



HENRY McMASTER  
ATTORNEY GENERAL

August 26, 2010

Joel T. Felder, Deputy State Forester  
South Carolina Forestry Commission  
P. O. Box 21707  
Columbia, South Carolina 29221

Dear Mr. Felder:

In a letter to this office you indicated that the State Forestry Commission has required all agency line employees to participate in a fitness training and testing program to ensure that employees that perform direct fire line duties are physically able to perform their duties safely and efficiently. You stated that due to concerns expressed by employees as to the difficulties of aging employees and those with minor physical impairments not being able to pass a test but still being able to perform basic job functions and to concerns expressed about potential inequalities within program guidelines, you have evaluated the program and potential changes have been considered. As a result, you stated that the following changes to the program were deemed appropriate:

fitness screening and testing would be conducted annually instead of current semi-annual testing.

in addition to the current moderate fitness standard - two mile walk in 30 minutes with 25 lb pack - fire line employees would have the option of obtaining a physician's statement that they are capable of performing fire line duties safely. The statement signed by the physician would include a detailed description of typical fire line employee tasks and any fees associated with the physician's visit would be the employee's responsibility.

You further stated as follows:

The objectives of the Program are:

To ensure the readiness of fireline employees to perform their jobs.  
To increase fireline employees' productivity

To increase physical fitness levels of fireline employees through a program of fitness and health education, evaluation, monitoring, and follow-up.

The Program should also produce the following positive benefits to the fireline employees:

- Decreased medical costs due to accidents and disease.
- Increased awareness of the importance of a healthy lifestyle for long-term health and happiness.
- Reduced risk factors for lifestyle-related conditions such as cardiovascular disease, hypertension, muscular skeletal problems, pulmonary disease, cancer, obesity, diabetes, depression, and other potential disabilities.
- Improved morale and self-confidence.

Fireline employees have a duty and an obligation to be ready to respond to situations affecting the public's safety and property. A physically fit fireline employee can go from rest to exertion, can sustain that exertion, and recover from it safely. Unfit fireline employees cannot perform their jobs effectively or efficiently and in many wildfire and/or prescribed burning situations, unfit fireline employees are risks to themselves and to anyone they are protecting or with whom they are working.

Many fireline tasks require sustained heavy activity. Getting tractors out of bogs, pulling winch cables, raking hand lines, and pulling hoses are a few examples of where high degrees of muscular and cardio-respiratory endurance are necessary. A healthy, fit employee gets a fireline job done more quickly, which means reduced damage to timber and property and reduced chance of loss of life for firefighters and the public.

The program was phased in beginning in September 2001 with fireline employees walking 1 mile without a pack and a goal of 16 minutes or less. Employees unable to complete the walk within 16 minutes would come back and try again one month later. The 1 mile walk was administered 2 more times over 12 months. In September 2002; the test became walking 2 miles in 30 minutes or less without a pack. Again, there were 3 required walks for that year. The 25 pound packs were first worn in September 2003. Employees were required to walk 1 mile with the pack in 15 minutes or less 3 times that year. Employees not finishing or finishing over the allotted time were required to come back and re-walk a month later. In July, 2004 it became mandatory for all new hired fireline employees to pass the moderate level walk (2 miles with 25 lbs pack in 30 minutes or less) as a condition of employment and to continue to pass all future tests as a continuing condition of employment.

Employees hired prior to July 1, 2004 must participate in the moderate level test and make a good faith effort to meet the time requirement. The first 2 mile walk with a pack was held in October, 2004....

According to the State Forestry Commission Policy Manual, “[t]he South Carolina Forestry Commission requires physical fitness testing for all fireline employees who perform direct fireline activities....” It is further stated that the Incentive Based Physical Fitness Program

... is designed to help ensure that fireline employees who perform direct fireline activities (wildland firefighting and/or prescribed burning) are physically able to perform their duties safely and efficiently. The job classifications required to perform fireline duties are Equipment Operator, Forestry Technician I, II, III (includes Forestry Tech/LE and Forestry Tech/Sup), Forestry Warden I, Project Forester, FLEP Forester, Forester Sup., Unit Forester, Assistant Regional Forester, State Forests Foresters, State Forests Directors, Investigators, and other designated personnel as defined in approved position descriptions. The Program as set forth in this Procedure will be incorporated into the position descriptions as an essential job duty for all fireline employees in the job classifications stated above. Employees who volunteer to assist with fireline duties must become eligible to do so by passing the basic fire school and any other required fire courses.

#### 2538.2 OBJECTIVES

The objectives of the Program are:

- A. To ensure the readiness of fireline employees to perform their jobs.
- B. To increase fireline employee’s productivity.
- C. To increase physical fitness levels of fireline employees through a program of fitness and health education, evaluation, monitoring, and follow-up.

