UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

May 15, 2013

MEMORANDUM FOR CHIEF HUMAN CAPITAL OFFICERS

FROM: Elaine Kaplan,
Acting Director

SUBJECT: Contractor Fitness Adjudication – Best Practices

In January 2011, Attorney General Eric Holder established the Federal Interagency Reentry Council to focus on removing Federal barriers to successful reentry of individuals released from State and Federal prisons, and assist these individuals in becoming productive citizens. The goal of the Reentry Council is to identify research and evidence-based practices, policies, and programs that advance the Reentry Council's mission around prisoner reentry and community safety.

The Office of Personnel Management (OPM) is a member of the Reentry Council and supports it with its expertise regarding Federal employment matters. OPM has Government-wide responsibilities pertaining to suitability for employment in the competitive service. Based on this experience, OPM is routinely contacted by agencies seeking guidance on adjudicating the fitness of contractor applicants and employees.

In support of the goals of the Reentry Council, OPM has developed a best practices guide which addresses employment fitness adjudication for contractor applicants and employees who support Federal agencies. The attached best practices guide is offered to agencies to consider, consistent with their discretionary authority to prescribe appropriate contractor fitness standards. This supports a goal of Executive Order (E.O.) 13467 to "ensure alignment of suitability, security, and, as appropriate, contractor employee fitness investigative and adjudicative processes." OPM also expects that this guidance will complement investigative standards for fitness to work for or on behalf of the Government as a contractor employee.

I hope this best practices guide will be helpful. If you have any questions, please contact Michael J. Mahoney at mike.mahoney@opm.gov or 202-606-1142.

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Contractor Fitness Adjudication—Best Practices

Federal Government contracts routinely include requirements for certain contract employees to undergo a background investigation and an adjudication of their "fitness" to work on the contract, based on character and conduct. These are distinct from requirements that a contract employee have work authorization, be eligible for a security clearance, or be eligible to work in a sensitive national security position. They are also distinct from any screening activities and employment actions undertaken by the private contractors who actually employ the contract employees. As defined in Executive Order (E.O.) 13488, a determination of "fitness" is a "decision by an agency that an individual has or does not have the required level of character and conduct necessary to perform work for or on behalf of a Federal agency . . . as a contractor employee." [1]

E.O. 13488 reaffirms each agency's authority to "establish criteria for making fitness determinations," but provides that for reciprocity purposes agencies "shall take into account" OPM guidance about suitability and fitness standards. The order further delegates to OPM the authority to issue "guidance governing suitability, or guidance related to fitness, as the Director determines appropriate." Separately, OPM has been delegated the authority to prescribe the investigative standards for fitness determinations.[2]

OPM also administers a Government-wide program to adjudicate the suitability of Federal applicants and employees whose positions are covered by the suitability regulations in title 5, Code of Federal Regulations, part 731. The purpose of a suitability determination is to evaluate a person's character and conduct to decide if it may have an impact on the integrity or efficiency of the Federal service. Many contract employees have staff-like access and responsibilities; therefore, their character and conduct may also potentially have an impact on the integrity or efficiency of the service. For that reason, agencies are encouraged to establish consistent procedures to evaluate the fitness of contractor and subcontractor applicants and employees in staff-like positions.

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[1] Likewise under E.O. 13467, "contractor employee fitness" refers to "fitness based on character and conduct for work for or on behalf of the Government" (but not as a Federal employee).

[2] Office of Management and Budget, *Assignment of Functions Relating to Coverage of Contractor Employee Fitness in the Federal Investigative Standards* (Dec. 6, 2012). The delegations read as follows:

> a. The DNI shall prescribe investigative standards for contractor employees seeking to perform work for or on behalf of the executive branch that, had that work been performed by a Federal employee, would cause the Federal position to be designated as a "sensitive position" under EO 10450 of April 27, 1953, as amended.
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> b. The Director of OPM shall prescribe investigative standards for "contractor employee fitness" as that term is defined in section 1.3(f) of EO 13467.

As a result of OPM's responsibility for conducting investigations and adjudications for suitability for employment in the competitive civil service under Executive Order 10577, as amended, and pursuant to its role as human resources policy advisor to the Federal Government, we are routinely contacted by agencies seeking guidance on adjudicating the fitness of contractor applicants and employees. In order to assist agencies, we have developed the following best practices guide. We developed these practices after outreach to the Background Investigations Stakeholder Group — a group of Federal agency officials with expertise on these matters – on their current fitness adjudication practices. We have also consulted with the Attorney General's Reentry Council, and issuance of these best practices fulfills a commitment that OPM made to the Council. The Office of Federal Procurement Policy has reviewed the practices in this guidance for general consistency with the Federal Acquisition Regulation.

