

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

██████████

and

Department of State

FSGB No. 2014-003

August 27, 2015

**AMENDED DECISION**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

J. Robert Manzanares

Nancy M. Serpa

Special Assistant

Lisa K. Bucher

Representative for the Grievant:

Michael L. Vogelsang, Jr.

Representative for the Department:

Margaret E. McPartlin, HR/G

Employee Exclusive Representative:

American Foreign Service Association

## OVERVIEW

**HELD:** Grievant failed to meet her burden of proving that she was a qualified individual with a disability entitled to a reasonable accommodation under the Americans with Disabilities Act or the Rehabilitation Act. Grievant was separated from the Service under Section 612 of the Foreign Service Act and is not entitled to a hearing.

**CASE SUMMARY:** Grievant, an untenured FS-06 Diplomatic Security (DS) Special Agent Candidate at the Department of State (Department, agency) grieved her separation from the Department after she failed to successfully complete the Basic Special Agent Course (BSAC) Physical Fitness Test. Grievant claims that by terminating her employment, the Department discriminated against her because of her disability (asthma) and violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act by not engaging in the required interactive process and refusing to provide her with a reasonable accommodation. Grievant requested as a reasonable accommodation that the Department waive the timed portion of the 1.5 mile run required of all incoming Special Agent Candidates, or alternatively, that the agency hire her for a Civil Service position within DS.

Grievant was provided numerous opportunities to pass the fitness portion of the BSAC and, despite being provided an individual trainer and additional time to train, she was unable to pass the fitness course. The Grievance Board found that grievant presented insufficient evidence that her asthma was a disability that substantially impaired her breathing during her efforts to pass the timed run portion of the Physical Fitness Test. The Board further found that the Department met its burden of proving that passing the Physical Fitness Test, including the timed run, was a validated job pre-qualification and, therefore, was a mandatory job-related prerequisite to becoming a DS Special Agent. The Board further found that the Department was not required to waive this pre-qualification and that grievant did not qualify for any accommodation. The grievance appeal was denied.

## DECISION

### I. THE GRIEVANCE

██████████, (grievant), an untenured FS-06 Diplomatic Security (DS) Special Agent Candidate at the Department of State (Department, agency), was separated because she failed to successfully complete the Basic Special Agent Course (BSAC) Physical Fitness Test. Grievant claims that the Department violated the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 by discriminating against her because of a disability (asthma); failing to engage her in the required interactive process; refusing to provide her with a reasonable accommodation, that is, either a waiver of the timed run portion of the fitness test or a Civil Service position; and terminating her employment when she was unable to pass this part of the test.

### II. BACKGROUND

Grievant was an untenured FS-06 DS Special Agent Candidate who was separated by the Director General of the Foreign Service, pursuant to Section 612 of the Foreign Service Act (FSA) of 1980 as amended, 22 U.S.C. § 4011, after she failed to successfully complete the BSAC Physical Fitness Test. Specifically, grievant was unable to meet the minimum time standard for running 1.5 miles in 16 minutes and 15 seconds.

Grievant began her employment with the Department on ██████████ when she joined BSAC training. When she took the Physical Fitness Test, she repeatedly failed both the timed run and the push up portions of the test. Eventually, she was able to pass the push up requirement, but she continued to fail the timed run portion of the test, despite receiving individualized training and additional time to prepare. After she failed the timed run for the sixth time, grievant was notified on ██████████ of her termination from the Service, effective

October 4, 2013. She filed the instant grievance on October 4, 2013, and on that same date, the Department granted her request for interim relief during the pendency of her agency-level grievance.

Grievant challenged the agency's decision to separate her after refusing to waive the timed portion of the run test. The Department denied the grievance in a decision letter, dated January 23, 2014. On February 4, 2014, grievant filed the instant appeal with the Foreign Service Grievance Board (FSGB, Board), requesting continuation of her interim relief (IR) from separation until the grievance appeal is decided. The Department opposed the continuation of IR and on April 7, 2014, the Board denied grievant's request for IR during the pendency of this appeal. Following lengthy discovery, grievant filed her Supplemental Submission on February 23, 2015. The Department filed its response on April 15, 2015 and grievant submitted a rebuttal on April 30, 2015. The Record of Proceedings (ROP) is closed with this decision.

