

TO: Mayor Montgomery and City Council

FROM: Jeffrey L. McCormick, Chief of Police

SUBJECT: Worksteps Agreement

DATE: January 12, 2023

BACKGROUND

The League of Minnesota Cities (LMC) provides most Minnesota cities, including Cannon Falls, with support and resources covering a variety of areas. One area they have been working is to create a valid pre-employment, physical abilities test for police officer candidates. The test was created with significant input from a police-led steering committee and the League of Minnesota Cities. The Cannon Falls Police Department provided sworn officers to that effort.

After finalizing the testing protocol, LMC then found a vendor and negotiated the terms of these services, to be provided to member cities. The attached agreement is the outcome of that effort. The agreement has been reviewed by the LMC attorneys and approved. Each City needs to enter into the agreement that they want to use the standards established by LMC and the agreement outlines the terms if the City wished to pursue creating their own standards. Because the LMC is also the provider for the City's insurance through the League of Minnesota Cities Insurance Trust, I would not recommend seeking our own standards, but accept the validated standards LMC has created.

REQUESTED COUNCIL ACTION

Motion and approval of the Worksteps agreement, and authorize the signing of said agreement by designated persons.

AGREEMENT

THIS AGREEMENT is by and between WorkSTEPS®, Inc., a Texas corporation located at University Business Park, 3019 Alvin DeVane Blvd., Suite 150, Austin, Texas, 78741 (“**WorkSTEPS**”), and City of Cannon Falls Police Department, a political subdivision of the State of Minnesota, located at 918 River Road, Cannon Falls, MN 55009 (“**CITY**”), collectively (“**THE PARTIES**”).

WHEREAS: CITY is desirous of implementing a functional employment testing program as a part of its work injury and disability management program, to, among other reasons, effectuate a reduction of on-the-job injuries by trying to determine if an applicant or employee can safely perform the essential functions of the job.

WHEREAS: WorkSTEPS has developed functional employment testing protocols and procedures that CITY desires to utilize for its functional employment testing program, and

WHEREAS: WorkSTEPS desires to assist CITY in implementing the WorkSTEPS functional employment-testing program,

THEREFORE, THE PARTIES HERETO DO HEREBY AGREE AS FOLLOWS: Based on the functional employment test(s) and services that have been identified below the price for the test(s) and services shall be:

Functional Testing Services

		<u>Price</u>	<u>Approve (Initial)</u>
• Comprehensive Post Offer Functional Employment Testing	Upon Request	\$185.00	
• Post-Employment/Fit-For-Duty/Return to Work Testing	Upon Request	\$185.00	
• Basic Carpal Tunnel Evaluation	Upon Request	N/A	
• Upper Quadrant / Carpal Tunnel / Post-Offer Evaluation	Upon Request	N/A	
• Job Analysis and Validation Process (*\$200.00 per hour plus travel expenses related to transportation, lodging, meals, tec., to be billed at the rate incurred)	Upon Request	\$200.00*	
• No Show Fee (24-hour cancellation required)			
• Centralized Billing (one time set up fee)	Upon Request	Waived	
• Scheduling (per candidate fee if coordinated by WorkSTEPS)	Upon Request	\$35.00	

Other Services

		<u>Price</u>	<u>Approve (Initial)</u>
• Return on Investment Study (annual)	No Charge	\$0.00	Included
• Sample Policies and Procedures (Introductory Employer Packet)	No Charge	\$0.00	Included
• Quarterly Statistical Candidate/Emp Reports (Annual fee)	Upon Request	\$200.00	
• HR & Risk Training (Continuing Education)	Upon Request	TBD	

CITY agrees to pay WorkSTEPS within thirty (30) days of receipt of an invoice for completed tests.

CITY acknowledges that WorkSTEPS provides its testing services to CITY through a licensed network of independent third-party providers and therefore CITY acknowledges each licensed provider utilized by CITY will be treated as a party to this contract with regard to payment for services rendered. All WorkSTEPS Providers who have provided WorkSTEPS testing services to CITY will be compensated within thirty (30) days of receipt of invoices.

