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L. W. Johnson, MAJ

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## PERFORMANCE OR DISCRIMINATION?

### I. General:

Does the height of a police officer affect his job performance to such a degree that it justifies discriminating against persons of short stature? This is the question that is being raised by the public as more concern is generated for equal rights and discrimination.

Height requirements in civil police agencies have been challenged in court as discriminatory and arbitrary (Hardy v. Stumpf, Smith v. Troyan, etc.) which indicates the same challenge will probably face the Military Police height requirements of a minimum 5'9" for males and 5'4" for females.

### II. Purpose:

Since the Department of Defense or Military Services have not conducted studies on the relationship of height versus job performance and the discriminatory effects of a minimum height requirement, it is necessary to review civil studies and court cases. This review should determine the issues, their relationship to the Army, and to determine if the Military Police height requirements are justified to an extent they would survive a court challenge.

This survey is directed at determining the relationship of height to job performance and implications of race and sex discrimination of a minimum height requirement.

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### III. Definition of Job Performance:

The dictionary definition of performance is "a formal exhibition of skill or talent."<sup>1</sup> Skill or talent can be exhibited physically or mentally. The physical and mental skill or talent of a police officer can be divided into three general categories. Having the intelligence to understand the law, the physical ability to enforce the law, and the intellectual and physical ability to communicate the precise details of a violation of the law. It will be assumed that height only relates to the physical ability to enforce the law.

### IV. Physical and Environmental Differences:

The physical ability to enforce laws is influenced by the environment in which the laws are to be enforced.

The physical duties of civil and Military Police are different. Civil police duties are generally patrolling, traffic control, accident investigations, criminal investigations and crowd control. Military Police have the same general duties as the civil police plus physical security surveys; civil court liaison; conducting and controlling ceremonies; VIP security; convoy escorts under combat conditions; security of sensitive areas; Prisoner of War control; refugee control; and perform as combat infantry when required.

There are also differences in the age of the community served and the Military Police and civil police. The average age of the US Army soldier is 22.2.<sup>2</sup>

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Since age 18 is the minimum for the Military Police, their average age should be equivalent to the average soldier. The average age of the civil police is 30.7.<sup>3</sup> Within a population often referred to as the highest crime age, Military Police are younger than the civil police officer and perceived to be less mature.

With physical and environmental differences between the military and civil communities and their respective police forces, civil studies will not be completely applicable to the Military Police.

#### V. Physical Indicators:

To enforce laws with minimum force necessary normally means apprehending an offender with the least bodily injury expected of the reasonable man under the existing circumstances. The use of deadly force is strictly controlled by law and is an undesirable and seldom necessary duty of a police officer. In other words, pulling the trigger of a pistol is not normally reasonable force or a reasonable indicator of police job performance. Desirable physical indicators for police job performance is the strength, skill and physical influence that minimizes injury to the offender or police officer when making an apprehension. How then does the question of height relate to strength, skill and physical influence?

Height is generally attributed to increased strength, physical influence which reduces the likelihood of being assaulted, and the ability to see over crowds which helps to control public disorders.

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Being able to see over crowds by a taller person cannot be disputed. This is definitely an advantage for a taller person providing he is taller than the crowd.

There is little doubt that the physical influence of a large person would reduce the likelihood that he would be assaulted by a smaller person. The heavily muscled, not fat, broad shouldered and relatively narrow hipped male is the most favorable image to the public.<sup>4</sup> It is possible the offender who is smaller than the police officer may be prone to attack the officer to increase his self-esteem since...many young adult males find small body size a threat to self-esteem and tend to depreciate their own personal worth based on this perception.<sup>5</sup>

"Body build is markedly related to strength and strength correlated significantly with height and weight."<sup>6</sup> It is doubtful that all taller men are stronger than the shorter man, but on the average it is more often true than not. To ensure that height is related to strength then weight must also be considered.

#### VI. Assault as an Indicator:

The average male offender is 70 inches tall<sup>7</sup> and conversely the civil police officers between 68 and 69 inches are assaulted more than they should be.<sup>8</sup> The highest percentages of assaults are against 5'9" officers.<sup>9</sup> Studies from the Los Angeles and Washington, D.C. Police Departments support the theory that the shorter officer is more likely, under given circumstances, to be assaulted.

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However, the latest study found on height requirements showed that in Nassau County and Dallas "No statistically significant relationship with height was found in either department for assaults on officers, auto accidents, department complaints, injuries on duty, or department commendations."<sup>10</sup>

There is obviously some controversy over the validity of studies that have been conducted on height requirements. It must be assumed that there are shortcomings in the studies; therefore, only the trend found in all studies should be considered. The trend is that shorter officers are assaulted more than taller officers. It is unknown if the more frequent assaults are a result of perception by the offender or provocation by the shorter officer.