### **III. POSITIONS OF THE PARTIES**

#### **A. The Grievant**

Grievant argues that, pursuant to 22 CFR § 904.1, the Board's "jurisdiction extends to any grievance, and to any separation for cause proceeding initiated pursuant to Section 610(a)(2) of the [Foreign Service] Act." She further cites 22 CFR § 901.18 that provides: "A grievance is defined as 'any act, omission, or condition subject to the control of an Agency which is alleged to deprive a member of the Service who is a citizen of the United States of a right or benefit authorized by law or regulation or is otherwise a concern or dissatisfaction to the member. . . .'" Grievant argues that her grievance is cognizable because she claims a violation of the ADA and the Rehabilitation Act and deprivation of a right to which she is entitled under those laws.

Grievant also asks, pursuant to 22 CFR § 906.1, that the Board grant her request for a hearing on this grievance appeal.

Grievant contends that she should not be separated from the Service because she is capable of passing the run portion of the Fitness Test if she is given a reasonable accommodation for which she states she qualifies under the ADA and the Rehabilitation Act. She claims that she is a “qualified person with a disability” because she has asthma, an existing physical impairment, that implicates a major life activity (breathing) in a substantially limiting way. She further claims that with a reasonable accommodation – waiver of the time requirement for the run – she can pass the fitness test and otherwise perform all essential functions of the job of Special Agent.

Grievant avers that the time requirement for the 1.5 mile run is neither an essential job function nor a valid pre-employment qualification standard. She argues that the Department confuses and conflates the different analyses for an essential job function and a proper job qualification standard. Grievant contends that when the Department argues that the “physical fitness requirements are job-related and are consistent with a business necessity,” these factors pertain to a qualification standard, but not an essential job function. The distinction is important, she states, because the Department, not the employee, bears the burden of establishing a qualification standard as job-related and consistent with a business necessity. *See* 42 U.S.C. § 12113(a); 29 CFR §1630, App. § 1630.10; *Valle v. City of Chicago*, 982 F. Supp. 560, 566 (N.D. Ill., 1997).

Grievant argues that the timed run is not an “essential function” of the position of Special Agent, as that term is defined in 29 CFR §1630.2(n), for several reasons: the agency has not provided evidence that time is an essential part of the requirement that Special Agents run on occasions. She also contends that the amount of time a Special Agent spends running 1.5 miles

is insignificant compared to other duties of a DS Agent. She also maintains that it is not an undue burden for the agency to waive the run time since it already accepts different run times based on gender and age. In fact, grievant claims, the Department does not even require a timed run test for agents after they receive their credentials and are sworn in. She states that her performance on all other aspects of her training indicate that she is qualified for the job and that her request to waive the run time, or to be transferred to a vacant Civil Service position, are reasonable accommodations.

Grievant claims that because she is a qualified individual with a disability, the Department had an obligation to engage her in an interactive discussion to establish a reasonable accommodation for her disability. She claims that contrary to the Department's assertions, she did not need to specifically request an accommodation in order for the interactive process to be required. Her only obligation was to put the Department on notice of her disability and its limitations. *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 113 (7<sup>th</sup> Cir. 1995); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7<sup>th</sup> Cir. 1998). The Department, grievant claims, had "tacit, constructive and actual knowledge" that her asthma substantially limited her normal breathing, yet the agency failed to engage in the required interactive process to attempt to accommodate her disability. She also asserts that the fact that she requested an accommodation after her failed timed run, or that she attempted the timed run several times without first requesting an accommodation is irrelevant. Grievant claims that she was a covered employee under the ADA and Rehabilitation Act and there is no statute of limitations for requesting a reasonable accommodation. Finally, she claims that if a reasonable accommodation for the timed run is not granted, she would alternatively accept as relief placement in a civil service position within DS other than that of a Special Agent.

## **B. THE DEPARTMENT**

The Department argues that grievant was separated by the Director General of the Foreign Service, pursuant to Section 612 of the FSA, as amended, 22 U.S.C. § 4011, because she failed to successfully complete the BSAC Physical Fitness Test. The Department also argues that grievant has not shown that she is a qualified individual with a disability who is entitled to a reasonable accommodation under the ADA or the ADA Amendment Act of 2001 (ADAAA).

