Chapter 5
Current Issues in Psychological Fitness-for-Duty Evaluations of Law Enforcement Officers:
Legal and Practice Implications

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ABSTRACT

Courts throughout the United States have ruled that that the "awesome powers" entrusted to law enforcement officers, and the safety-sensitive nature of their positions, impose on their public employers a responsibility to ensure that they are fit to perform their duties. But, as with an officer's powers, the authority of a police employer to mandate a psychological fitness-for-duty evaluation (FFDE) is not without boundaries. This chapter addresses the legal authority of a police employer to require an FFDE, the limits to that authority, and the implications of these constraints both for police employers and the psychologists who conduct these evaluations on their behalf. Written by two prominent experts in police employment law and police psychology, this chapter concerns itself with both the law and professional standards of practice. Key topics include the legal threshold for requiring an FFDE, limitations to the content of an FFDE report, and evaluator qualifications.

INTRODUCTION

A long series of statutory and case law authority dating back more than 50 years establishes both the right and the obligation of police employers to ensure that their officers are physically and mentally fit to perform their job duties and exercise the powers of a law enforcement officer (*Bonsignore v. City of New York,* 1982; *Conte v. Horcher,* 1977; *People ex rel. Ballinger v. O'Connor,* 1982). Although quite broad, the authority of a police employer to order an officer to submit to a psychological fitness-for-

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duty evaluation (FFDE) is not without restrictions. The law—comprised of statutes and regulations, and court decisions that interpret the meaning and application of both—also places constraints on the scope of the evaluation, the acquisition and communication of private information, the role of a mental health expert in making employment decisions, and, in some jurisdictions, who is qualified to perform these evaluations. Standards of practice and ethics also serve to guide a police psychologist's decisions concerning the antecedent conditions, informed consent, assessment methods, reporting constraints, and other considerations associated with FFDEs (American Psychological Association [APA], 2015; International Association of Chiefs of Police [IACP], 2013).

Indeed, it is where the law and standards of psychological practice intersect that the parameters of a proper FFDE can be found. In this chapter, we focus on this intersection and discuss emerging trends in the law and their practice implications for both the police employer and psychologist. This chapter is not intended to provide legal advice, which necessarily requires an attorney's consideration of the facts of a particular case in combination with state and federal law, provisions of any collective bargaining agreement, institutional policies and procedures, and local risk management decisions. Furthermore, this chapter is intended to supplement, not supplant, existing treatises on the topic (e.g., APA, 2015; Corey, 2011; Corey & Borum, 2013; Fischler, McElroy, Miller, Saxe-Clifford, Stewart, & Zelig, 2011; Gold & Shuman, 2009; Piechowski & Drukteinis, 2011; Rostow & Davis, 2004; Stone, 2000) by focusing on contemporary issues and controversies.

The Legal Threshold

Once an employee is on the job, actual performance is generally the best measure of the employee's ability to do the job (Equal Employment Opportunity Commission [EEOC], 1995). Courts have long held that capricious, retaliatory, or punitive demands for psychological evaluations of incumbent employees "*based solely on the will and not the reason of the public employer*, would constitute an arbitrary and unlawful imposition of terms and conditions of public employment" (*Hill v. City of Winona,* 1990, at 661, footnote 1, emphasis added; see also *McGreal v. Ostrov,* 2004; *Merillat v. Michigan State University,* 1994; *Watts v. Alfred,* 1992). On the other hand, courts also have given broad authority to employers to mandate medical evaluations of their employees, particularly those engaged in safety-sensitive work, when doing so serves the goal of reducing the risk of injury to the employee or others. The standard for justifying an FFDE is often referred to as the "threshold" (cf. APA, 2015; IACP, 2013). We next discuss three elements of the legal threshold question: when FFDEs *may be* conducted (including when they do not violate an employee's legal rights), when they *should be* conducted, and when they *should not be* conducted.

When Fitness-for-Duty Evaluations May Be Conducted

The Americans with Disabilities Act of 1990 (ADA, 1990) is the federal statute with the greatest controlling authority over an employer's ability to require a medical evaluation of an employee. However, it must also be noted that state laws may provide greater protections than do the ADA. In California, for example, the Fair Employment and Housing Act (FEHA, 2011) is just such a law.

According to the ADA, when an employer has a reasonable belief, based on objective evidence, that a police officer may have a psychological condition that impairs his or her ability to perform essential job functions or poses a direct threat, an FFDE is "job-related and consistent with business necessity"