EXHIBIT A

EXECUTIVE ORDER 12564 (September 15, 1986)

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release September 15, 1986

EXECUTIVE ORDER

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DRUG-FREE FEDERAL WORKPLACE

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

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Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. Drug-Free Workplace.

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. Agency Responsibilities.

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. Drug Testing Programs.

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient

use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. Drug Testing Procedures.

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. Personnel Actions.

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

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(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, provided that such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. Coordination of Agency Programs.

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Sec. 7. Definitions.

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Sec. 8. Effective Date. This Order is effective immediately.

RONALD REAGAN

THE WHITE HOUSE,
September 15, 1986.

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EXHIBIT B

Chapter 731, Federal Personnel Manual

Chapter 731

Suitability

Contents

For related information on—	*See—*
Text of pertinent laws, rules, and regulations	Supplement 990–1
Agency suitability determinations	Supplement 296–31
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Subchapter 1. General Provisions

1–1. SUITABILITY DEFINED

Suitability as that term is used in this chapter means a requirement or requirements for employment by the Government having reference to the character, reputation, and fitness of the person under consideration.

1–2. DISTINCTION BETWEEN SUITABILITY AND SECURITY

a. **Distinction in law and Executive order.** Although it is sometimes difficult to distinguish clearly between what matters are relevant to suitability and what matters are relevant to security, it should be borne in mind that the general personnel laws authorize removals for such cause as will promote the efficiency of the service, whereas 5 U.S.C. 7532 and Executive Order 10450 authorize removals for reasons pertinent to the security of the Nation. The Supreme Court has held that an employee can be removed in the interest of the national security only if he occupies a sensitive position. Questions of security do not arise in deciding cases of *employees* who occupy nonsensitive positions. Like distinctions should be made between *applicants* for sensitive positions and *applicants* for nonsensitive positions.

b. **Clarifying example.** An example which may help to clarify these distinctions relates to the use of intoxicants. A person who uses intoxicants habitually to excess is unsuitable for any position in the competitive service. An employee who drinks on duty may be violating agency standards of conduct and might be removed as unsuitable even though he does not use intoxicants habitually to excess. An employee who occupies a sensitive position may use intoxicants moderately while off duty, but if that use makes him unable to remain silent concerning those details of his employment which affect the national security, it may be found by the agency head that his employment is not clearly consistent with the interests of national security.

1–3. OPPORTUNITY TO EXPLAIN

a. **Usual practice.** Before taking action against a person for suitability disqualification the Commission gives him an opportunity to explain the derogatory information. This opportunity to explain is a safeguard which the Commission has adopted to avoid errors which might otherwise result from mistakes in identity, or where mitigating circumstances may exist which are unknown to the Commission. The safeguard is applied in the cases of applicants, eligibles, and appointees, as well as to employees who have apparently violated the civil service laws, rules, or regulations.

b. **Exceptions.** Exceptions to this policy are sometimes made when the primary disqualifying factor is a mental or nervous disorder, when an applicant or eligible furnishes the disqualifying suitability information in his application, or when the only action contemplated by the Commission is a warning to the employee.

c. **Method used.** The opportunity to explain may take the form of serving written interrogatories on the person concerned or of having him appear personally before a Commission employee authorized to take his statement.

1–4. PROTECTING INFORMATION SOURCES

a. **General.** Agencies use the reports furnished by other investigative agencies for a variety of purposes, both in the selection process and deciding on the retention or reassignment of employees. In doing so, they often have

occasion to use derogatory information from these reports in providing an opportunity for the applicant or employee concerned to explain or attempt to rebut unfavorable information in situations ranging from personal interviews and interrogatories to formal hearings and formal notices of proposed adverse action. It is important, therefore, that all employees who are engaged in these duties avoid disclosure of sources.

b. **Avoidance of identification of source.** Information developed through the inquiries of investigative agencies is usually secured under a pledge of confidence. For this reason, when reports of investigation are loaned to the employing agency by the investigating agency for security or suitability evaluation, the restrictions which the investigating agency has placed on the content of the investigative reports must be scrupulously observed by the employing agency. It is very important that agency personnel refer to the derogatory information in such a way as to protect the sources of the information from disclosure when questioning employees about matters which relate to possible suitability disqualifications, or when drafting letters of interrogatory, or presenting charges.

(1) *Commission reports.* Reports of investigation conducted by the Commission and furnished to agencies are subject to these restrictions: The sources of the information must not be disclosed to the person investigated, nor may the information be discussed with him in a manner which would reveal or permit him to deduce the source of the information. These restrictions do not apply to (a) information of public record; (b) information from law enforcement records; and (c) information from Federal personnel records which could be obtained on request by the employee. Other information sources identified in the investigation reports may be disclosed to the employee only if the information is obtained independently by the agency, such as by interviewing the employee, by obtaining it from other sources, or by obtaining permission from the sources named in the Commission's reports to use the information and to identify the source.

(2) *Other investigative reports.* Investigative agencies may restrict the use of their reports and of the information in them by other Government agencies. Investigative reports furnished to employing agencies by investigative agencies other than the Commission, or reports of these agencies transmitted by the Commission, must be treated in accordance with the restrictions imposed by the original investigating agency.

c. **Derogatory information furnished by a private employer.** Cases involving discharge from private employment for cause present a special area of difficulty because identifying the employment usually amounts to disclosing the source of the information. The Commission, in its investigation of cases in which it has jurisdiction, not only attempts to secure this information from more than one source, but also asks the employer's permission to name him as the source. If required by the employer, the Commission requests a release from the applicant or appointee. In these cases the report of investigation, when furnished to the employing agency, includes a statement whether the employer has given this permission. When the release is obtained a copy of it is furnished to the agency, along with the report, for use if it is needed. When the information about a discharge from private employment is received from an investigative agency other than the Commission, the employing agency may find it appropriate to take similar steps, such as requesting the investigating agency to request permission to identify the source, or to provide the release to the source. Advice on how to proceed in individual cases of this type can be obtained from the Commission office serving the agency.

1–5. SUITABILITY INFORMATION TO BE TREATED CONFIDENTIALLY

Reports, records, and files relative to suitability matters must be preserved in strict

confidence. This is necessary not only to preserve the confidential character and sources of information furnished but also to protect Government personnel against the dissemination of unfounded or disproved allegations. It is particularly important that such records not be filed in the Official Personnel Folder where the employee concerned might obtain access thereto. It may be prudent, however, to make note in the Official Personnel Folder of the existence of the suitability records so that persons authorized to receive derogatory information will be alerted.