The agency maintains that while asthma may be a physical impairment in some individuals, grievant did not offer medical evidence in her grievance to prove she is “disabled,” that is, that her asthma substantially limits a major life activity (breathing). The Department claims that grievant’s medical evidence, submitted on appeal, establishes that her asthma does not substantially interfere with her breathing, including when she is exercising. The agency notes that at the direction of its Office of Medical Services (MED), grievant was examined by her own physician who completed a form entitled “Reactive Airway Disease/Asthma Evaluation Form.” While her physician acknowledged that grievant suffered from asthma, he reported that her asthma was “mild intermittent” and in the preceding four weeks, it was “completely controlled.” Based on the medical documentation provided by grievant and her physician, MED determined that she could be issued a Class 1 medical clearance for worldwide availability.<sup>1</sup>

In response to grievant’s claim that the medical documentation filled out by her own physician only demonstrates that her “asthma is not limiting when inactive,” the agency states that grievant has not submitted any objective evidence, such as a pulmonary function test or a diagnosis by a pulmonologist, that her lungs are so damaged that she is in fact disabled. The Department also notes that on the one occasion when grievant went to an emergency room (ER)

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<sup>1</sup>See 16 FAM 211.2a that provides: “World-wide Available (Class 1): issued to applicants, employees, and eligible family members who have no identifiable medical conditions that would limit assignment abroad.”

while she was in training at the Federal Law Enforcement Training Center (FLETC) in Georgia, she was diagnosed with a respiratory problem, chills and a low grade fever. The Department notes that this incident was not reported as an asthmatic episode.

The Department also states that on the two occasions when grievant submitted written statements to the Student Performance Review Committee (SPRC) requesting that her BSAC training be extended, she never mentioned asthma as the reason for her failures on the Physical Fitness Test. In the first of these statements, dated June 2, 2013, grievant advised the SPRC of the improvements she made since becoming a candidate trainee, including losing 36 pounds and cutting 6 minutes off her run time. She also mentioned she had designed a physical fitness plan with her trainer to help her meet her goals. In her second statement, dated July 23, 2013, grievant discussed different lifestyle improvements that she claimed allowed her to lose weight and physical fitness routines that helped her reduce her run time.

The Department also argues that grievant only requested a reasonable accommodation after she failed the physical fitness requirements of her candidate training and was notified she would be separated from the Service. The agency concludes that grievant's inability to perform the 1.5 mile run was because she was physically unfit and not because she was disabled. The agency also contends that because grievant did not provide evidence to support a conclusion that she was in fact disabled, the Department did not consider her to be disabled and, therefore, it had no obligation to engage in an interactive dialogue with her regarding a reasonable accommodation.

The Department also argues that grievant is not a "qualified" person for the job. In order to establish disability discrimination based on a failure to accommodate, the Department maintains that grievant must first show that she was a qualified individual with a disability.

Absent such a showing, grievant is not entitled to protection under the Rehabilitation Act. The Department cites 29 CFR §1630.2(m) that provides:

A “qualified individual with a disability” is an individual with a disability who satisfies the requisite skill, experience, education and other job related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the position.”

In support of its contention that grievant is not “qualified” for the position of DS Special Agent, the Department contends that the physical fitness requirements of BSAC training are essential job functions of the Diplomatic Special Agent position that are both job-related and consistent with business necessity. The Department maintains that the BSAC Course, including the Physical Fitness Test, is a valid pre-employment qualification standard for entry level DS Special Agents. The agency asserts that grievant was fully aware of the hiring qualifications. The Vacancy Announcement (VA) for the position for which grievant applied clearly stated that physical fitness demands, including prolonged running, were essential functions of the position. The Department also states that grievant was also on notice of the physical prerequisites of the position via the BSAC Agreement that she signed and initialed on each page. The BSAC Agreement advised her that Special Agent Candidates must meet certain minimum physical requirements and must achieve a “Satisfactory” (50%) score on the Physical Fitness Test to successfully complete BSAC training. Grievant was also advised that if she failed to attain a satisfactory score, she would be referred to the SPRC for review and appropriate action that could include a recommendation for dismissal from training and separation from the agency. The Department argues that successful completion of BSAC is a mandatory requirement for all Special Agent Candidates for continued employment that cannot be waived because the physical fitness requirements are essential to the job.