These best practices are not intended to create any legal rights or obligations. Rather, they are offered for agencies to consider, consistent with their discretionary authority to prescribe appropriate contractor fitness standards, and consistent with the terms of the contracts they have entered.

1. Provide Transparency

Many contractor employees lack familiarity with the background investigation and fitness adjudication process. Providing clear explanations of your process is a great way to de-mystify the experience and make Government contractors and their applicants and employees feel more comfortable.

You may wish to take the following steps to ensure contractors are able to answer questions raised by their applicants and employees about the investigation and adjudication process:

- Provide a briefing to new contractors at the time the contract is awarded to explain what to expect during the investigation and adjudication process.

- Provide the contractor with a point of contact at the agency who can respond to questions as they arise.

- Provide the contractor with periodic updates during the investigation and adjudication process, such as when the case enters an administrative review process, as well as when a favorable determination has been made that will allow the individual to begin work on the contract.

- Once an applicant's investigation has received a favorable adjudication and the contractor has been notified, follow up with the company to determine whether or not the applicant has begun work.

There are also steps you can take to ensure the subject of the investigation and adjudication understands the process:

- When investigations are requested through OPM, individuals with questions about the investigative process may be directed to the explanations on the investigative form completed by the subject to initiate the investigation. The purpose and content of the investigation is clearly explained on that form.

- You may wish to provide additional information directly to the contractor applicant or employee at the beginning of the process to further explain the steps of the process from the investigation to the adjudication, as well as any appeal rights available to contractor employees who receive unfavorable fitness adjudications. Or you may wish to provide readily accessible information such as a Q & A on a website to answer common questions and concerns. If you choose to do so, use plain language. Also ensure it is clear that questions about whether or not the person will ultimately be hired or retained by the contracting company must be directed to the contracting company.

2. Adopt Sound Standards

OPM has developed adjudicative standards for Federal employee suitability in part 731 of its regulations (at 5 CFR 731.202). Though suitability and fitness determinations have different purposes and different consequences, both assess character and conduct, and many agencies have chosen to apply standards they consider to be equivalent to OPM's suitability standards in making fitness determinations. For the following reasons, we encourage agencies to consider adopting standards equivalent to OPM's suitability standards for contractor fitness determinations, when appropriate.

First, these standards have been painstakingly developed over decades and tested through litigation before the Merit Systems Protection Board and the Federal courts. The considerations relevant to suitability for employment in the competitive civil service – such as whether the candidate has falsified employment documents, or whether he or she has committed criminal or dishonest conduct that has a nexus to the integrity or efficiency of the service – may also be relevant to whether an individual is fit for a staff-like position under a contract. The standards also include additional factors that allow decisions to be tailored to individual circumstances.[3]

[3] When an agency makes a suitability determination and when pertinent to the individual case, an agency must consider criteria such as the nature of the position, the nature and seriousness of the conduct, and the recency of the conduct; and must also provide an opportunity for an explanation before an action is taken. *See* 5 C.F.R. 731.202(c), 731.303, 731.403. These decision factors and procedures are consistent with the Equal Employment Opportunity Commission's *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012). *See* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The EEOC guidance is relevant to agency fitness determinations as well.

Second, use of these standards promotes reciprocal acceptance of investigations and adjudications, an important goal of Executive Orders 13467 and 13488. Reciprocity improves the timeliness and reduces the cost of investigations and adjudications. Specifically:

- A contractor employee whose fitness has been favorably adjudicated under these standards may be exempt from a new investigation and a new adjudication for appointment in the competitive civil service, or for appointment in any other position covered by OPM's suitability regulations. (*See* 5 CFR 731.104(a)(4), 731.202(d)).
- A contractor employee whose fitness has been favorably adjudicated under these standards may be exempt from a new investigation and a new adjudication for employment in another contract position, or for appointment in the excepted civil service. (*See* OPM, *Memorandum to Heads of Departments and Agencies, Guidance on Implementing Executive Order 13488* (Sept. 24, 2009).)