#### 2538.3 ADDITIONAL BENEFITS TO PARTICIPANTS

The Program should also produce the following positive benefits to the fireline employees:

- A. Decreased medical costs due to accidents and disease.
- B. Increased awareness of the importance of a healthy lifestyle to long-term health and happiness.
- C. Reduced risk factors for lifestyle-related conditions such as cardiovascular disease, hypertension, muscular skeletal problems, pulmonary disease, cancer, obesity, diabetes, depression, and other potential disabilities.
- D. Improved morale and self-concept.

#### 2538.4 JOB RELATEDNESS

- A. Readiness to Respond: Fireline employees have a duty and an obligation to be ready to respond to situations affecting the public’s safety and property. A physically fit fireline employee can go from

rest to exertion, can sustain that exertion, and recover from it safely. Unfit fireline employees cannot perform their jobs effectively or efficiently and in many wildfire and/or prescribed burning situations, unfit fireline employees are risks to themselves and to anyone they are protecting or with whom they are working.

- B. Survivability: Trauma patients who are physically fit, have a higher probability of surviving any type of physical trauma. Heart attack victims who are physically fit have a greater survival rate than unfit people if they do develop cardiovascular disease.
- C. Fatigue Resistance and Accident Prevention: One's tolerance to fatigue increases with physical fitness level. Physically fit people do not get as tired, and can work harder and longer than unfit people. As a consequence, the incidence of accidents and injuries decreases as fitness increases. Many accidents occur when people become fatigued and lose alertness.
- D. Response Options: In a confrontation situation, an unfit fireline employee's options are limited. The fit fireline employee has a broader response repertoire because of greater stamina, strength, and flexibility.
- E. Endurance: Many fireline tasks require sustained heavy activity. High degrees of muscular and cardio-respiratory endurance are necessary.
- F. Stress Management: As one becomes more fit, one's physiological mechanisms for managing and handling stress are enhanced. This is critical in fireline duties.
- G. Productivity: A healthy, fit employee gets a fireline job done more quickly, which means before more lives and property are destroyed...

#### 2538.6 PHYSICAL FITNESS TEST

All fireline employees will be required to participate in the Moderate Level Work Capacity Test semiannually. The walks will normally be scheduled for February and October, but may be changed when deemed necessary. The test was developed for the U.S. Forest Service for wildland firefighters. The test measures aerobic capacity, muscular strength, and muscular endurance. The test requires a 2 mile walk with a 25 pound pack in 30 minutes or less.

All fireline employees hired PRIOR TO 7-1-04 must participate in the walks and are encouraged to walk the full distance without stopping and to make every effort to do so within the required time.

All fireline employees hired AFTER 7-1-04 must pass the test as a condition of employment, and must continue to pass all future tests

as a continuing condition of employment. Passing means completing the 2 mile walk while carrying the 25 pounds within 30 minutes. Fireline employees who are unable to obtain medical clearance to take the test after seeing a Qualified Medical Provider will be placed on sick leave. Agency Leave Procedures outlined in Chapter 2516 will be followed in such cases. In extenuating or extraordinary circumstances, the State Forester has the option of reviewing cases and taking other actions which may be appropriate in accordance with State Human Resources Regulations. In cases of documented temporary medical problems, employees whose fireline duties are shown as 10% or less on their position description may be temporarily relieved of fireline duties and participation in the Program for up to six months.

It is further stated that

- A. [f]ireline employees hired after 7/1/04 who are medically cleared to take the tests but do not pass will be removed temporarily from their positions. In most cases they will not be eligible to use accumulated sick leave but may use a combination of annual leave and leave without pay for a maximum of six months. Arrangements will be made for testing or re-testing, as determined by the agency and those employees on such leaves of absence who pass the required test will be returned to active duty.
- B. Fireline employees on such leaves of absence may apply for permanent reassignment to posted South Carolina Forestry Commission job vacancies and will be considered for them.
- C. Fireline employees hired after 7/1/04 on such leaves of absence who, after six months in such status, have not been returned to active duty in their regular positions or transferred to some other South Carolina Forestry Commission position will be terminated from employment.
- D. Fireline employees hired after 7/1/04 with at least one year of service, who are terminated from employment as a result of the Program have the right to file a grievance in accordance with the Forestry Commission's Employee Grievance and Appeal Procedure outlined in Chapter 2517 of the South Carolina Forestry Commission's Procedure Manual

2538.8 Fireline employees are authorized 2.5 hours per week to exercise on Agency time. This must be coordinated with the employee's supervisor

Referencing such, you have questioned the legal exposure to the State for wrongful termination or other civil action under the current program and the proposed revision. You also requested any legal advice as to how to accomplish program objectives and minimize liability.

It is generally stated that

[t]he right to engage in any legitimate trade, occupation, business or profession is subject to a reasonable and necessary exercise of the regulatory powers of government in the public interest or welfare...The right to engage in any legitimate trade, occupation, business, or profession is not absolute, unqualified or unrestricted, but is subject to limitation and regulation...The right to engage in any lawful...occupation is subject to a reasonable and necessary exercise of the government's police power....