The Department disputes grievant's claim that the task of running by a DS Special Agent is a marginal function. The agency asserts that the requirement to run is an essential function of the job because the need to run can occur at any time, without notice, and, contrary to grievant's statement, the necessity of running is not "an unlikely emergency situation" for Special Agents. The Department provided as evidence in support of its position a 2004 Job Analysis of the Diplomatic Security Agent Jobs in the U.S. Department of State that states that the physical tasks of a DS agent include:

- Running/sprinting in pursuit for short distances;
- Sustained running in pursuit between 1-2 minutes and over 2 minutes;
- Running up stairs; and
- Running over uneven terrain.

The Department cites 29 CFR § 1630.2(n)(1) that defines "essential job functions" as those duties that are "fundamental" and not "marginal." The agency asserts that a job function may be considered essential if:

1. the reason the position exists is to perform that function;
2. there are only a limited number of employees among whom the function can be distributed; or,
3. it is so highly specialized that the employee was hired for his/her ability to perform the function.

*See*, 29 CFR § 1630.2(n)(2). The Department contends that it is a DS agent's function and purpose to "provide a safe and secure environment for the conduct of foreign policy. Every diplomatic mission in the world operates under a security program designed and maintained by Diplomatic Security." The agency further states that there are only a limited number of DS Special Agents in each domestic building and post around the world. The Department further asserts that DS Special Agents are federal law enforcement officers whose duties are rigorous, including protecting and maintaining the security and safety of heads of foreign states, the Secretary of State and other representatives of the U.S., both at home and abroad. According to

the agency, these duties may require a Special Agent to run fast and be physically capable of responding to security threats and other strenuous emergency situations. The Department lastly states that the Special Agent position is highly specialized and requires BSAC training as well as other specialized law enforcement training. Accordingly, passing the timed distance run is essential to performing the job of a DS Special Agent.

With regard to the pre-qualification requirements for DS Special Agents, the Department submitted a 2001 “DS Special Agent Job Task Analysis and Physical Ability Test Validation” from Health Metrix, Incorporated (the “Health Metrix study (HMS)”) that evaluated and determined the physical demands of critical and essential job functions of the DS Special Agent position. The Department states that the HMS validated a Physical Ability Test as job-related to the position of DS Special Agent and “identifie[d], on an objective, performance-related basis, those individuals who possess a high probability of success in their work versus those with critical deficiencies or propensities toward injury.” The Department notes that the HMS endorsed the agency’s pre-employment qualification standard of a timed 1.5 mile run as a “predictive indicator for the DS Special Agent selection/qualification. . . .” According to the HMS, running was identified as an essential function, a demanding physical task of the position that is common to all law enforcement positions.

The Department argued, finally, that grievant should be denied her request for a hearing because she was separated, pursuant to Section 612 of the FSA and, thus, she has no statutory right to a hearing in this case. The Department also claims that grievant’s request for a hearing is untimely and would prejudice the agency if granted. Had grievant’s hearing request been approved by the Board early on, the Department claims, it would have pursued discovery differently.

#### IV. DISCUSSION AND FINDINGS

In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing by a preponderance of the evidence that the grievance is meritorious. 22 CFR § 905.1(a). In the instant case, the burden of proof is shared by the parties with regard to certain elements of their claims and defenses. As discussed below, we find that grievant has failed to carry her burden of proof on certain elements of her claim of disability discrimination. We also find the Department has met its burden of proving one defense to the claim.

Under the ADA and the Rehabilitation Act, no federal agency employer

shall discriminate against a qualified individual on the basis of disability 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.

42 U.S.C. § 12112(a); 29 CFR § 1630.9(a). In addition, the term “discriminate against a qualified individual on the basis of disability” includes:

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or . . .

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. . . .

42 U.S.C. §12112(b). Similarly, under the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, a qualified applicant for employment, or an employee of the Foreign Service, who is able to perform all of the essential functions of the job, but who has a disability that substantially limits a major activity of living, is entitled to request and receive a reasonable accommodation from the Department that does not place an undue burden on the Service. 3 FAM 3670; 29 CFR 1630.