1. Job Analyses. Job Analyses is the foundation of the CITY'S functional employment testing program. A job analysis is a measurement of the physical demands and requirements of the essential functions of a specific job. Accurate and current job analyses are the CITY'S responsibility. Job Specific Authorization Forms that document essential function requirements must be executed by CITY'S representative and provided to WorkSTEPS before testing can begin. CITY employees responsible for management of this program should use professionals experienced in assisting with job analyses or other trained and certified ergonomic assessment specialists to assist in the preparation of job analyses and documentation of essential functions. The job analyses should be based on a close, careful examination of the specific job by an individual trained and competent in making the physical measurements of the essential functions of the specific job. The job analysis provides specific job content validity to CITY's functional employment testing program, which seeks to simulate the specific physical demands necessary to perform essential job functions. Accurate and up-to-date job analyses help ensure that employment decisions are based on objective, sound, individual, and job specific information. Likewise, accurate and up-to-date job analyses helps ensure that no individual or group of individuals is discriminated against. CITY agrees to enter into an agreement in the form attached hereto as Exhibit "1" with the Analyst that will perform the job analysis.

2. Terms. The term of this Agreement shall be for a term of 1 year (s). The Agreement shall be automatically renewed each year for additional 1-year terms, unless terminated by either Party.

3. Termination. This Agreement may be terminated by either Party hereto for any reason. The termination shall be effective five (5) business days after receipt of notice thereof. Receipt shall be deemed effective upon actual delivery to the noticed Party. Upon termination, CITY shall be responsible to pay for any employment tests that have actually been performed prior to the termination.

4. Ownership. All data and information generated by the WorkSTEPS Functional Employment Testing Program for CITY shall be the property of WorkSTEPS and CITY. WorkSTEPS shall use best efforts to keep such data or information in a legally compliant manner pursuant to all state or federal laws affecting such data or information. WorkSTEPS agrees to abide by the applicable provisions of the HIPAA requirements and all other applicable state or federal rules, regulations or orders pertaining to privacy or confidentiality. CITY understands and agrees that WorkSTEPS forms and the protocols, processes, and procedures contained therein are proprietary and trade secrets as that term is understood under federal law and Minnesota Statutes, Section 13.37(b), and therefore CITY shall not disclose such items to any party without written permission from WorkSTEPS or a valid order from a court of competent jurisdiction. CITY shall not disclose any items pursuant to a court order unless CITY immediately notifies WorkSTEPS in writing of the request or order and allows WorkSTEPS to reasonably assist with contesting the disclosure of such material. CITY may keep copies of data or information for use in its normal course of business, but CITY hereby agrees that should it have possession of any WorkSTEPS materials, forms, procedures, protocols, or information, that such shall be deemed proprietary and confidential and kept strictly confidential except to the extent that such information must be disclosed under the Minnesota Government Data Practice Act or other law. Should CITY be required by law to disclose any of WorkSTEPS materials, forms, procedures, protocols, or information, immediately up notice of such requirement, CITY shall notify WorkSTEPS in writing and allow and reasonably assist WorkSTEPS in contesting such release of information. CITY shall use best efforts to see that such is not utilized for any purpose that would reasonably be deemed in competition with WorkSTEPS.

5. Confidentiality. WorkSTEPS shall keep all information or materials received by CITY strictly confidential and shall not divulge any such information or materials without the express written consent of CITY.

6. Third Party Claims. In the event of any third-party claims associated with the services provided under this Agreement, the party receiving notice of the claim shall immediately inform the other party of such claim. WorkSTEPS and CITY shall timely make available to each other such information and assistance as reasonably requested in connection with the defense of any potential claim or action.

7. Release of Data. Notwithstanding any prohibition contained within this Section, WorkSTEPS or CITY may release data or information as contemplated herein should a state or federal court of law require it.

WorkSTEPS may also release data or information received from the testing of CITY's employees for any legitimate business purpose, provided that (i) any personal information is kept confidential, and (ii) that all state and federal laws regarding such data or information are strictly followed.

8. Proprietary Marks. CITY acknowledges that it has been advised that WorkSTEPS believes the WorkSTEPS name, and its marks and proprietary software, protocols and testing process are federally trademarked and copyrighted. CITY agrees that WorkSTEPS proprietary software, protocols, processes, procedures, including modifications thereto, are, and shall be considered "proprietary" and "confidential information." WorkSTEPS confidential and proprietary information will be provided to CITY for the sole purpose of having the WorkSTEPS Provider provide functional employment testing services to the CITY. CITY acknowledges, agrees and confirms that CITY's disclosure or misappropriation of WorkSTEPS proprietary information could cause irreparable injury to WorkSTEPS, and CITY hereby expressly agrees that it will not use the confidential and proprietary information provided to CITY, except for the express purposes described in this Agreement.

