February 27, 2006
[REISSUED June 5, 2006]

Request for Proposals/Reissued: TCRP J-5, Study Topic 9-03, Application of Physical Abilities Testing to Current Workforce of Transit Employees

Dear Attorney:

The Technical Activities Division of the Transportation Research Board (TRB), as part of its work with the Transit Cooperative Research Program (TCRP), plans to award a contract for a study and report. The research Problem Statement is enclosed for your consideration.

TRB anticipates an estimated 400 hour level of effort, and compensation in the $24,000.00 to $36,000.00 range for this study topic.

Research reports sponsored by this project are published in TRB’s Legal Research Digests (LRD) series. LRDs are distributed to some libraries and to approximately 4000 transportation lawyers and officials through the TRB distribution network.

After reviewing the enclosed statement, if you are interested in being considered as the researcher and author, you should reply by mail or before June 30, 2006 to:

James B. McDaniel
Counsel for Legal Research Projects
Transportation Research Board
500 5th Street, NW
4th Floor
Washington, DC 20001
Tel: (202) 334-3209
Fax: (202) 334-2003
Email: jmcdaniel@nas.edu

Your reply should include: a statement of interest; a resume; a list of your prior publications (you may enclose one or two publications); a statement of resources you will allocate to this project; any additions, deletions, or changes you may wish to suggest for undertaking the work; and your requested compensation.

Offerors are evaluated by Project Panel members and TCRP staff consisting of individuals collectively knowledgeable in the problem area. Evaluations are based upon the offerors’: 1) experience in the subject area; 2) understanding of the work (demonstrated by the commitment of resources); 3) prior relevant publications (including briefs); 4) schedule for completing the work; and 5) price.
Feel free to call me at (202) 334-3209 if you have any questions.

Sincerely,

James B. McDaniel
Counsel for Legal Research Projects

Enclosure

JBM/jlc
Applications of Physical Abilities Testing to Current Workforce of Transit Employees

PROBLEM STATEMENT
Revised

Physical abilities testing is accepted as a prerequisite to employment in the transit field, particularly for safety-sensitive job positions. Applicants for the position of bus, truck, or rail operator are generally required to undergo tests that demonstrate their fitness to perform daily job related functions. ¹ Often an applicant, otherwise qualified, will be placed in a probationary status until the acceptable results of such tests certify full employment. ² However, such testing is fraught with litigation challenges. The refusal to hire a job applicant for failing to meet certain health thresholds may lead to civil litigation under the American with Disabilities Act. ³ Tests that have lead to disparate hiring results may be subject to challenges under Civil Rights legislation and case law. ⁴

One of the more common types of testing is drug and alcohol testing, under the rules issued by the Department of Transportation and its various administrations.⁵ The U.S. Secretary of Transportation has the duty to prescribe regulations and issue orders that affect all modes of transportation. After several significant transportation accidents, Congress passed the Omnibus Transportation Employee Testing Act of 1991, because it recognized the safety need for ensuring drug- and alcohol-free transportation employees. The "Act" required DOT Agencies to implement drug testing of safety-sensitive transportation employees in the aviation, trucking (including school bus drivers, and certain limousine and van drivers), railroads, mass transit, and

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² Albertson’s, Inc. v. Kirkingberg, 527 U.S. 555, 119 S.Ct. 2162, 144 L.Ed. 2d 518 (1999) (truck driver fired for failing to meet the basic DOT vision standards).
³ The Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., forbids employers from discriminating against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. It also expressly allows examinations or inquiries as to whether an employee has a disability or as to the severity of a disability, if such examinations/inquiries are job-related and consistent with business necessity. 42 U.S.C.S. § 12112(a). See also, Murphy v. UPS, 527 U.S. 516, 119 S.Ct. 2133, 144 L.Ed. 2d 484 (1999) (commercial driver’s blood pressure exceeded DOT’s requirements).
⁵ See 49 CFR Parts 40, 655 (testing of safety-sensitive transit workers).
pipelines industries. In 1994, DOT added alcohol testing requirements to its regulations. The regulations prohibit covered employees from using or possessing alcohol or any controlled substance. The regulations further prohibit employees from reporting for covered service while under the influence of, or impaired by, alcohol, or while under the influence of, or impaired by, any controlled substance. As a result, employers in both the public and private transit sector have implemented related drug and alcohol testing programs.

Required drug and alcohol tests fall under the categories of pre-employment, suspicion-based testing, post-accident testing, random testing, and follow-up testing. Suspicion-based testing is prompted by a reasonable belief that an employee is engaging in some conduct prohibited by or hazardous to the requirements of his occupation. Complaints regarding an employee’s drug or alcohol impairment may give rise to this type of testing. Post-accident testing is usually triggered when the employee has been involved in a workplace accident that resulted in death, injury, or property damage. Pursuant to a random testing policy, an employer targets individuals by statistically random procedures. Courts have sustained random drug testing for government workers in safety-sensitive or high-risk positions. After an employee has tested positive, the employer often incorporates a return-to-work agreement that provides for an employee to submit to the federally mandated periodic follow-up testing as a condition of continued employment.

In addition to federally mandated testing, employers often conduct periodic testing, which usually occurs at announced intervals in conjunction with regularly scheduled routine physical examinations, such as to maintain a commercial driver's license.