Subchapter 2. Suitability Disqualifications

2–1. REASONS FOR DISQUALIFICATIONS

a. **Disqualification by the Commission.** The Commission may deny an examination to an applicant, deny appointment to an eligible, and, within the time limits shown in subchapter 3, may require an agency to remove an appointee. These actions may be taken for any of the following reasons:

(1) Removal from employment for delinquency or misconduct;

(2) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;

(3) Intentional false statements or deception or fraud in examination or appointment;

(4) Refusal to furnish testimony as required by section 5.3 of rule V;

(5) Habitual use of intoxicating beverage to excess (5 U.S.C. 7352);

(6) Reasonable doubt of the loyalty of the person involved to the Government of the United States; or

(7) Any legal or other disqualification which makes the person unfit for the service. (For physical or mental unfitness provisions, see chapter 339, subchapter 1.)

b. **Disqualification by the agency.** Agencies may disqualify applicants for appointment for the reasons in paragraph a when they have been delegated appointment authority to appoint to competitive positions; for example, in reinstatements, transfers, and noncompetitive temporary limited appointments under section 316.402 of the Commission's regulations. (See also sec. 3–3b(3) of this chapter.)

2–2. JUDGMENTAL AREAS

With respect to the above enumerated disqualifications, particular note should be made of the permissive language describing the action authorized. Most suitability evaluations are, of course, a matter of judgment, and sound judgment and discretion must be exercised in disqualifying an applicant under these criteria. With the exception of a few statutes relating to treason, destruction of public records, bribery of Government officials, etc., the privilege of holding office in the competitive service is extended to all citizens of the United States. In evaluating the suitability of applicants, therefore, the rating official should always be interested in ascertaining any mitigating factors which may be present in any of the suitability disqualifications, or in establishing the extent of rehabilitation where any person may have been previously disqualified.

2–3. DISCHARGES FROM THE ARMED FORCES OF THE UNITED STATES UNDER OTHER THAN HONORABLE CONDITIONS

a. Applications from persons who have been separated from the Armed Forces of the United States with dishonorable discharges or under conditions other than honorable, with no extenuating circumstances, may be accepted after the lapse of one year from the date of the separation, subject to appropriate investigation. The Commission may accept applications during the 1-year waiting period if:

(1) Exceptionally meritorious circumstances exist;

(2) The reason for the discharge or separation would not affect the eligibility of the ex-serviceman for Federal employment; and

(3) The Commission receives information from the appropriate service department that the ex-serviceman concerned would be acceptable for induction despite the circumstances of the discharge or separation.

2–4. RECORD OF LAW VIOLATIONS

a. **General procedures.** (1) A check should be made to determine whether an applicant has

a record of law violations. The primary concern is with convictions for law violations rather than with arrests. This fact, however, and the fact that arrests are not required to be shown on the application form, do not preclude either the Commission or the agency from developing and evaluating the circumstances surrounding an arrest when it makes a suitability determination for Federal employment. An arrest record may have a genuine bearing on a person's fitness for Federal employment even though there was no criminal conviction. Some arrested persons are not brought to trial because of the disappearance of witnesses or an unwillingness on the part of those concerned to prosecute.

(2) The Commission or the agency shall decide the fitness of each applicant with a record of law violations on its individual merits, taking into account such matters as the nature and seriousness of the offense, the circumstances under which it occurred, how long ago it occurred, whether the offense was an isolated or repeated violation, the age of the person when he committed the offense, social conditions which may have contributed to the offense, any evidence of rehabilitation, and the kind of position for which the applicant is applying. Accordingly, after all the facts have been gathered and evaluated, if the applicant is considered a *good risk* offender, his application will be rated eligible.

(3) Any former offender who has demonstrated successful rehabilitation under the work release program authorized by the Prisoner Rehabilitation Act of 1965 (Public Law 89–176), or has demonstrated his rehabilitation by good conduct while living in the community, would be considered an example of a *good risk* former offender.

→(4) If an applicant fails to admit a conviction which has been expunged under State law, no adverse suitability determination may be based in whole or in part on a finding that failure to list the conviction constitutes an intentional false statement. The facts and circumstances on which the conviction was based, however, shall be considered when making a suitability determination and, if warranted, may be the basis in whole or in part for a suitability disqualification.←

b. **Felony.** (1) For the purpose of determining suitability the word *felony* means any crime for which the court has imposed a penalty of a prison term exceeding one year (a year and a day or more) and there has been some period of actual confinement under the sentence.

(2) When an applicant has served a term for a felony conviction within the three years immediately preceding the date his application is being considered, the Commission or the agency will ask the warden of the appropriate penal or correctional institution for a complete report on the person's background, conduct during his prison term, and any special training he may have received during his prison term. The warden will also be asked to make a definite recommendation on whether the applicant should be considered for Federal employment in the position that he seeks. If the applicant is or has been on probation or parole, information similar to that obtained from the warden should be requested from the appropriate probation or parole officer. When a suitability determination is made, the reports and recommendations from the warden, parole, or probation officer should be considered along with all the other information available and the circumstances known in accordance with the principles in paragraph a above.

(3) When necessary an investigation will be made to establish present fitness.

c. **Misdemeanor.** A misdemeanor is defined as any offense not classifiable as a felony under subparagraph b above, regardless of whether it is termed a felony under the laws of the State where the offense occurred. Whether conviction of a misdemeanor would be disqualifying for appointment would, as with a felony, depend upon all the facts in the case. Accordingly, it is appropriate to stress the nature of the offense, the nature of the duties of the position applied for, and whether there is substantial evidence of rehabilitation. A

record of repeated arrests for minor offenses which reflects a disregard for law may be disqualifying. Whenever it appears to be necessary inquiries will be sent to wardens or parole or probation officers, as appropriate, similar to the ones sent in the case of a felony to establish present suitability or fitness. When necessary an investigation will be made to establish present fitness.

d. **Person on parole or probation.** If an appointing officer has delegated authority to fill a competitive position and he is not con-

vinced, after having reviewed all available reports and recommendations, that he has full knowledge of all the circumstances involved in the case of a person on probation or parole, he must refer the case to the appropriate Commission office for further consideration.

e. **Person under indictment.** An application may be accepted from a person who is under indictment, subject to whatever action as may be later warranted.

2–5. JUVENILE CASES

a. **Provisions of law.** The laws of the District of Columbia and some of the States provide that the disposition, evidence, or adjudication before a juvenile court shall not operate to disqualify a juvenile offender in any future civil service examination. To provide equitable procedures for handling the cases of all juvenile offenders, the Commission has approved the following definition of juvenile offenders and the following procedures for handling their cases:

(1) A juvenile offender is defined as one who committed an act in violation of a law, regulation, or ordinance before his 21st birthday and the offense for which he was charged was adjudicated in a juvenile court or under a youth offender law.