9. Protected Health Information. WorkSTEPS may receive from CITY health information that is protected under applicable state and/or federal law, including without limitation, protected health information ("PHI") as defined in the regulations at 45 C.F.R. Parts 160 and 164 (the "Privacy Standards") promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). WorkSTEPS agrees not to use or disclose (or permit the use or disclosure of) PHI in a manner that would violate the requirements of the Privacy Standards if the PHI were used or disclosed by CITY in the same manner. WorkSTEPS shall use appropriate safeguards to prevent the use or disclosure of PHI other than as expressly permitted under this Agreement.

Use of PHI. WorkSTEPS will use PHI solely for CITY's benefit and only (i) for the purpose of performing services for CITY and (ii) as necessary for the proper management and administration of the CITY or to carry out its legal responsibilities, provided that such uses are permitted under federal and state law. CITY shall retain all rights in the PHI not granted herein.

Disclosure of PHI. WorkSTEPS may disclose PHI as necessary to perform its obligations under this Agreement and as permitted by law, provided that WorkSTEPS shall in such case: (a) obtain reasonable assurances from any person to whom the information is disclosed that it will be held confidential and further used and disclosed only as required by law or for the purpose for which it was disclosed to the person or entity; (b) agree to immediately notify CITY of any instances of which it is aware that PHI is being used or disclosed for a purpose that is not otherwise provided for in this Agreement or for a purpose not expressly permitted by the Privacy Standards; and (c) ensure that all disclosures of PHI are subject to the principle of "minimum and necessary use and disclosure," i.e., only the minimum PHI that is necessary to accomplish the intended purpose may be disclosed. If WorkSTEPS discloses PHI received from CITY or created or received by WorkSTEPS on behalf of CITY, to agents, including a subcontractor (collectively, "Recipients"), WorkSTEPS shall require Recipients to agree in writing to the same restrictions and conditions that apply to the WorkSTEPS under this Agreement.

10. Remedies. THE PARTIES agree that (i) the covenants and restrictions contained herein are of material consideration to this Agreement and are reasonable and necessary to protect and preserve the interest of both PARTIES; (ii) irreparable loss and damage will result from any breach hereof; (iii) monetary damages will not be sufficient to compensate a PARTY for any such default or breach by the other party; and (iv) in addition to all other remedies provided at law or in equity, a PARTY shall be entitled to seek and obtain temporary, preliminary and permanent injunctive relief in a court of law to prevent and restrain any breach or contemplated or threatened breach of and to specifically enforce the provisions of this Section, and neither PARTY will be obligated to post a bond or other security in seeking such relief or to provide proof of irreparable harm. Such remedies shall be in addition to and not in limitation of any injunctive relief or other rights or remedies to which a PARTY is or may be entitled at law or in equity or under this Agreement.

11. Exclusivity and Performance of the Test. For as long as this Agreement is in effect, CITY shall not acquire the same or similar functional testing services from anyone other than WorkSTEPS or its' duly approved providers. CITY acknowledges and understands that the tests are to be performed by medical

providers that are independent contractors that have been approved by WorkSTEPS to perform the tests identified.

12. Non-solicitation of Employees. CITY acknowledges that WorkSTEPS has invested considerable time and financial resource in the training, education, and certification of the professional staff necessary to deliver the services set forth on Attachment “A” to this Agreement. During the term of this Agreement, and for a period of one year after its termination, CITY agrees that it shall not actively or knowingly solicit or make an offer of employment to any of WorkSTEPS employees or WorkSTEPS licensed Providers associated with the delivery of these services to CITY nor shall CITY utilize the proprietary WorkSTEPS Network to perform any other competitive product to the WorkSTEPS Testing Program.