Under Section 504 of the Rehabilitation Act: No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

To prove disability discrimination, grievant must prove by a preponderance of the evidence that:

- (1) She has a disability;
- (2) She can perform all of the essential functions of the job, with or without reasonable accommodations by the employer; and
- (3) She was denied a reasonable accommodation of her disability by her employer.

*See*, 29 CFR §§ 1613.702 - 1613.705; 42 U.S.C. § 12102(4)(D). In this instance, then, grievant must prove not only that she has asthma, but that her asthma was a disability that substantially interfered with her breathing. She must also prove that she can perform all of the essential, non-marginal functions of the job of DS Special Agent and that she was denied a reasonable accommodation of her disability by the Department.

If she establishes these elements, the Department would then have the opportunity to prove by preponderant evidence that grievant's asthma was not a disability; that she was not a "qualified" employee, either because she could not satisfy a validated job-related pre-employment qualification, or because she could not perform all of the essential functions of the job of DS agent. This, in turn, would require the Department to show that its mandatory fitness test, including the timed run, is a valid predictor of a Special Agent Candidate's ability to successfully perform the job of DS Agent, or that the timed run is itself an essential function of the job. The Department would also have the opportunity to prove that there is no reasonable accommodation that it could provide to grievant without suffering undue hardship as an agency.

*See, Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 997 (9<sup>th</sup> Cir. 2007); *Valle v. City of Chicago, supra*, 982 F. Supp. at 566.

A. The Evidence Presented Is Insufficient to Prove that Grievant Is a Person With a Disability

The Board finds that grievant documented that she suffers from asthma, a condition that can, in some individuals, qualify as a disability. She asserts that her asthma substantially limited her breathing (a major life activity). Grievant argues that her intermittent use of inhalers and the episodic occasions when asthma impacted her breathing do not automatically disqualify her condition from being a disability. *See*, ADA, 42 U.S.C. § 12102(4)(D) and (E)(i).

Upon review of the information and arguments presented by grievant concerning her condition, we conclude that although there is some evidence that grievant's asthma may have affected her breathing to some degree and on some occasions, the evidence is inconclusive on whether asthma substantially impaired her breathing, even episodically, while she was a DS Special Agent Candidate. Grievant's medical documents indicate that within a month prior to her admission to BSAC 123, her doctor reported that asthma did not substantially interfere with her breathing, except "mildly" and "intermittently." Her doctor repeated this finding when asked by the agency's grievance staff during the pendency of this grievance appeal. Grievant's doctor also reported initially that her asthma was "well controlled" and that during the previous month before she applied to become a DS Special Agent, the condition did not affect her work, school or home life; she had no shortness of breath; and she had not used an inhaler.

Even stronger evidence of impairment was found to be insufficient to prove a disability in *Fuller v. Alliant Energy Corp. Services, Inc.*, 456 F. Supp. 2d 1044, 1072-73 (N.D. Iowa, 2006) (The only record evidence is a note from plaintiff's doctor confirming that her condition was

“mild” and “chronic.”) As the court noted in *Martinez v. Connecticut State Lib.*, 817 F. Supp.2d 28, 53, 54 (D.Conn. 2011): “The severity of asthma varies a great deal among individuals. Symptoms may fall anywhere along the spectrum from mild to life-threatening, and the frequency of asthmatic episodes also varies greatly from person to person. . . .” See also, *Burke v. Niagra Mohawk Power Corp.*, 1422 Fed. Appx. 527, 529 (2d Cir. 2005), citing *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999) (“[A]sthma does not invariably impair a major life activity.”)

Grievant cites one ER visit as evidence that asthma was a disabling condition for her. However, her medical records suggest that although she had asthma as a condition prior to her visit to the ER on April 7, 2013, the diagnosis that day was chills, a low grade fever and a need for rest. The doctor placed grievant on one day of bed rest and, without ascribing her symptoms to asthma, noted that she had a history of the condition. It is unclear from the record what the underlying cause was for this hospital visit.