(2) A juvenile offender is not required to answer affirmatively a question on conviction for offense against the law when the question is asked in civil service employment application forms. Moreover, if a juvenile offender does furnish information about his convictions, this information shall not be used by either the Commission or an agency to disqualify him for any civil service examination or for appointment to a position in the competitive Federal service. If, however, an offense was not adjudicated in a juvenile court or under a youth offender law, the applicant is required to answer affirmatively any questions on convictions which may appear in civil service applications and appointment papers, regardless of his age at the time he committed the offense.

b. **Application of suitability standards to juveniles.** Although the act for which a juvenile offender was required to appear before a juvenile court may not be used to disqualify him for a position in the competitive civil service, he is not excluded from the general requirement that all persons entering the Federal service be of good character. In such cases any necessary investigation will be conducted to enable the Commission to determine the person's acceptability for Federal employment. Any substantially derogatory information developed as a result of the investigation may be grounds for disqualifying these persons.

2–6. OTHER YOUTH OFFENDER CASES

Convictions under the Federal Youth Corrections Act. A person whose conviction has been set aside under the Federal Youth Corrections Act, which may be applied to a person who was under age 26 at the time of his conviction, or similar State authority, need not list a conviction in response to a question asking for this information in any application for Federal employment. Convictions set aside under that act which may be admitted are not used to disqualify a person for any civil service examination or for appointment in a position in the competitive Federal service.

2–7. DISLOYALTY AND STRIKING AGAINST THE GOVERNMENT

a. **Employment limitation.** Under law and Executive order a person may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he:

(1) →Seeks the overthrow of our constitutional form of government by force or violence or other unlawful means;

(2) Is a member of an organization that he knows seeks the overthrow of our constitutional form of government by force or violence or other unlawful means; or

(3) Participates in a strike against the Government of the United States or the government of the District of Columbia.←

b. **Employee affidavit.** Section 3333 of title 5, United States Code, →as interpreted by the courts,← requires a person who accepts office or employment in the Government of the United States or the government of the District of Columbia to execute an affidavit within 60 days after accepting the office or employment that his acceptance and holding of the office or employment does not or will not violate →the prohibition in 5 U.S.C. 7311 against participating in a strike against the Government of the United States or the government of the District of Columbia. For applicable penalty see 18 U.S.C. 1918.←

2–8. COMMUNIST PARTY OF THE UNITED STATES

a. **Communist party members holding Federal office.** Under the provisions of section 5(a)(1) (A) and (B) of the Subversive Activities Control Act of 1950 (50 U.S.C. 784, et seq.) it is unlawful for any member of the Communist Party of the United States of America to hold any nonelective office or employment under the United States or, in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of the Communist Party.

b. **Contributions to the Communist Party.** It is also unlawful under the provisions of section 5(a)(2) of the act for any officer or employee of the United States to contribute funds or services to the Communist Party, U.S.A., or to advise, counsel, or urge any person known to him to be a member of this organization to perform or omit to perform any act if such act or omission would violate any provision of 50 U.S.C. 784(a)(1).

2–9. LOYALTY DETERMINATIONS

a. **Agency determination.** In view of the serious and far-reaching effects of an adverse loyalty finding on a person, the Commission recommends that agency rating actions taken on the suitability disqualification, "Reasonable doubt as to the loyalty of the person involved to the Government of the United States," or cases involving false statements about loyalty matters be reviewed at a sufficiently high level within the agency so as to insure that such a finding has a valid basis in fact.

b. **Commission determination.** In cases in which the Commission exercises its jurisdiction, only the Commissioners can rate applicants or appointees ineligible under the disqualification, "Reasonable doubt as to the loyalty of the person involved to the Government of the United States."

2–10. LEGAL OR OTHER DISQUALIFICATIONS

Although no attempt can be made to list all the legal or other disqualifications referred to in section 2–1 above, the following may be considered examples of these disqualifications;

—Inducing withdrawals from competition (section 4.3 of rule IV);
—Participating in any strike against the Government of the United States;
—Illegal entry into the United States;
—Soliciting or requiring a fee for aiding a person to obtain public office (18 U.S.C. 211).

If, in connection with the appointment of an employee recruited or certified by the Commission, a fraud comes to the attention of the agency before the Commission has completed its determination of suitability, the question may be referred to the appropriate Commission office for resolution. Fraud, in this sense, includes impersonation, collusion, and an intentional misstatement or omission of a fact which, if the truth had been known, would have prevented the appointment.

2–11. POLITICAL ACTIVITY CASES

Federal positions. Persons who have been removed because of certain legal provisions relating to political activity (5 U.S.C. 7325) are subject to certain restrictions on acceptance of applications. The limitations upon the employment of persons who have been removed from the Federal service for this reason are given in chapter 733.

Subchapter 3. Suitability Rating Actions

3–1. SCOPE OF COMMISSION JURISDICTION

a. Appointments subject to investigation. In order to establish an appointee's qualifications and suitability for employment in the competitive service, every appointment to a position in the competitive service is subject to investigation by the Commission, except:

(1) Promotion;
(2) Demotion;
(3) Reassignment;
(4) Conversion from career-conditional to career tenure; and
(5) Appointment, or conversion to an appointment, made by an agency of an employee of that agency who has been serving continuously with that agency for at least one year in one or more positions in the competitive service under an appointment subject to investigation.
(6) Reinstatement, effected within one year from the date of separation from Federal civilian employment or from honorable separation from military service, provided the 1-year, subject-to-investigation period applied to the previous appointment has expired; and
(7) Transfer, provided the 1-year, subject-to-investigation period applied to the previous appointment has expired.

b. Action when appointee is disqualified or is unsuitable. Whenever the Commission finds an appointee disqualified or unsuitable for Federal employment it may, as authorized by the President under section 5.2 of civil service rule V, instruct the agency to remove him, or to suspend him pending an appeal from the Commission's finding.

3–2. TIME LIMITS OF JURISDICTION

a. One-year limitation. Except in cases involving intentional false statements or deception or fraud in examination or appointment, the condition, *subject to investigation*, expires automatically at the end of one year after the effective date of the appointment. During that year the Commission may instruct the agency to remove the employee if he is found unsuitable for any of the reasons cited under Suitability Disqualifications listed in section 2–1. (See also chapter 339, for medical suitability.)

b. Deception or fraud. After the condition expires, the Commission may require removal only on the basis of intentional false statements or deception or fraud in examination or appointment. If an appointment to the competitive service is obtained through fraud, the fraud vitiates the appointment and the benefits accruing therefrom. For that reason the Commission's jurisdiction to remove an employee who has obtained his appointment through fraud does not expire automatically. As a general rule, however, the Commission does not take action to remove an employee whose original appointment was obtained fraudulently if five years or more have elapsed before the fraud is uncovered.