13. Use of Information after Termination. Without limiting the generality of this Section, the PARTIES agree that after the termination or expiration of this Agreement, such PARTIES will not use the proprietary, confidential information of the other PARTY to provide the same or similar services to any person (unless and until such information ceases to be proprietary and confidential through no fault of the PARTY seeking to use the same), however, nothing in this Section shall prohibit CITY or its affiliates, after termination of this Agreement, from contracting for or providing a service to similar to the services provided by Provider hereunder as long as neither CITY nor its affiliates uses the proprietary, confidential information of WorkSTEPS in so doing.

14. Employment Decision. CITY acknowledges and understands that this Agreement contemplates the functional employment testing of prospective employees and/or actual employees of CITY. That CITY, as employer of the individuals tested have a significant role, both before and after the test, including, but not limited to, selection of the essential functions of the applicable job, the writing of job descriptions, if any, in communicating with the individuals to be tested in a consistent manner, in making appropriate employment decisions based on test results and in properly processing and advising those individuals tested.

15. Adherence to Laws. CITY agrees to follow state and federal employment laws, regulations and practices including, but not limited to, appropriate procedures related to employment testing as set forth in the Americans’ with Disabilities Act and any and all applicable laws. CITY further acknowledges that CITY, not the Provider, nor WorkSTEPS is responsible for making employment decisions concerning any post employment candidates’ or current employees’ suitability for employment or continued employment and for making decisions concerning reasonable accommodations.

16. GENERAL INDEMNITY AND INSURANCE.

16.A. WorkSTEPS shall indemnify and hold CITY, its directors, officers and employees harmless from all claims, damages, losses, fines, penalties, costs and expenses, including reasonable attorneys’ fees (hereafter, “Liabilities”), arising out of or resulting from this Agreement, and either (1) caused, in whole or in part, by the negligent act or omission of WorkSTEPS, anyone directly or indirectly employed by it (including without limitation, WorkSTEPS’s subcontractors of any tier), or anyone for whose acts it may be liable, or (2) related to any payments due or owing between the WorkSTEPS and its subcontractors.

16.B. CITY agrees to indemnify and hold WorkSTEPS, its directors, officers and employees harmless from and against any and Liabilities arising out of or resulting from this contract and caused in whole or in part by the negligent act or omission or willful misconduct of the CITY.

16.C. If the Parties are concurrently negligent, each Party’s liability shall be limited to that portion of negligence attributable to it as determined under the applicable proportionate responsibility rules of the State of Minnesota.

16.D. WorkSteps shall maintain and will cause its third-party providers to maintain professional liability insurance for all claims WorkSTEPS or a provider may become legally obligated to pay resulting from any actual or alleged negligent act, error, or omission related to WorkSTEP’s or a provider’s services required under this Agreement. The following minimum limits shall be maintained: \$1,000,000 per occurrence; \$2,000,000 annual aggregate.

16.E. Notwithstanding anything to the contrary herein, neither Party shall be liable to indemnify the other for the negligence, gross negligence or willful misconduct of the other.

16.F. All indemnity provisions of this Agreement shall be deemed independent covenants and shall survive completion or termination of the Agreement or any claimed breach thereof.

This Agreement shall be governed by the laws of the State of Minnesota. Jurisdiction for any claim or action arising out of this Agreement shall be in an appropriate state or federal court of law in the State of Minnesota. If a court finds any portion of this Agreement to be contrary to law, invalid, or unenforceable, the remainder of the Agreement will remain in full force and effect.

AGREED TO THIS ____ DAY OF _____, 20____.

WorkSTEPS®, Inc.

City of Cannon Falls Police Department

By,

By,

Title

Mayor

Printed Signature

Printed Signature

City Clerk

Printed Signature

Exhibit "1"
Contract for Services
For
Job Analysis Bid Proposal

While the ADA does not require that a formal job analysis be conducted to determine the essential functions of a specific job position, the ADA does require an employer to prove that any exclusionary criteria obtained from a medical examination used to withdraw an offer of employment or terminate employment are "job related and consistent with business necessity." Thus, the ("Analyst") should conduct a job analysis of the positions for which employment tests are performed to ensure that the employment test is measuring the candidate's or employee's ability to perform essential job functions. It is imperative that the CITY provides accurate information to the Analyst regarding the essential job functions for specific job positions. The CITY acknowledges that the CITY is responsible for familiarizing itself with the ADA's definition of what is job related and consistent with business necessity and providing the Analyst accurate information concerning essential job functions.