#### VII. Implications for Females:

The trend for male police officers has been established, but there have not been any studies on female police officers. It could be concluded, based on the trend of previous studies, that the shorter female would be assaulted more than the taller male. The implication here is that female police officer height requirements should be the same as males; however, most police departments and the Military Police have a lower height requirement for females. This dichotomy implies that height cannot be job performance related since the male and female police officer must perform the same functions. Some points that might be considered in justifying this dichotomy is that society still has a different image of females;<sup>11</sup> men are not as likely to assault a female as they are a male; police agencies generally do not allow females to patrol alone; and females are still taught to

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Until these statements are confirmed, the standards that permit females to be shorter than males will be difficult to justify.

#### VIII. Discrimination:

Maintaining the same height requirement for females and males will discriminate against the majority of females. Even though job performance may be affected, in 1974 the California Court of Appeals ruled it illegal to disqualify the majority of females by a height requirement.<sup>13</sup> The implication of this court decision is that regardless of job performance relationship, height for females will be lower than males or the height for males must be lowered to the female standards. In 1975 a height requirement of 5'8" for police officers was upheld in the US Court of Appeals.<sup>14</sup> This court decision implies that a 5'8" height standard is legal even if the majority of females are disqualified, providing the requirement is the same for males and females. Regardless of the court decisions to allow a minimum height requirement, the Department of Justice has threatened to withhold federal funds from those police departments with a minimum height requirement unless they adequately show the relationship of height and job performance.<sup>15</sup> An inquiry sent to the Department of Justice requesting information on what justifies a minimum height requirement, received no response. However, it must be assumed that the Department of Justice has some standard which they consider adequate to justify a minimum height requirement.

Discrimination by race has been unsuccessfully challenged in the US Court of Appeals.<sup>16</sup>

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The only problem with the 1972 court decision is that it only dismissed the charge of discrimination because there were no national studies to indicate spanish-surnamed individuals having an average height of less than 5'7". If there were a national study conducted which proved that the average height of a race was less than the minimum height of a police agency, then this discrimination issue could be raised again.

A study of Law Enforcement Officers conducted in 1976 indicates that Mexican Americans, Puerto Ricans and Cubans are shorter than other ethnic groups. Findings of average heights of police officers were,<sup>17</sup>

| <u>Ethnic Background</u> | <u>Mean Height</u> |
|--------------------------|--------------------|
| Black                    | 70.20              |
| Mexican American         | 68.31              |
| Puerto Rican/Cuban       | 68.71              |
| European, Northern       | 70.47              |
| European, Southern       | 69.17              |
| European, Western        | 70.21              |
| American Indian          | 69.57              |
| White American (Other)   | <u>70.63</u>       |
| Mean Average             | 70.12              |

Since the Military Police minimum height for males is 5'9" it is possible that a high percentage of Mexican Americans, puerto Ricans and Cubans would be ineligible.

There is another aspect of discrimination which should be considered. The courts have consistantly required schools to integrate on the basis of percentage of local population of an ethnic group. If the national population were known by the percentage of all ethnic groups and the average height of each ethnic group, it would be simple to determine the discriminatory effects of a minimum height requirement.

For example, if twenty percent of the blacks, two percent of the Cubans, five percent of the Mexican Americans, etc. met the minimum height requirement then there would be no discrimination if these percentages represented the national averages for these ethnic groups. Until such empirical evidence is available only the subjective decisions of the courts can be used and they presently support a minimum height requirement of 5'8".

The Medical Disqualification Study partially supports a 5'9" male height requirement. This study showed that of the 724,186 males examined between August 1969 and January 1970, the ones between the ages of 21-22 had an average height by ethnic groups as follows:<sup>18</sup>

| <u>Ethnic Group</u> | <u>Mean Height</u> | <u>Percentage of No. Surveyed</u> |
|---------------------|--------------------|-----------------------------------|
| Caucasian           | 69.40              | 85                                |
| Negro               | 69.22              | 14                                |
| Other               | 66.92              | 1                                 |

In 1966 the average age of an individual in the Army was 22.2 with an average height of 68.71.<sup>19</sup> The average height according to the Medical Disqualification Study is 68.54. The average height of the individual in the Army is remaining fairly constant. The 5'9" minimum height requirement for male Military Police is only slightly taller than the average of the population which they serve. If the Military Police has a composition of 85% caucasians, 14% negro and one percent of other ethnic groups, then there would be no discrimination.