3–3. DUAL JURISDICTION

a. Distinction in area of jurisdiction. During the first year after appointment both the agency and the Commission have jurisdiction over the appointee in suitability matters which may be developed by investigation or otherwise. It is important, however, to distinguish between suitability matters which originated prior to appointment or in connection with the execution of appointment papers, and those matters which occur as a result of the employment relationship, or after the appointee has entered on duty. The Commission is not ordinarily interested from a jurisdictional standpoint in the conduct of the employee on the job, unless the conduct relates specifically to violation of the civil service laws, rules, or regulations. Consequently,

dual jurisdiction in suitability matters generally relates to matters which arise as a result of falsifications made in appointment documents or in the application itself, or to events which occurred before the appointment, which may reflect on the character, reputation, and fitness of the appointee.

b. **Removal procedures.** (1) When the Commission orders the separation of an employee, during the first year after appointment, the order will be addressed to the agency with a copy to the employee, and will contain specific instructions and a summary of the supporting facts. The separation must be effected on the date specified in the order unless it is appealed, or unless the person is in the military service of the United States. If the separation order is appealed by either the agency or the employee, the agency may either keep the employee on active duty until the appeal is settled, or suspend the employee until the appeal is settled, in which case the suspension is not subject to the job protection procedures. If the employee has been separated or furloughed for military service when the separation order is received from the Commission, the agency should take no action except to return the case to the Commission with a statement of the facts. The Commission should be informed when the person is restored to his job.

(2) When the Commission orders the separation of an employee after the normal 1-year subject-to-investigation condition has expired on the basis of intentional false statements or deception or fraud in examination or appointment, the employee is entitled to the notice and appeal provisions contained in chapters 754 and 772 of this manual.

(3) In removals initiated by agencies the procedures followed depend upon whether the disqualifications result from the employee's activities before or after his appointment and whether he has completed his probationary period, and are effected in accordance with the particular regulation applicable to the situation.

c. **Review of appointment papers.** The Commission reviews the applications of persons who apply for entry on civil service registers. Any suitability question disclosed as a result of this review ordinarily will have been resolved by the Commission before the eligible's name is certified to an agency. Appointing officers, however, are responsible for making a similar review of applications of persons who are considered for appointments to competitive positions by reinstatement, transfer, temporary limited appointments based on reinstatement or transfer eligibility, indefinite appointments, job appointments or appointments outside the register. Similarly, appointing officers are responsible for reviewing Standard Form 61, Appointment Affidavits, and other appointment papers, and for the review of the Official Personnel Folder of former Federal employees.

d. **Separation of appointees under investigation.** When an appointee is separated for any reason and the agency knows that the Commission is conducting a personal investigation in his case rather than written inquiries, it should notify the Bureau of Personnel Investigations, United States Civil Service Commission, or the appropriate regional office of the Commission so that investigative time will not be wasted on appointees who are no longer in the service.

3–4. RELIANCE ON AGENCY DETERMINATIONS

a. **Sensitive positions.** The Commission ordinarily does not exercise its jurisdiction in suitability cases of persons appointed to sensitive positions and investigated under sections 1304 and 7532 of title 5, United States Code, or similar authorities. In these cases the Commission as a general policy relies upon the decision made by the agency on security to have resolved any question of suitability. The Commission, however, may rate any serious case of this kind that comes to its attention in which the agency made a favorable decision and in which the Commission has authority to direct adverse action.

b. **Agency investigated cases.** In instances where the Commission has special agreements with the agencies which have their own investigative facilities, the Commission does not ordinarily exercise its jurisdiction in suitability matters, relying on the agency concerned to make suitability determinations based upon its investigative findings.

3–5. ADVISORY OPINIONS

The Commission does not evaluate cases in which it does not have jurisdiction. Upon agency request, however, it will furnish advice on the general application and interpretation of the Commission's suitability standards.

3–6. RATING ACTIONS

a. **Types of suitability rating actions.** During the time it retains rating jurisdiction in the cases of appointees, and in dealing with applicants and eligibles, the Commission may take the following suitability rating actions:

(1) Rate an application ineligible and cancel any eligibility which may have been obtained as a result of filing the application or other applications.

(2) Direct removal from the service or cancel reinstatement eligibility, or both.

(3) Issue a letter of warning to the applicant concerned, informing him of the substance of the matter concerned and warning him of the possible consequences of a repetition of the offense or action on his part; or issue a letter of reprimand to an appointee or incumbent. In the latter case a copy of the letter of warning is furnished the employing agency for inclusion in the employee's Official Personnel Folder.

(4) Take debarment action. An individual may be barred from competing in competitive civil service examinations or accepting competitive civil service employment for a period of one, two, or three years, depending upon the seriousness of the offense or disqualification. The debarment may or may not be associated with a directive for removal from the service, depending upon the status of the individual. Upon expiration of the period of debarment, the person who has been debarred may not be appointed to any position in the competitive service until his fitness for appointment has been redetermined by the Commission. The maximum debarment period has been established as three years on the grounds that an individual is entitled to consideration if he has rehabilitated himself. This does not mean, of course, that an individual is entitled automatically to a favorable suitability determination when his debarment has expired, but it does give him an opportunity to demonstrate that he now is qualified.

b. **Special report to the employing agency.** In some cases in which the Commission has lost jurisdiction or in which special circumstances obtain, the Commission may furnish the derogatory information developed to the appointing officer for his consideration in determining whether any further action is warranted under all the circumstances.

3–7. NOTIFICATION OF RATING ACTION

The individuals concerned are notified of adverse suitability determinations, and in any case in which a favorable decision is made after an individual has been questioned about apparently derogatory information, he is advised of his eligibility. A notice of adverse rating action will contain an express finding of disqualification under one or more of the suitability disqualifications listed in section 2–1 and will be related to the facts of the case at hand.

3–8. REMOVAL OF APPOINTEES IN THE U.S. MILITARY SERVICE

The Commission does not order an agency to remove an employee when it knows the employee is in the United States military service. Therefore, if the Commission orders an agency to remove an employee and the employee has entered the military service, the agency should return the order with that information. When the employee is honorably separated from the military service and is restored to a civilian position, the Commission will review the derogatory information for appropriate disposition. If the Commission still has removal jurisdiction, it will make a determination of what action should be taken in view of the facts at that time. Otherwise, the derogatory report will be forwarded to the agency for whatever action it desires to take.

3–9. ENFORCEMENT AUTHORITY

a. **Notice to individual or to agency.** Under section 5.4(a) of civil service rule V, when the

Commission finds that a "person has been appointed to or is holding a position in violation of the Civil Service Act, rules, or regulations, or that any officer or employee in the executive branch has violated . . . any of the laws, rules, or regulations administered by the Commission, it is authorized, after giving due notice and opportunity for explanation to the officer or employee and the agency concerned, to certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal or other corrective actions."

b. **Compliance**. Section 5.4(d) of civil service rule V provides that, "Whenever the Commission issues specific instructions as to discipline or dismissal of an officer or employee, or to restore an officer or employee to duty, the appointing officer concerned shall comply with the Commission's instructions."

c. **Method of enforcement.** Subsection (e) of the same rule provides that, "If the appointing officer fails to carry out the instructions of the Commission issued under section 4(a) of this rule, the Commission shall certify the facts to the head of the agency concerned. If the head of the agency fails to carry out the instructions of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the Comptroller General of the United States, and shall furnish a copy of such certification to the head of the agency concerned; and thereafter no payment shall be made of the salary or wages accruing to the employee concerned."