State agencies have stringent periodic physical testing procedures for school bus drivers. In Illinois a person who drives or is in actual physical control of a school bus or any other vehicle owned or operated by or for a public or private school is deemed to have given consent to a chemical test or tests of blood, breath, or urine for the purpose of determining the alcohol content of the person's blood. In Pennsylvania, school bus operators receive an annual physical examination administered by a school transportation physician, practical nurse, or a physician’s assistant.

The accident or injury which occasions physical abilities testing may not be job-related. In Tice v. Centre Area Transportation Authority, et. al., 247 F.3d 506; 2001 U.S. App. LEXIS 7405; 11 Am. Disabilities Cas. (BNA) 1185 (2001), the plaintiff, a public bus operator, was tested before he could resume work after he was injured when a restaurant utility room door struck him in the back.

6 http://www.dot.gov/ost/dapc/employee.html
10 625 ILCS 5/6-106 (2005)
11 67 Pa Code § 71.3 (2005)
Recently, in response to an increase in health insurance premiums for smokers, employers who offer health insurance or insurance supplements complain about higher premiums associated with smokers have implemented policies to weed out smokers among applicants for employment and current employees. Applicants for employment are subjected to nicotine tests or required to sign affidavits declaring that they have not been smokers over a specified period. Current employees have been forced to submit to random nicotine testing. This year, much attention has been given to a company in Michigan that developed a policy that banned smokers entirely, resulting in at least four long-term employees losing their jobs. Query the extent to which these actions have been implemented in the transit field.

What limitations might apply on other aspects of physical testing such as those that are frequently applied to law enforcement officers and firefighters? For example, can an agency impose a requirement that transit employees, particularly bus and train operators, have a certain level of agility? Can the agency screen out morbidly obese people? Are there minimum physical qualifications for mechanics?

Some agencies have had problems in determining whether drivers are physically able to perform their duties. For example, drivers who may have been out on extended sick leave are often required to submit a note from their doctor clearing them to return to work, as opposed to being sent for a physical examination. Sometimes the doctor supplies the driver with the note even though the driver has been out for a serious medical condition that could, under federal and state regulations, trigger their disqualification from driving (e.g. flare up of diabetes that requires treatment with insulin). How do agencies find out about these cases, especially if the driver does not disclose the information. Are there forms that can be legally used? What information may employees legally disclose, and agencies inquire about, without violating employees' rights under the ADA and FEHA?

Primary data is needed on the extent to which transportation agencies are engaged in all forms of physical abilities testing. What distinctions are made between new job applicants and current employees?

A complete compilation of state and federal laws and regulations would be helpful to transit administrative personnel, attorneys, state and federal legislators, and others who are charged with

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14 On October 30, correspondent Morley Safer on CBS 60 minutes reported on a case in Michigan where employees lost their jobs after the company gave them 15 months to quit smoking, before subjecting them to random nicotine testing, http://www.cbsnews.com/stories/2005/10/28/60 minutes.

the responsibility of examining this issue and promulgating rules and guidelines concerning job-related physical abilities testing.

This study should discuss, generally, the differences in the types of tests and the bases for different degrees of permissible intrusions into individual privacy of transit employees. There is very little case law in this area. Advocacy groups have led much of the related discussions and legal challenges. A survey may be necessary, particularly as it relates to drug and nicotine testing, to ascertain, *inter alia*, how and when tests are given to applicants or employees, and the rate of success of obtaining the cooperation of the job applicant or current employee in administering the test. Has the employer experienced any difficulty in hiring or establishing a skilled workforce since implementing the testing? What legal problems have been encountered, and what is the forecast for future testing?

**Task 1. Research Implementation. Research Plan and Detailed Report Outline.**

Consultant will conduct background research and develop a complete research plan. The final step of this task will consist of a work plan, a proposed questionnaire to state agencies, and a detailed outline for the report (8-10) pages. This material will be submitted to TRB for approval.

- Estimated Length of Time: 60 days
- Estimated Work Effort: 60 hours

**Task 2. Collect primary data by sending the questionnaire to state agencies. Collect and analyze the data.**

- Estimated Length of Time: 90 days
- Estimated Work Effort: 60 hours

**Task 3. Draft report in accordance with the approved outline (including modifications required by TRB).**

- Estimated Length of Time: 90 days
- Estimated Work Effort: 200 hours

**Task 4. Revise report as necessary.** Offeror should estimate that 2 revisions will be necessary. One revision may be required after review by the Principal Investigator and members of a subcommittee. In addition, revisions may be required after the full committee has reviewed the report.

- Estimated Length of Time: 60 days
- Estimated Work Effort: 80 hours

**Total Effort Estimated Length of Time:** 300 days*

- Estimated Work Effort: 400 hours
Estimated Compensation: $24,000 - $36,000.00

If an offeror’s estimation on Length of Time and Estimated Work Effort differs from those above, the Offeror should use his/her estimates.

* The successful offeror can expect committee review time to consume as additional 90-150 days.

Submit Statements of Interest on or before June 30, 2006 by mail to:

James B. McDaniel
Counsel for Legal Research Projects
Transportation Research Board
500 Fifth Street, NW, Room 4
Washington, DC 20001