Third, use of these standards – which incorporate additional factors that allow decisions to be tailored to individual circumstances, and which allow disqualification only when character and conduct issues have a nexus to the integrity or efficiency of the service – promotes fairness in collateral decisions affecting conditions of contractor employment (for example, the decision whether to grant the contractor employee an identity credential for access to facilities or information systems).[4]

3. Explain Adverse Fitness Determinations

If the agency makes an unfavorable fitness determination, consider providing a written decision to the individual that explains the reason(s) for the unfavorable determination. At a minimum, the individual should have an opportunity to raise concerns about the accuracy of any facts relied upon in deeming him or her unfit.

4. Provide a Mechanism for Review

Agencies should also provide an opportunity for contractor employees to obtain review of an unfavorable fitness determination. At a minimum, agencies should advise that individuals receiving an unfavorable determination may request their investigative file from OPM (or other applicable investigative service provider) and explain the procedures for doing so. In addition, we encourage agencies to provide notice to individuals of the reasons they were deemed unfit, a reasonable period of time to file a written response, and review by an official above the level of the official who made the initial fitness determination. This is especially important where criminal history records are at issue, since an arrest is never, in itself, sufficient to establish the occurrence of criminal conduct, let alone its relevance to the position. The EEOC has stated in

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[4] *See* OPM, *Memorandum to Heads of Departments and Agencies, Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD-12* (July 31, 2008).

its guidance on arrest and conviction records that an opportunity to respond is important to ensure that a disqualification on the basis of criminal conduct is job related and consistent with business necessity.

Agencies may also want to establish an avenue for further appeal or reconsideration. The review process should focus on allowing contractor applicants and employees to dispute the accuracy of the factual underpinnings of the agency's fitness determination. It should also afford the individual the opportunity to offer any additional evidence of mitigating factors or rehabilitation, where appropriate.

5. Preserve Confidentiality of Unfavorable Fitness Determinations

Agencies should take care in reporting information about unfavorable fitness determinations to the contractor that employs or seeks to employ the individual. While it is appropriate for the agency to advise the contractor that an unfavorable fitness determination has been made, it may not be appropriate to disclose additional information about the basis for the determination. A determination that an individual is not fit to work on a particular Government contract does not necessarily imply that he or she is unfit to work for the same private employer in some other capacity. Furthermore, OPM's reports of investigation are protected from disclosure under the Privacy Act and other authorities. Agencies should consult with their legal counsel in considering how to convey unfavorable determinations to the contractor.

6. Incorporate a Nondiscrimination Policy

Under 5 U.S.C. 2302(b)(10), it is a prohibited personnel practice to discriminate "for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States." Further, under E.O. 11478, as amended, "it is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons" and "to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, age, sexual orientation, or status as a parent." While these policies specifically apply to suitability and fitness determinations for Federal employment, it is a good practice for agencies to put in place similar policies for contract employee fitness determinations.

Further, agencies should remind contractors that regardless of the outcome of an agency's determination of whether an individual is fit to work on a particular Government contract, contractors must adhere to their nondiscrimination obligations under E.O. 11246, as amended; section 503 of the Rehabilitation Act of 1973 (Section 503); the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA); and Federal Acquisition Regulation sections

22.810 and 52.222-26.[5] It is not acceptable for a Government contractor to take an adverse employment action against its employee for discriminatory reasons, based on information derived from an agency's adjudication of whether the employee is fit to work on a particular contract. (*See* OPM Federal Investigations Notice 10-05 (May 17, 2010), describing a similar obligation related to identity credentialing decisions; see also 41 C.F.R. Part 60, describing contractors' and subcontractors' nondiscrimination and affirmative action obligations under E.O. 11246, Section 503, and VEVRAA, enforced by the Office of Federal Contract Compliance Programs in the Department of Labor).

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We hope you find these best practices useful in connection with adjudicating fitness of contractor employees. If you have questions about OPM's suitability policy, please contact Kimberly A. Holden, Deputy Associate Director, Recruiting and Hiring, at (202) 418-3218, or by email to kimberly.holden@opm.gov.

cc: Chief Acquisition Officers
Senior Procurement Executives

[5] *See also* Department of Labor, *OFCCP Directive 306, Complying with Nondiscrimination Provisions: Criminal Record Restrictions and Discrimination Based on Race and National Origin* (Jan. 29, 2013), *at* http://www.dol.gov/ofccp/regs/compliance/directives/dir306.htm.