Subchapter 4. Appeals and Reemployment Eligibility

4–1. APPEAL OF ADVERSE RATING

a. **Who may appeal.** Any person against whom the Commission takes an adverse rating action has the right to appeal from, or request reconsideration of, the action. In suitability cases, an employing agency may also file an appeal on behalf of the employee if the action includes instructions to suspend or to separate.

b. **Time limits.** When no time limitation is given in the notification of rating action, consideration is given to an appeal filed within a reasonable time from the date of action.

c. **Appellate jurisdiction.** The initial appeal or request for reconsideration should be directed to the office of the Commission which took the initial rating, which will forward the appeal to →the Commission's Federal Employee Appeals Authority. The decision of the Appeals Authority is final, unless the applicant, appointee, or agency petitions the Appeals Review Board to reopen and reconsider the decision under the provisions of chapter 772 of the Federal Personnel Manual.←

4–2. EVIDENCE CONSIDERED

Consideration is given in an appeal to all the evidence, including any new or additional evidence submitted in connection with it. In some cases, adverse suitability decisions may have been made on the basis of specific disqualifications without fully resolving all other questions of suitability which may have been raised. In considering appeals in these cases, if there is indication that the original decision may be reversed, steps will be taken to clear up any remaining unresolved questions of suitability before a decision is made on the appeal.

4–3. REEMPLOYMENT ELIGIBILITY

a. **Requests by former employees for suitability determination.** When an employee has been removed by an agency on charges (other than security or loyalty), or has resigned upon learning the agency planned to prefer the charges or while the charges were pending, he may apply to the Bureau of Personnel Investigations in the central office of the Commission for a determination of his suitability for further employment in the competitive Federal service. The request will be considered only if the former employee completed any required probationary period, has basic eligibility for reinstatement, and submits a sworn statement which gives fully and in detail the facts surrounding his removal or resignation.

b. **Action on requests.** After appropriate consideration, including such investigation as the Commission considers necessary, the Commission will notify the former employee whether he has been found suitable for further employment in the competitive service. If he is found unsuitable and has had an opportunity to comment on the reasons for this finding, or if he has furnished the reasons to the Commission, the Commission may cancel his reinstatement eligibility if that eligibility resulted from his last Federal employment and was obtained through fraud. In addition, the Commission may prescribe a period of debarment from the competitive service not to exceed three years. An adverse decision will state the reasons and will advise the former employee of any appeal rights.

c. **Time limits on requests.** No case will be considered under this provision unless the request is submitted to the Commission within six months after the date of separation of the employee, or sixty calendar days after the

date of the last adverse decision as a result of an appeal, whichever is later. At its discretion, the Commission may extend the time limit upon a showing by the former employee that circumstances beyond his control prevented him from filing his request within the prescribed period.

d. **Other means of securing suitability determination.** The procedure in paragraphs a, b, and c, above, is not the only way by which a former employee may secure a determination on his suitability for further employment in the competitive service. If he is not barred from the competitive service, he may initiate action to secure a determination by filing an application for a specific position for which he is otherwise qualified.

e. **Agency requests.** If a Federal agency wishes the Commission to determine the suitability of a former Federal employee for reemployment in the competitive service, the Commission will make the determination upon receipt of an official request from the interested agency provided the employee has basic eligibility for reemployment.

United States Civil Service Commission

FPM Letter 731-5

Federal Personnel Manual System

FPM Letter 731-5

Published in advance of incorporation in FPM Chapters 731 and 736

RETAIN UNTIL SUPERSEDED

SUBJECT: New Procedures in Evaluating the Suitability of Persons Entering the Federal Competitive Service

The Advance Edition was dated 2/21/80

Washington, D. C. 20415

March 6, 1980

Heads of Departments and Independent Establishments:

1. This Letter provides notice of new procedures in evaluating the suitability of applicants for and appointees to positions in the Federal competitive service. The new procedures, effective April 1, 1980, are part of an overall effort by the Office of Personnel Management (OPM) to streamline the staffing process Government-wide. The changes in the appointee rating program also reflects the OPM's ongoing policy of providing agencies with increased decision-making responsibility consistent with the philosophy and intent of the Civil Service Reform Act.

2. Agencies are requested to review the new procedures and forward any comments to the Office of Personnel Management, Staffing Services Group, Division of Personnel Investigations, Washington, D. C. 20415, by March 17, 1980. A set of questions and answers are attached to help explain, and thereby facilitate comments on the new procedures. Agencies will be notified of any changes resulting from the comments.

Current Practice

3. Except for actions in connection with critical-sensitive positions, and as otherwise delegated by agreement with agencies, the OPM currently has primary responsibility for determining the suitability of applicants for and appointees to positions in the competitive service. The OPM may deny an applicant examination, and instruct an agency to remove an appointee under Part 731, Title 5, of the Code of Federal Regulations.

4. Suitability decisions on applicants are made by the OPM primarily during the application and certification stages of the examining process. The OPM's review of the application and related material may include limited investigation as required to resolve specific suitability issues, before an applicant is placed on a register or an eligible is certified to an agency. The OPM also makes final suitability decisions on agency objections to and passovers of eligibles certified by the OPM to the agency.

5. The OPM's suitability rating authority extends to competitive service appointees essentially during the first year of appointment. National Agency Check and Inquiry (NACI) investigations conducted by the OPM on appointees are sent directly to the employing agency for a determination of continued employment, unless the NACI discloses materially derogatory information involving an appointee in the competitive service. These cases are reviewed by the OPM for decision on the appointee's suitability for continued Federal employment before referral of the investigative material to the employing agency. The OPM's review frequently involves additional investigation to resolve the suitability issue(s) disclosed by the NACI before a decision with respect to suitability is made.

Inquiries: Division of Personnel Investigations, Staffing Services, extension 632-6152

CSC Code: 731, Suitability

Distribution: FPM

agency for use in the agency's determination of the appointee's continued employment. The OPM will provide an advisory opinion on a nonreimbursable basis in individual cases based on the results of additional investigation only upon request by the agency. Request for additional investigation and/or advisory opinion must be made in writing to the Office of Personnel Management, Division of Personnel Investigations, Washington, D. C. 20415.

13. NACI cases containing loyalty information will be referred directly to the FBI by the OPM. The employing agency will be forwarded a copy of the FBI investigation, if any, by the OPM. As in suitability cases, the agency will have the responsibility for making the retention decision. Request for an advisory opinion by the OPM may be made as outlined in the preceding paragraph.

14. Agency actions under the new procedure will be monitored by the OPM through periodic audits. The OPM reserves the right to take action under Part 731 in individual appointee cases as warranted.