There is also evidence that grievant claimed that she was suffering from pollen allergies, not asthma, when she failed some of her timed runs. She also cited other reasons – weight and not being in shape – as causes for her failed runs. We conclude that grievant’s evidence is insufficient to establish by a preponderance of the evidence that her asthma was a disability that substantially impaired her breathing while she was in BSAC training.

Although this conclusion by itself precludes a finding in grievant’s favor, we nonetheless address and decide a second issue – whether grievant was a “qualified” individual – because, as discussed below, we are strongly persuaded by the undisputed evidence in this record that the timed run test is a validated prerequisite for the position of DS Special Agent and that because

grievant could not demonstrate competence in that requisite skill, she was not a “qualified” individual, with or without a disability.

B. The Timed Run Is a Valid Pre-Employment Qualification Standard

The Department contends that its BSAC qualification standards, including the timed run, are job-related to the position of DS Special Agent. Job-relatedness means that “the qualification standard fairly and accurately measures the employee’s actual ability to perform the essential, not marginal, functions of the job.” The question presented here is whether the minimum entry level physical fitness standards, including a timed distance run, along with a minimum number of sit-ups and push-ups, have been validated as accurate predictors of success for the job of Special Agent and, therefore, are a job-related business necessity.

A number of courts have considered the legitimacy of pre-employment qualification standards in the face of disability discrimination claims, holding consistently that validated initial fitness qualifications for jobs that are physically demanding are appropriate criteria for hiring and are therefore business necessities for those positions. *See, e.g., Coleman v. Pa. State Police*, 2013 U.S. Dist. LEXIS 99609, 40-41 (W.D. Pa. July 17, 2013):

Because police officers encounter extremely stressful and dangerous situations during the course of their work . . . “ensuring members’ fitness for duty is a business necessity vital to the operation” of police departments. (Citations omitted).

*See also, Diaz v. City of Philadelphia*, 2012 U.S. Dist. LEXIS 66326, 2012 WL 1657866, \*11 (E.D. Pa. 2012) (“[E]specially in the context of police officers, employers do not violate ADA by ensuring that officers are . . . fit for duty.”); *Gile v. United Airlines*, 95 F.3d 492, 499 (7<sup>th</sup> Cir. 1996) (“If a job involves manual labor, physical fitness is generally considered an essential function of the job”); *see Adams v. Commonwealth of Pennsylvania*, 2009 WL 2707601, \*1 (M.D. PA 2009) (Pennsylvania State Police impose minimum physical standards on all police

cadets. Cadets must run a 1.5 mile timed run . . . cadets who cannot complete these requirements do not graduate).

The job of DS Special Agent is a Foreign Service law enforcement position that is reported to be physically demanding in the position description, the VA and the BSAC agreement. The VA reads: “Special Agents (SA) of the Bureau of Diplomatic Security (DS) are sworn federal law enforcement officers who are responsible for the security of Foreign Service personnel, property, and sensitive information throughout the world.” In addition, the VA reads: “Applicants must be fit for strenuous physical exertion and able to pass physical fitness tests.” Accordingly, we deem it appropriate that DS would seek to ensure that Special Agent candidates are capable of doing this physically demanding job.

On the issue of what evidence is sufficient to prove the job-relatedness of pre-employment qualification standards for law enforcement officers, the Court in *Lanning v. SEPTA*,<sup>2</sup> 308 F.3d 286, 291 (3d Cir. Pa. 2002) noted with approval a validation study that the employer underwrote that correlated a timed run with overall success in the position. The Court stated:

SEPTA [the employer] argued that the run test measures the “minimum qualifications necessary” because the relevant studies indicate that individuals who fail the test will be much less likely to successfully execute critical policing tasks. For example the District Court credited a study that evaluated the correlation between a successful run time and performance on 12 job standards. The study found that individuals who passed the run test had a success rate on the job standards ranging from 70% to 90%. The success rate of the individuals who failed the run test ranged from 5% to 20%.

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In sum, SEPTA transit police officers and the public they serve should not be required to engage in high-stakes gambling when it comes to public safety and law enforcement. SEPTA has demonstrated that the cutoff

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<sup>2</sup> Southeastern Pennsylvania Transportation Authority (SEPTA).

score it established measures the minimum qualifications necessary for successful performance as a SEPTA officer.