16A C.J.S. Constitutional Law § 734. Moreover, it has been determined that

[a]n applicant for a position within the police or fire department may be required to meet reasonable and nondiscriminatory physical and psychological requirements for such positions. The department may set minimum-maximum weight standards, vision acuity standards, hearing acuity standards, and height requirements...An applicant for a permanent appointment as a firefighter may be denied the position on the basis of a physical condition, where, given the nature of a firefighter's duties and of the applicant's condition, the conclusion that it would affect his or her performance, as well as increase the likelihood that he or she would eventually become disabled, has a rational basis. Furthermore, there is authority providing that it is not unreasonable to allow a fire district to upgrade their forces by imposing higher physical standards for new employees without terminating all currently employed persons who do not meet the new standards. A civil service law is valid when it provides that an applicant may be disqualified for appointment when the applicant's medical condition may reasonably be expected to render that applicant unfit to continue to perform the duties of the position.

16A McQuillin Municipal Corporations § 45.12.30 (3<sup>rd</sup> ed.).

It is further stated that

[p]rospective firefighters must meet the standards or qualifications fixed for the positions sought...Appropriate standards or qualifications may be fixed for positions in the fire department, and the determination of such qualifications may be left to the discretion of an administrative body...The requirement of a physical examination, when appropriate, vests in...(a)...commission a sound discretion as to the necessity therefor....

63 C.J.S. Municipal Corporations § 549. The Mississippi Attorney General in an opinion dated January 28, 2005 determined that upon findings by a governing body that certain physical fitness is required for certain public employees to perform their duties, physical fitness standards may be made a prerequisite to obtaining or maintaining that position as a public officer.

As to your questions, as stated in Division 241 Amalgamated Transit Union (AFL-CIO v. Suscy, 538 F.2d 1264 at 1267 (7<sup>th</sup> Cir. 1976) citing Kelly v. Johnson, 425 U.S. 238 (1976), “[i]t is clear that a governmental agency can place reasonable conditions on public employment.” See also: Pickering v. Board of Education, 391 U.S. 563 (1968). The court cited Kelly, supra in determining that the Chicago Transit Authority, the employer entity before the court, “...has a paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs.” Id.

As to firefighters, the Minnesota Court of Appeals in Senior v. City of Edina, 547 N.W.2d 411 (Ct.App. Minn. 1996) determined that the city’s termination of a firefighter due to his refusal to address substantial weight problems over the term of several years raised legitimate safety concerns and was not arbitrary and capricious. It was noted that the record before the court showed that a high level of physical fitness was required to work safely as a firefighter and that obesity “substantially affected areas of functioning that were crucial to firefighters.” 547 N.W.2d at 411. In Smith v. Folmar et al., 534 So.2d 309 (Ct.Civ.App. Ala. 1988), it was held that a personnel board’s regulation determining that applicants for fire fighter positions were required to have certain physical strength and freedom from serious physical defects satisfactorily met the requirement that the personnel board establish minimum criteria for a fire fighter position. It was further determined that the fire department “validly enlarged” its requirement by developing an official weight program.

As to the termination of a firefighter, it is generally stated that

[t]he person or body authorized to remove a member of the fire department depends on the terms of the statutes or regulations. Where a firefighter has a property interest in his continued employment, he is entitled to procedural due process in connection with removal hearings...An officer or member of a fire department, entitled to a trial or hearing under the regulations, cannot be removed without one. The hearing must be conducted in a proper manner and before a duly authorized person or body. An officer or employee of a fire department cannot be removed without a trial or hearing where he is entitled thereto under the regulations....

63 C.J.S. Municipal Corporations § 572. In its decision in Parent v. City of Bellevue Civil Service Commission, 763 N.W.2d 739 (Ct.App. Neb. 2009), as to police officers, the court dealt with a policy mandating that “[a]ll officers are required to maintain at least a ‘fair’ level of physical wellness pursuant to the standards contained within the ...Department’s Wellness Program Manual.” 763 N.W.2d at 460. As to the individual involved, the court determined that where the officer had complied with the physical activities standards, the city had no grounds to terminate the officer’s employment because he fulfilled the mandatory requirements.

Mr. Felder  
Page 8  
August 26, 2010

Referencing the above, in the opinion of this office, the State Forestry Commission may establish reasonable standards for fitness screening and testing such as those outlined above. It appears that such standards would meet the criteria of reasonableness and would be upheld. While there is always the risk of legal exposure in any plan establishing standards, in the opinion of this office, the standards adopted would tend to limit any such risk. Of course, as set forth, in any situation where a particular individual contests any standards of such a program, procedural due process must be afforded in association with any such challenge.

With kind regards, I am,

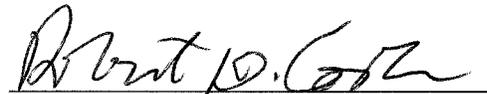
Very truly yours,

Henry McMaster  
Attorney General



By: Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General