Conclusion

15. The Federal Personnel Manual will be revised as appropriate to reflect the above procedural changes.

By direction of the Director:

Jule Sugarman

Jule M. Sugarman
Deputy Director

Attachment

QUESTIONS AND ANSWERS ON THE NEW PROCEDURES IN EVALUATING SUITABILITY FOR THE FEDERAL COMPETITIVE SERVICE

Q.1. In simplest terms, what changes are being made in the present suitability rating program?

A.1. Applicants: The only real change in the applicant program will be the OPM's use of the NACI as a mechanism for screening applicants during the initial stages of fitness review. Rather than directly schedule an often lengthy investigation into the issue(s) indicated on the application, the OPM will go "up-front" to applicants with potentially serious suitability problems and ask them to complete the papers necessary to initiate a NACI.

Appointees: The OPM will no longer evaluate the suitability of appointees. This will become the sole responsibility of the employing agency. Results of the NACI and any additional investigation to ensure accuracy and completeness will be sent by the OPM to the employing agency for consideration in an employment determination. The agency could make further inquiries as necessary, or request the OPM to conduct further investigation on a reimbursable basis before a determination is made.

Q.2. Why were the new procedures developed?

A.2. There are two broad reasons: (1) to improve the efficiency of the staffing process Government-wide, and (2) in the case of appointees, to provide agencies with increased decision-making authority consistent with the philosophy and intent of the Civil Service Reform Act.

Q.3. What specifically are the advantages of the new procedures?

A.3. Applicants: The new procedure, in addition to providing the applicant with advance notice that a potential suitability problem exists, should also significantly streamline the review and rating process. It is expected that no more than 1,000 applications (out of an estimated 6,000 received yearly for review from examining offices) will involve actual NACI investigation.

Appointees: By providing employing agencies with sole responsibility for making employment determinations on appointees, the OPM will be eliminating the dual jurisdiction which has subjected the appointee to two employment determinations for the same job--one by the OPM and another by the agency. The new procedures should allow the agency to make more timely employment decisions. It is also felt that the agency is in a better position than the OPM to evaluate investigative information in terms of job and staffing requirements, effect of the conduct on co-workers and other localized factors. To assist agencies in making a decision, the OPM will expand the NACI to a limited personal investigation in individual cases as required (at no cost to the agency) to ensure that the investigative information serving as a basis for the agency's decision is as complete as possible.

Q.4. Will the personal investigation conducted as part of the expanded NACI differ in any way from the limited suitability investigations previously conducted by the OPM in serious suitability cases?

A.4. Yes. The NACI will be expanded to a personal investigation when necessary to fully develop a specific issue to ensure accuracy and completeness of the investigative information furnished to the agency.

> Example: A NACI source reports that the person investigated was fired by a previous employer for theft. Additional investigation would be conducted as necessary at the place of employment to verify the firing and fully establish the reasons for the employer's action.

The above investigation differs from the limited suitability investigation previously conducted by the OPM in that the latter was designed to establish current employability or the relationship ("nexus") between the theft and the specific job employed in. Under the new procedures, additional investigation to establish current employability may be conducted by the agency or on a reimbursable basis by the OPM.

Q.5. Will the new procedures have any adverse impact on agency operations?

A.5. Applicants: The change in the applicant program is an internal improvement by the OPM which should have no impact on agency operations other than the probable advantage of more timely suitability decisions in many cases.

Appointees: The impact on agencies of the OPM's decision to discontinue rating appointee cases should be minimal. It is expected that most agencies would continue to make employment decisions utilizing the rating expertise already available within the agency. The OPM's adjudicative and appraisal staff, however, will be available to provide agencies with program guidance as needed. The OPM will also render an advisory opinion (at no cost to the agency) in individual cases when requested to do so by the agency.

Some additional cost will probably be incurred by agencies in conducting additional investigation in serious cases to establish current employability. This cost should not be too significant. The expanded NACI should eliminate the need for further investigation in many cases. It is expected that no more than 400 cases Government-wide each year will require investigation beyond that initially conducted by the OPM.

Many agencies already conduct inquiries beyond the completed NACI. A number of the larger agencies have a trained staff of investigators which can be used to conduct limited suitability investigations. In view of the above capabilities and the limited number of cases which will require additional investigation, the need for requesting a reimbursable investigation by the OPM should be minimal (probably considerably less than 200 requests a year). The billing rate for such investigation ($390.00) will be substantially less than the actual investigative cost incurred by the OPM which is prepared to absorb the difference in the interest of providing agencies without investigative facilities a relatively low cost investigative product.

U.S. GOVERNMENT PRINTING OFFICE: 1980— 311 539 136

Federal Personnel Manual System

FPM Bulletin

Bulletin No. 731-5

Washington, D. C. 20415
August 21, 1980

SUBJECT: Correction to Suitability Regulations

Heads of Departments and Independent Establishments:

An Information Notice on Changes to Federal Personnel Regulations Is Attached to This Bulletin

This Notice Must Be Posted in a Prominent Place

1. The Director of the Office of Personnel Management (OPM) is required to take steps to ensure that OPM regulations which apply to individuals or organizations outside OPM are posted in offices of Federal agencies maintaining copies of Federal personnel regulations [5 USC 1103(b)(2)(A)].
2. To carry out this responsibility, OPM issued regulations under Part 110 of 5 CFR which require agencies to (a) make available for review on request the regulatory material which appears as attachment 1 to this bulletin; and (b) complete and post the notice (attachment 2) in a prominent place.
3. Completion of the notice requires insertion of the room number where the regulations are available for review.
4. Individuals who wish to make comments on regulations or notices should address them to the OPM official whose mailing address is listed on the reprint of *Federal Register* material in attachment 1 of this bulletin.
5. The public comment period on proposed regulations begins when they are published in the *Federal Register*, or made available for public inspection at the Office of the Federal Register in Washington, D.C. Sometimes delays in distribution may result in posting notices on proposed regulations being received at agency field offices near the end of the comment period on a regulation. In other cases, the attached posting notice may convey information about a final regulation and no comments will be sought. **In either case, the attached notice must still be posted. The purpose of the material is to provide notice rather than to solicit comment.**
6. There is no maximum number of days which the attached notice must remain posted; each agency or office is free to make this determination. However, we suggest 10 working days as a minimum. The basic requirement is that there be sufficient opportunity for interested individuals to receive adequate notice of changes in the Federal personnel regulations.

Jule Sugarman

Jule M. Sugarman
Deputy Director

Attachments (2)

Inquiries: Issuance System Office, OPE, 202-254-7086

Code: 731, Suitability

Distribution: FPM

Bulletin Expires: July 20, 1981

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5 CFR Part 731

Suitability; Correction

AGENCY: Office of Personnel Management (OPM).

ACTION: Final rule; Correction.