*See also, Lapiere v. Prince George's County*, 2013 U.S. Dist. LEXIS 21485, 2013 WL 497971,

\*3 (D.MD. 2013):

[A]s measures of job fitness [as a police officer], employers may require applicants or cadets to complete training runs in a certain amount of time; no accommodation exists that would render applicant able to complete a required fitness run in a minimally acceptable time. . . . Although Plaintiff references a handful of doctor's letters stating that his blood condition did not prevent him from being a police officer, none of these documents even attempts to explain how a reasonable accommodation would have rendered Plaintiff sufficiently fit to perform his job duties. . . . Accordingly, no reasonable juror could conclude that Plaintiff could have performed the essential functions of a police officer with a reasonable accommodation.

In this appeal, the Department offers a 2001 “Job Task Analysis and Physical Ability Test Validation for Special Agents of the United States Department of State Bureau of Diplomatic Security,” prepared by Health Metrix, Inc. The HMS was undertaken to develop and validate a “job-related physical ability test [PAT] suitable for the job title Special Agent (SA) with the United States Department of State, Diplomatic Security Service (DSS).” The study analyzed the work of DS agents and determined the physical demands of critical and essential job functions of the position. The study then developed and tested the job-relatedness of the PAT vis-à-vis the position. Ultimately, the HMS provided unrefuted evidence that success on the PAT, including the timed 1.5 mile run, correlated with a high probability of success in the DS Special Agent position. The HMS “identifie[d], on an objective, performance-related basis, those individuals who possess a high probability of success in their work versus those with critical deficiencies or propensities toward injury.” The study concluded that the timed 1.5 mile run is a “predictive indicator for the DS Special Agent selection/qualification” and stated that running is “an essential function that was a demanding task common to law enforcement.”

Based on the findings in the Health Metrix study and the absence of any evidence to prove that the study is unsound, we conclude that the Department has met its burden of proving that the timed run test is a valid qualification standard for Special Agent candidates and, because it is job-related, it cannot be waived. As was the case in *Diaz v. City of Philadelphia, supra*, and *Adams v. Commonwealth of Pennsylvania, supra*, we conclude that Special Agent candidates, like grievant, who are unable to pass the timed run test do not meet the mandatory skill qualifications for the position of Special Agent. We further conclude that the Department's utilization of this standard is not discriminatory under the ADA and the Rehabilitation Act against those with asthma or other disabilities that prevent them from passing this test because those who cannot pass the test are, by definition, not likely to succeed in the position and are, therefore, not qualified for the position. Thus, like the bar examination for lawyers or the doctoral examination for PhD candidates, we conclude that the Physical Fitness Test for DS Special Agent candidates is an appropriate job-related prequalification requirement that is consistent with business necessity. *See, Valle v. City of Chicago, supra*, 982 F. Supp at 566 (“[A]ll attorneys must pass the bar exam in order to practice law. . . . Satisfying the prerequisites for obtaining a job is different from doing the job. . . .”)

C. Grievant Does Not Prove That She is Entitled to a Reasonable Accommodation

Grievant contends that the Department should waive the timed portion of the run test as a reasonable accommodation because the time element of the test is not an essential function of the job. Grievant also argues that she can perform all other functions of the DS Special Agent position and that running within a specified time period is not a daily, or even regular, requirement of the position. Thus, she claims that running at a particular speed is at best a marginal, not an essential, function of the job. Grievant also claims (without supporting

evidence or proof) that the entire physical fitness requirement for DS Special Agents is “participatory” and non-mandatory after graduation from BSAC.

We do not reach any conclusions about whether a timed run is an essential function of the job of DS Special Agent *after* initial qualification. For purposes of this decision, we accept grievant’s assertion that after passing the BSAC course, she might never have to qualify again for a timed run. However, we conclude that grievant’s arguments miss the point that she does not meet the preliminary skill requirements for the job. That she might never be required to pass the Physical Fitness Test after BSAC is irrelevant to whether she must pass it during training. The Department’s pre-employment standards are no different than what is required in many professions. For example, after passing a state bar exam that tests candidates on any number of areas of law, an attorney may thereafter never practice a particular area of law and may never have to prove competency in any particular area of law. Nonetheless, these qualifying exams that prove that candidates possess a satisfactory knowledge of a wide range of legal topics have been validated as appropriate pre-qualification measures for the practice of law.

