Employment Opportunity Commission v. Humiston-Keeling, Inc.*, 2000 WL 1310519 (7th Cir. 2000).

⁹⁰ See *Willis v. Pacific Maritime Association*, 162 F.3d 561 (9th Cir. 1998).

⁹¹ *Disanto v. McGraw-Hill, Incorporated/Platts Division*, 220 F.3d 61 (2nd Cir. 2000); *Treanor v. MCI Telecommunications Corporation*, 200 F.3d 570 (8th Cir. 2000).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize their exemplary service to the law enforcement profession.



Officer Mowry



Officer Ratliff



Officer Rowe

Officers Stacy Mowry, Will Ratliff, and Chris Rowe of the Nampa, Idaho, Police Department responded to a fire at an old, three-story former motel that served as a residential facility. Using ladders at the rear of the building, Officers Mowry, Ratliff, and Rowe entered the second and third floors of the burning building to rescue occupants. Additionally, they searched the ground floor to help several

residents reach safety. After their rescue efforts, Officers Mowry, Ratliff, and Rowe helped move injured individuals to ambulances and temporary emergency shelters. Although this tragic fire claimed two lives and critically injured several residents, the rescue efforts of Officers Mowry, Ratliff, and Rowe saved numerous other citizens from serious danger.



Officer Potter



Officer Goss

During the early morning hours, Officers W.A. Potter and C.S. Goss of the Raleigh, North Carolina, Police Department responded to a one-car accident. The officers found the driver thrown from the vehicle, dead at the scene, and the passenger unconscious in the mangled and burning vehicle. Officer Goss used a fire extinguisher to put out the fire while Officer Potter climbed in the driver's side door, unbuckled the passenger's

seatbelt, and removed him from the burning vehicle. The two officers carried the passenger away from the car where the victim could be treated safely. Although the vehicle accident resulted in the loss of one life, the quick, decisive actions of Officers Potter and Goss saved the life of the passenger.

Nominations for the *Bulletin Notes* should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions should be sent to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 209, Quantico, VA 22135.

U.S. Department of Justice
Federal Bureau of Investigation
FBI Law Enforcement Bulletin
935 Pennsylvania Avenue, N.W.
Washington, DC 20535-0001

Periodicals
Postage and Fees Paid
Federal Bureau of Investigation
ISSN 0014-5688

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Patch Call



The patch of the Mississippi Department of Wildlife, Fisheries, and Parks features a deer, a fishing boat, and a campfire representing the wildlife, fisheries, and campsites found throughout the parks.



The University of Alaska Fairbanks, Police Department depicts the University's polar bear mascot "Nanook." The mountains in the background represent the Alaska Range with a winter sun low over the mountains.