



Homeland Security

August 22, 2008

Department of Homeland Security comments to the Office of Personnel Management in response to the Federal Register Notice regarding the proposed rule for Suitability, 5 CFR Part 731 on June 23, 2008. 73 FR 35358

The Department of Homeland Security's (DHS or the Department) has a number of concerns with the proposed rule.

An overarching concern is that the underlying premise with reciprocity is that once an investigation is performed the person does not subsequently have the opportunity to perform any acts that might exclude them from employment. By requiring reciprocity we are taking a snapshot of an individual at a certain time and using that as the basis for all decisions afterwards, without taking into consideration the fact that the person has had the ability and opportunity to perform in ways that are inconsistent with Federal employment. This is contrary to the ultimate purpose of these investigations and will likely lead to embarrassing situations for high risk level organizations, such as DHS. For instance, if an applicant from another federal agency had a suitability investigation favorably adjudicated 3 years ago, but was arrested for DWI 9 months ago, this information may not be available unless forms / checks are conducted. Actual case at DHS: 14 year Federal employee at another agency applied for position. Upon receipt of forms for suitability screening, subject indicated they used illegal drugs over the past 3 years and as recently as 6 months ago, while employed by the other federal agency. As a result, DHS is opposed to the current concept of reciprocity without the ability to conduct certain preliminary checks.

DHS urges that the suitability standards, which are currently in development, be issued prior to the implementation of these proposed regulations. Additionally, appropriate training should also be provided to all deciding officials, in advance of the implementation of these regulations, so as to ensure the consistency of the determinations that other agencies are going to be bound by.

731.104(b)(2)(ii): This section states that an appointment to a covered position will be subject to investigation when "an agency obtains new information in connection with the person's appointment that calls into question the person's suitability under § 731.202". However, nowhere does the proposed regulation define or explain how an agency "obtains new information." Is it to obtain new forms and compare them to the information provided by CVS? Is it to run new checks to see if new acts incompatible with Federal employment have been engaged in since the last investigation? Without a process for obtaining "new information" this exception is illusory and will likely only be implemented when the person's act is so egregious it is publicized or the person is arrested. This appears to directly undermine the purpose of these investigations.

731.206: While it is understood by DHS that an agency will not be held to reciprocity if the investigation was not reported or included in the CVS system, DHS believes that a clear statement to that effect will ensure that agencies are aware of the requirement. To that end, DHS suggests revising this section to:

Agencies must report to OPM the level and result of each background investigation, suitability determination, and suitability action taken under this part, as required in OPM issuances. Individuals whose appointment background investigations, suitability determinations, and suitability actions were not reported will require a new investigation for the individual.

Additionally, this section only requires agencies to report the level of the investigation and result of the background, investigation, suitability determination and any suitability action it does not include the underlying information or the results of individual checks. For instance, if the specific results of the NCIC check are not included in the CVS how is the gaining agency going to become aware of any derogatory information which was relied upon during the adjudicative decision? That information would be used in order to make a determination about its impact on the ability to perform their Core Duties. An act which was found acceptable in a low risk level agency may not be acceptable in light of the Core Duties of a high risk level agency. Where is this information to be stored and how is it to be obtained?

Further, there is no provision for how quickly this information must be provided to the new agency. The Federal government already has a slow hiring time and in many cases it presents significant problems for hiring employees and without a definitive and short time frame for providing this information to the new agency, it appears that this requirement will delay the process even further.

731.202(d): According to this section, a new investigation may be required if the “investigative record on file for the person shows conduct that is incompatible with the core duties of the relevant covered position.” This exception to when a new suitability investigation may be initiated is illusory without providing a definition to core duties. Without this definition there is a potential for the implementation of the proposed regulation to undercut agencies unique mission requirements. If the exception for certain reviews requires the establishment of codified core duties, then each agency would need to define those core duties for their organization. For example, DHS would need to define Foreign Influence, Preference, and Allegiance as core values so that the Department has the ability to review potential applicants for these concerns. Suggested language for CFR 731.202(d):

Core Duties means those service(s) or function(s) performed by a covered person in support of an Agency mission or legislative mandate.

731.106(c)(2): This section currently refers to “investigation types.” However, since 5 CFR 731.202 actually addresses “investigative requirements,” DHS recommends changing the language to:

Sections 732.210 and 732.202 of this chapter detail the various sensitivity levels and investigative requirements.

731.106(e): In this section, the proposed rule indicates that,

if an employee experiences a change to a higher position risk level due to a promotion, demotion, or reassignment, or the risk level of the employee's position is changed to a higher level, the employee may remain in or encumber the ^{New} position. Any upgrade in the investigation required for the new risk level should be initiated within 14 calendar days after the promotion, demotion, reassignment or new designation of risk level is final.

This language is unclear and appears to present an untenable situation for the agency. First, it is unclear whether the position in which "the employee may remain," is the position with higher risk level or the original position. Additionally, if the employee does not "encumber" the higher risk level position, then an agency is left with the possibility of knowing that an employee has derogatory information regarding him/her, but cannot necessarily initiate any action related to it, other than to rescind the tentative job offer. This appears to undermine the entire premise of ensuring suitability for government employ.