A separate job analysis should be performed for each position for which the CITY desires to utilize employment testing. The job analysis may include filming, weighing, and measuring tasks for the selected job positions for the CITY.

The CITY understands that the evaluation is dependent upon the complexity of the job and is billed based on the services requested to meet the CITY's specific needs. Additional expenses billed include, but are not limited to travel and lodging expenses, meals, and shipping expenses of necessary equipment. The CITY hereby authorizes Analyst to provide said job analysis at the rates referenced below. CITY agrees to prepayment of thirty-five percent (35%) of proposed job analysis costs upon execution of the job specific scope of work. Prepayment will be applied to the final invoice and actual costs of services and expenses.

<u>Service</u>	<u>Price</u>	<u>Approve (Initial)</u>
• Single Analyst	\$200/hr.	_____
• Single Ergonomist	\$250.00	_____
• Additional Analysts (per analyst)	\$100/hr.	_____
• Expenses (to be billed at actual cost)	TBD	_____
• Travel Time	TBD	_____
• Additional Reporting	TBD*	_____
• Cancellation Fee (*less than two weeks notice of cancellation will result in all non-refundable expenses, as well as the specified cancellation fee billed to CITY)	_____	_____

Reference Information

- Department of Labor (article): <https://www.dol.gov/odep/pubs/fact/opening.htm>
- Medical Inquiries (ADA): <https://www.eeoc.gov/policy/docs/qanda-inquiries.html>

City of Cannon Falls Police Department /Title

Date

Printed Signature

Analyst Representative/Title

Date

Printed Signature

“Attachment A” Description of Services

Post Offer Testing to Include:

Medical History – The candidate is taken through a comprehensive medical history interview to obtain information on previous injuries, surgeries, treatments, as well as current medical conditions. Candidate’s also sign a “falsification of the information” clause which states that falsifying information on the medical history, could result in the withdrawal of the conditional job offer of employment.

Musculoskeletal Examination – A WorkSTEPS certified licensed clinician completes a comprehensive musculoskeletal evaluation with over 100 baseline measures.

Static Grip - This portion of the tests measures grip strength and gathers baseline strength readings on the employee.

Dynamic Lifting - This portion of the test utilizes NIOSH’s 4-standard lifting postures to gather baseline material handling data, as well as to qualify individuals to attempt job simulation tasks. Candidates are instructed on proper lifting techniques for each lifting posture.

Job Specific Tasks - This portion tests the candidate’s ability to perform the essential functions for the position being offered in a controlled clinical setting. The essential functions are created from a job analysis which captures accrual weights and measures for that position begin tested.

Fit for Duty Testing as Part of A Return To Work (“RTW”) Program To Include:

WorkSTEPS will be conducting Fit-for-Duty (Post-Injury RTW) Tests on existing employees to include the following:

- Any reported injury, illness, or condition that gives the employer reasonable belief that the employee’s ability to perform essential job functions will be impaired or create a direct threat to health and safety.
- This category may also include testing at the request of the employer because, although there has been no formal injury or medical condition reported, the employer has observed current performance problems or has received reliable reports of performance problems indicating that the employee may not be able to perform essential job functions or may pose a direct threat to the health and safety of the employee or others.
- Even if the employee has fully “recovered” from injury or illness and no longer considers him or herself “injured”, for documentation purposes the test should be identified as a “post-injury” fit for duty, or an injured worker, because that was the trigger for the test.
- When testing an employee post-injury or illness the provider will:
 - Use the WorkSTEPS Fit for Duty Physical Capacity Consent Form
 - Use the WorkSTEPS Post Injury Fit for Duty Medical History Interview
 - Not perform “routine” medical measures, including heart rate and blood pressure, that are not related to the injury or condition for which the employee is being seen, or that are not contributing to a job-related functional deficit.

- Not perform the standard “baseline” tests such as step test, Sorenson’s or grip if they are not related to the injured area.
- Perform only the dynamic lift postures that are considered qualifying criteria.
- Perform any and all standard job specific tasks for the position and expand to include any additional essential function tasks that could be impacted by their injury or condition.

City of Cannon Falls Police Department / Title

Date

WorkSTEPS Representative /Title

Date