#### IX. Senior Police Officer Views:

When discussing any professional field it is only common sense to consult with personnel with experience and training in that profession.

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In the case of Smith v. Troyer the US Court of Appeals made part of their decision to support a minimum height of 5'8" because "... police testimony in support of the requirement was rebutted only by experts without any police experience."<sup>20</sup> Based on the only survey of senior Military Police Officers, the US Army could not support the present height requirements since sixty-five percent indicate that current height standards should not be maintained and the majority feel that physical fitness and ability is more important to job performance than height.<sup>21</sup>

#### X. Conclusions:

The conclusions drawn from studies, surveys and court cases for this survey can best be illustrated through a matrix followed by questions and answers pertinent to height as a job performance indicator and to the question of the Military Police maintaining the current height standards. (See matrix on page 10)

Can the current Military Police height standards be supported? If current civil police studies and supportive court decisions are considered to apply to the military, then the current height standards can be supported. There is some doubt that civil studies would be applied against the military since it is a different society and the Military Police have many additional duties over the civil police. Only a court test can actually determine if the current standards can be supported with the present supportive evidence.

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Summary of Studies, Surveys and Court Cases

| Study, Survey,<br>Court Case  | Supports Height |    | Assualts as<br>a Indicator |    | Public Image<br>Supported |    | Discrimi-<br>nates |    |
|---|-----------------|----|----------------------------|----|---------------------------|----|--------------------|----|
|   | Yes             | No | Yes                        | No | Yes                       | No | Yes                | No |
| Texas, 1974   | x               |    | x                          |    | x                         |    |                    |    |
| Wash, D.C., 1971  | x               |    | x                          |    | x                         |    |                    |    |
| Seattle, 1971   | x               |    | x                          |    |                           |    |                    |    |
| Los Angeles, 1961   | x               |    | x                          |    |                           |    |                    |    |
| Adolescents Behavior<br>and Development, 1970                         |                 |    |                            |    | x                         |    |                    |    |
| Police Officer Height<br>and Selected Aspects of<br>Performance, 1975 |                 | x  |                            | x  |                           | x  | x                  |    |
| USAMPS Survey, 1975   |                 | x  |                            | x  |                           | x  | x                  |    |
| Castro v. Beecher,<br>1972  | x               |    |                            |    |                           |    |                    | x  |
| Hardy v. Stumpf, 1974   |                 | x  |                            |    | x                         |    | x                  |    |
| Smith v. Troyan, 1975   | x               |    |                            |    |                           |    |                    | x  |

Should the current height standards be changed? No.

Based on the average height of the US Army soldier and racial distribution, the present height standard is supported as job performance related and is not discriminatory.

How important is the judgement of senior law enforcement officials? Since the US Court of Appeals has given great credit to law enforcement officials support for a height requirement, their judgement is a key factor in the issue of height as a job performance indicator. However, it appears the majority of Military Police senior officers do not support the current height requirements.

Can the disparity in height standards between males and females be supported?

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Based upon court decisions of 1973 and 1975 the current disparity can not be justified if it is maintained that height is job performance related. The minimum requirement of 5'4" has not been challenged, but if a male were to challenge this lower requirement for females, the requirement would probably be found discriminatory.

What height is right for males and females? Based on assumed social treatment of females, court challenges, other police agency standards, average height of offenders and average height of the US Army soldier, the current standards of 5'9" for males and 5'4" for females are right.

#### XI. Recommendations:

Past challenges to height requirements have been decided only in the courts. Continued surveys of civil studies, which probably do not apply to the Military Police, will only result in identifying problem areas and the general trend of the courts. The following recommendations should preclude further wasted research efforts and guide future changes or studies on the question of Military Police height standards.

Submit the question of validity of the current height standards to the Judge Advocate Generals Office and/or the Department of Justice for their opinion. If their opinion does not support the current height standards, then a study should be conducted on the Military Police to determine if height is related to Military Police duties and if the minimum standards are discriminating to females or a race in the Army.

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Another approach would be to maintain current height standards, but develop a job performance test to set standards which relate to job performance. Require all Military Police recruits to pass this test. The test should be based on a persons physical ability to perform common police tasks, not according to height, sex or race. Once this test is developed, change AR 611-201 to indicate waivers can be granted upon successful completion of a job performance test.

A conclusive recommendation would be that regardless of how the change is made, if indeed one is made, the opportunity for change must be made available. As attitudes towards height, sex and race change, so must our standards.

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