SUMMARY: This document corrects a subpart heading in OPM's suitability regulations. This corrects a printing error, and is an editorial change only.

EFFECTIVE DATE: August 14, 1979.

FOR FURTHER INFORMATION CONTACT: Kathryn Anderson Fetzer, Assistant Issuance System Manager, (202) 254-7086.

SUPPLEMENTARY INFORMATION: On August 14, 1979, OPM published a document (at 44 FR 47523) which made general nomenclature changes to 5 CFR Chapter I as required by the Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978. The document also listed certain exceptions to the nomenclature changes, including an exception for the heading of Subpart D of Part 731. That heading was misprinted when Title 5 was codified in 1980, and this document corrects that heading.

Because this is an editorial correction, OPM has determined that this is a non-significant regulation for the purposes of E.O. 12044.

Office of Personnel Management.

Beverly M. Jones,

Issuance System Manager.

Accordingly, the heading of 5 CFR Part 731, Subpart D, is corrected to read as follows:

Subpart D—Appeals to the Merit Systems Protection Board

(Pub. L. 95-454; Reorganization Plan No. 2 of 1978)

[FR Doc. 80-22748 Filed 7-28-80; 8:45 am]

BILLING CODE 6325-01-M

United States
Office of
Personnel
Management

Notice of Changes to Title 5 of the Code of Federal Regulations

The Office of Personnel Management has issued final regulations on suitability, 5 CFR Part 731.

These regulations correct the heading of Subpart D. This is an editorial change to correct a printing error; there are no changes to the suitability regulations.

You can read a complete copy of the text at:	This notice expires on:

The Director of the Office of Personnel Management (OPM) is required to take steps to ensure that OPM regulations which apply to individuals or organizations outside OPM are posted in Federal agencies maintaining copies of the Federal personnel regulations [5 USC 1103(b)(2)(A)]. This notice, which should be posted in a prominent place, carries out that requirement.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 – 311-539:337

OPM Form 1222 PP1 (1/80)

EXHIBIT C

MACK v. UNITED STATES, No. 85 Civ. 5764 (S.D.N.Y. April 21, 1986)

Copies sent — Counsel Goldberg 8325656

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN P. MACK,

Plaintiff,

-against-

UNITED STATES OF AMERICA,
FEDERAL BUREAU OF INVESTIGATION.

Defendant.

85 Civ. 5704 (PNL)

MEMORANDUM AND ORDER

Dated: April 18, 1986

PIERRE N. LEVAL, U.S.D.J.

This is an action against the United States and the Federal Bureau of Investigation ("FBI") for damages and injunctive relief arising out of plaintiff John P. Mack's termination as an agent of the FBI. Plaintiff was terminated in part because a urinalysis revealed he had taken cocaine up to 24 hours before the test. Defendants move for summary judgment claiming that plaintiff's claims are groundless and that this court lacks subject matter jurisdiction.

I. Facts

The following facts are either undisputed or taken as alleged by plaintiff. Until September 1983, plaintiff was employed as an FBI agent in New York. On July 13, 1983, he was interviewed during an internal FBI investigation because of his association with another FBI agent who was suspected of dealing in drugs. At the interview, he was told that he was suspected of drug use and asked to submit to a polygraph and urinalysis and provide sworn statements.

That same day, plaintiff gave a urine sample and signed sworn statements denying the use of any narcotics while a FBI agent. He also signed a form granting consent to the urinalysis. Although plaintiff initially stated in a deposition that he was not forced to give the urine samples and did so voluntarily, he now contends that he was coerced into submitting to the tests by being told that a refusal would be held against him.

The urinalysis revealed the presence of an element of cocaine as well as cocaine itself, indicating drug use within the past 12-24 hours. Plaintiff was informed of these results and later on July 15, signed another sworn statement that he had no explanation for the results and that he was not under any doctor's prescription. In a letter dated July 29, 1983, plaintiff was advised that the FBI was considering firing him for his drug use and lack of candor. Through his attorney, plaintiff responded to these charges in a letter dated August 11, 1983, arguing that his dismissal was unjustified. On September 9, 1983, the FBI informed him he was terminated and that he could appeal to the Director of the FBI, which plaintiff declined to do.

The initial complaint asserted subject matter jurisdiction under 28 U.S.C. § 1331, the Constitution, and 5 U.S.C. § 5596, and sought $1 million compensatory damages and $3 million punitive damages. An amended complaint adds a claim of jurisdiction based primarily on the Federal

Torts Claim Act ("FTCA"). In essence, plaintiff contends he was forced to give a urine sample, improperly terminated without an opportunity to be heard and wrongfully stigmatized in violation of his Fifth Amendment property and liberty interests, his rights under the Fourth Amendments and his common law right of privacy. All of these claims fail as a matter of law.

II. Discussion

A. Sovereign Immunity

It is well settled that the United States or an agency thereof is subject to suit only to the extent that Congress waives its sovereign immunity.[1/]

As to his constitutional claims, none of the statutes asserted in the complaint presents a basis for finding a waiver of sovereign immunity. Neither the federal Constitution nor the general federal question jurisdictional statute, 28 U.S.C. §1331, constitutes a waiver by the United States of its sovereign immunity.[2/] See Keene Corp. v. United States, 700 F.2d 836, 838 n.3 & 845 n.13 (2d Cir.), cert. denied, 464 U.S. 864 (1983); Doe v. Civiletti, 635 F.2d 88, 94 (2d Cir. 1980); Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978). Nevertheless, even assuming the United States has waived its sovereign immunity as to the constitutional claims, plaintiff has no basis for relief under the Fifth and Fourth Amendments.

B. Fifth Amendment Due Process Claims

A Government employee has a protected property interest in his employment if he has an expectation of continued employment guaranteed by a statute, contract or policy. See Arnett v. Kennedy, 416 U.S. 134 (1974); Roth v. Board of Regents, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Doe v. Department of Justice, 753 F.2d 1092, 1100 n.8 (D.C. Cir. 1985). As an FBI agent, plaintiff had no statutory right to continued employment. Although competitive civil service employees may be discharged "only for such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a); see id. at § 7511(a)(defining employees covered), FBI agents are specifically excepted from competitive civil service under 28 U.S.C. § 536.[3/] As an excepted service employee, plaintiff could be discharged with or without cause. See Doe v. Department of Justice, 753 F.2d at 1100; Carter v. United States, 407 F.2d 1238, 1242 (D.C. Cir. 1968). He also had no statutory right to any particular pretermination procedures or to judicial or administrative review of the termination decision. See Williams v. Internal Revenue Serv., 745 F.2d 702, 703 (D.C. Cir. 1984)(per curiam); Schwartz v. Department of Transportation, 714 F.2d 1581, 1582 (Fed. Cir. 1984); cf. 5 U.S.C. §§ 4303(e), 7513, 7701, 7703 (granting preference eligible or competitive service employees various procedural rights for claims of unjust dismissal).

