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This responds to your January 9, 1996, letter to former Acting General Counsel John P. Rowe regarding the Americans with Disabilities Act (ADA) of 1990. Your letter asks for a Commission "Opinion Letter" as to whether it would violate the ADA for the San Joaquin Sheriff's department to return to its pre-ADA practice of conducting post-offer background investigations of potential correctional officers that are non-medical in nature.

At the outset, please be advised that this is not a formal Commission "Opinion Letter." Rather, this is an informal legal analysis by Commission staff in the Office of Legal Counsel.

#### The Relevant ADA and EEOC Enforcement Guidance Provisions

As you know, the ADA prohibits employers from conducting medical examinations or making disability-related inquiries before an applicant is extended a conditional offer of employment. 42 U.S.C. 99 12112 (d) (2) and (3); 29 C.F.R. 98 1630.13, 1630.14. These prohibitions are meant to ensure that an individual's non-medical qualifications are considered before his/her medical condition is evaluated. They also ensure that, if a job offer is withdrawn after a medical examination/inquiry, the applicant is aware that the reason for the withdrawal relates to his/her medical condition, and not to non-medical qualifications .

In the October 10, 1995, Enforcement Guidance on pre-employment inquiries referenced in your letter, the Commission stated that there are limited situations in which an employer can demonstrate that it could not reasonably obtain and evaluate all non-medical information before making a conditional offer. If an employer so demonstrates, the Enforcement Guidance indicates that it would not violate the ADA for the employer to obtain and evaluate the non-medical information that it could not reasonably obtain/evaluate pre-offer at any time during the post-offer stage, including after the required medical entrance examination. Enforcement Guidance at 18.

As one example, the Enforcement Guidance notes that individual 1., enforcement employers may be able to demonstrate that it is too costly for them to obtain/evaluate polygraph and/or other non-medical information prior to the post-offer Stage. In such cases, the individual employers would be able to Obtain/evaluate that information during the post-offer stage. Enforcement Guidance at 18-19.

#### The Situation of the Sheriff's Department and San Joaquin County

In your letter, you state that it is too costly for the San Joaquin Sheriff's department to continue to perform non-medical background investigations of correctional officer applicants prior to extending an offer of employment and conducting the requisite medical and psychological evaluation. You state that each background investigation requires approximately forty work hours to complete, and that, on average, between one-quarter to one-third of the applicants will be disqualified for, medical/psychological reasons.

You state that, during the period of July 1994 through January 1995, pre-offer background investigations were completed for 227 correctional officer applicants, and that approximately 68 of these applicants will ultimately be disqualified as a result of the medical/psychological evaluation. You also state that the background investigations of these 68 disqualifications represent an investment of approximately \$58,000 in staff salary and eight and one-half weeks of staff time - - expenditures that would not have been made if the Sheriff's department had been able to conduct the background investigations after the medical/psychological evaluation. Additionally, you assert that conducting the background investigations before the medical/psychological evaluation prolongs the hiring process, resulting in increased overtime costs that neither the Sheriff's department nor San Joaquin County can afford.

In the absence of a thorough investigation by the Commission, we are unable to state definitively how the Commission would view your departments situation. However, based on the information in your letter, it is likely that you would be able to demonstrate if challenged, that it is too costly for you to continue to conduct pre-offer background investigations of correctional Officer applicants, and that, therefore, it does not violate the ADA for you to conduct such background investigations after the medical/psychological evaluation. On the other hand, it would

clearly constitute a violation of the ADA to use these post-offer background investigations to discriminate against qualified individuals with disabilities.

We hope this information is helpful to you. If we can be of additional assistance to you, please contact me, or Naomi Levin of my staff at (202) 663-4503. This letter is an informal discussion of the issues you raised and is not an official opinion of the Equal Employment Opportunity Commission. In addition, our failure to address other matters that may have been presented in your letter should not be construed as agreement with statements or analysis related to those matters.

Sincerely,

Peggy R. Mastroianni  
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Coordination and Guidance Services