As we noted above, and as the court concluded in *Lapier v. Prince George’s County*, *supra*, we find that a request for a waiver of a basic job-related skill is not a reasonable accommodation. Thus, regardless whether the Department modifies its continuing fitness requirements after employment qualifications are met, grievant cannot establish that she met one of the entry level skill qualifications that is both job-related and a business necessity. Grievant therefore does not meet the definition of a qualified individual who must be both “an individual . . . who satisfies the requisite skill . . . and other job-related requirements of the . . . position” and who also “can perform the essential functions of the position.” 29 CFR § 1630.2(m). When grievant failed to meet the minimum pre-qualifications for the position after repeated tries, it was

appropriate for the Department to conclude that she was much less likely to successfully execute critical policing tasks as a Special Agent. See, *Allmond, supra*, a case involving proof that a hearing-aid ban was both job-related to the position of court security officer and a business necessity. The court stated:

[The employee's] only suggestion is to remove the hearing-aid ban entirely. That proposal is not reasonable: it destroys the very standard we have just upheld as a legitimate business necessity. We, therefore, reject [the employee's] proposal and conclude that the affirmative business-necessity defense bars [the employee's] claims in full.

558 F. 3d at 1318. Likewise, there is no reasonable accommodation that would enable grievant to complete the required fitness run in a minimally acceptable time.

Grievant also seeks as a reasonable accommodation a position as a DS Special Agent in which she would not be required to run quickly. However, this is merely a recast request for a waiver of a qualification criterion and is therefore not reasonable. See, *Lapier, supra*, 2013 U.S. Dist. LEXIS 21485 \* 10 (“Permanent light duty would eliminate the essential function of chasing suspects on foot and making forcible arrests.”)

Grievant lastly seeks an accommodation that the Department place her in a civil service position which she has not identified and to which she has not applied. Without more, we find that she has not met her burden of establishing that such a position is available, that she is qualified for it and that the Department is in a position to assign her to it. She does not establish that there is any reasonable accommodation that she was denied.

#### D. Grievant Is Not Entitled to a Hearing

Grievant claims that she is entitled to a hearing in this case because she is being proposed for separation for cause under Section 610 of the FSA. 22 U.S.C. § 4010. We conclude, however, that grievant's separation is not one for cause under Section 610; rather, it is because

she failed to pass the prequalification test for employment. According to the record in this case, grievant received a Conditional Offer Letter as part of a pre-employment package. She was therefore hired conditionally, based on her ability to successfully complete all of the required BSAC training, including the fitness test. The VA states:

Applicants must successfully complete *all* aspects of the seven month initial training program for their candidacy and their employment, to be continued; failure to pass any aspect of the initial training, including physical fitness tests, is grounds for separation.

(Emphasis in original).

Grievant is entitled to a hearing, then, only under Section 1106 of the FSA that provides:

The [FSGB] Board shall conduct a hearing at the request of a grievant in any case which involves . . . issues which, in the judgment of the Board, can best be resolved by a hearing or presentation of oral argument.

22 U.S.C. § 4136(1)(B); *see also* 22 C.F.R. § 906.1. The FSGB Policies and Procedures provide:

A hearing will be held if the grievant requests one in any case involving disciplinary action, separation based on the expiration of the grievant's time in class, or based on the grievant's relative performance. A hearing is required in a case involving recommendations for separation under Section 610 of the [FSA], unless the charged employee waives his right to a hearing. In all other cases, the Board may, upon the request of the grievant and after briefing by the parties, order a hearing or oral argument if it decides that the matter can best be resolved by either means.

As the parties may be aware, the Board seldom holds discretionary hearings, particularly where, as here, the issues are mostly legal, with little dispute between the parties about the pertinent facts. Because we do not decide this case on the basis of credibility determinations or competing expert analyses, we conclude that there is nothing about the instant case that warrants a hearing. Accordingly, grievant's request for a hearing is denied.

## **V. DECISION**

Grievant's appeal is denied.

**For the Foreign Service Grievance Board:**



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Susan R. Winfield  
Presiding Member



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J. Robert Manzanares  
Member



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Nancy M. Serpa  
Member