Plaintiff argues that he was not granted the procedural rights guaranteed him under the FBI's internal disciplinary procedures because he was not given a copy of the urine test results. It appears, however, that he was accorded all the procedural rights he was entitled to under the agency's internal procedures. These procedures entitle an employee to notice of the charges against him and an opportunity to respond.[1/] Plaintiff does not dispute that he was given such notice and opportunity to respond. The internal disciplinary procedures do not require the agency to furnish plaintiff with copies of the test results. Plaintiff has no valid claim that agency rules were violated. Accordingly, plaintiff cannot make out a claim for violation of his Fifth Amendment property rights.

Plaintiff also has no claim for violation of his due process liberty interest. In order to make out a liberty interest claim for injury to reputation, a plaintiff must show, inter alia, that the defendant published or otherwise disseminated false or defamatory information. See Loudermill v. Cleveland Bd. of Educ., 105 S.Ct. 1487, 1496 n.13 (1985); Bishop v. Wood, 426 U.S. 341, 348 (1976); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 447 (2d Cir. 1980); Gentile v. Wallen, 562 F.2d 193, 197 (2d Cir. 1977). Although plaintiff contends that the alleged false charges stigmatized his reputation, he does not claim that defendants published or disseminated any of these charges.

C. Fourth Amendment Claim

Plaintiff argues that the FBI's request for a urine sample was an unreasonable search violative of the Fourth Amendment. This argument is without merit.

Even assuming that the requirement of a urine sample constitutes a search, see Shoemaker v. Handel, 619 F. Supp. 1089, 1098 (D.N.J. 1985); Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984), the Fourth Amendment prohibits only unreasonable searches. Security & Law Enforcement Employees v. Carey, 737 F.2d 187, 201 (2d Cir. 1984). "To determine reasonableness, the court must balance the intrusiveness of the search on the individual's fourth amendment interests against its promotion of legitimate governmental interests." Id.; see Bell v. Wolfish, 441 U.S. 520 (1979). Factors to consider are "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell, 441 U.S. at 559; see Security & Law Enforcement Employees, 737 F.2d at 201.

Taking into consideration all these factors, the FBI's request for the urine sample was not an unreasonable search. First, collecting a urine sample is minimally intrusive. See United States v. Ramsey, 431 U.S. 606, 618 n.13; Shoemaker, 619 F. Supp. at 1101. In addition, this search was not conducted in an objectionably intrusive manner, as in Storms, 600 F. Supp. at 1222 where the urine sample was collected from a prisoner in view of others.

The collection of a urine sample has little in common with [illegible] the taking of a blood sample, which requires the infliction of an injury, albeit a small one). It is even less intrusive than a fingerprint which requires that one's fingers be smeared with black grease and pressed against a paper. A urine sample calls for nothing more than a natural function performed by everyone several times a day -- the only difference being the collection of the sample in a jar. Measured against the vital national interest of assuring that FBI agents are not involved in drugs, the claim that such a search is unreasonable is a mockery.

The scope of the intrusion must also "be viewed in the context of the individual's legitimate expectation of privacy." Security & Law Enforcement Employees, 737 F.2d at 201. Although plaintiff may have had a generalized expectation of privacy as to his private affairs, see McDonell, 612 F. Supp. at 1127, he had a diminished expectation in light of his position as an agent. See Security & Law Enforcement Employees, 737 F.2d at 202; Shoemaker, 619 F.Supp. at 1102 (jockeys as members of strictly regulated industry have diminished expectation of privacy). Well before this incident occurred plaintiff was advised of the FBI's strong interest in assuring that its agents' personal and professional affairs are beyond reproach. The FBI Personal Conduct Policy Memorandum dated May 15,

1981 (Defendants' Exhibit E, attached to Affidavit of Charles Lindigo) stated that:

> In addition, the FBI must be concerned with the employees' private as well as public personal conduct when such conduct does or could cause impairment of the FBI's efficiency or effectiveness. For example, any conduct which could render an employee vulnerable to inducements to violate law, Department of Justice or FBI rules, regulations, policy or the oath of office is prohibited at all times.

Finally, the FBI has a compelling interest in assuring that its agents are not involved in drugs. While all private employers may have a generalized desire to know of their employees' drug use which could decrease efficiency, the FBI has far more urgent and compelling needs for such information. FBI agents are privy to highly classified information. Any involvement of an FBI agent with drugs, no matter how small, exposes him to risks of extortion that could jeopardize the national security. Also, since the FBI is charged with responsibility for enforcement of the federal drug laws, illegal drug use by agents risks to corrupt and compromise the agency's discharge of those duties. Furthermore, drug use by an agent could affect the success of an operation implicating important national security law enforcement objectives and could pose risk of injury to other agents working with him. Given these considerations that are vital to national security, I can see no reasonable argument that the FBI

committed an unreasonable search in violation of the Fourth Amendment in requesting a urine sample of an agent.

D. The FTCA, 28 U.S.C. § 1346(b)

The FTCA, 28 U.S.C. §1346(b), constitutes a waiver of sovereign immunity for certain torts committed by federal agents. See Contemporary Mission, Inc. v. United States Postal Serv., 648 F.2d 97, 104-05 (2d Cir. 1981); Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978). To collect damages under the FTCA, a plaintiff must allege a common law tort actionable under the law of the place where the tortious act occurred. See 28 U.S.C. § 1346(b); Contemporary Mission, 648 F.2d at 104-05 n.9. Plaintiff claims the Government is liable for the common law tort of invasion of privacy.[5/]

New York, however, has never recognized the common law tort of invasion of privacy. In 1902, the New York Court of Appeals held in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 556, 64 N.E. 442, 447 (1902), that there was no common law right of privacy in New York. Shortly thereafter, the New York legislature passed an abbreviated privacy act, N.Y. Civ. Rts. Law §§ 50, 51, which prohibits unconsensual commercial use of an individual's name or likeness. Since the enactment of these provisions, New York courts have consistently refused to recognize a cause of action for invasion of privacy beyond that provided in the Civil Rights Act. See, e.g., Wojtowicz v. Delacorte Press, Inc., 43 N.Y.2d 858, 860, 403 N.Y.S.2d 218, 219,

374 N.E.2d 129 (1978); Flores v. Mosler Safe Co., 7 N.Y.2d [illegible], 199 N.Y.S.2d 975, 977 (1959); Cantier v. Pro-Football, Inc., 304 N.Y. 354, 358, 107 N.E.2d 485 (1952); but see Doe v. Roe, 42 A.D.2d 559, 345 N.Y.S.2d 560, 562 (1st Dept. 1972)(recognizing "expanded recognition" of invasion of privacy actions), aff'd, 33 N.Y.2d 902, 352 N.Y.S.2d 626 (1973), cert. denied, 420 U.S. 307 (1975).

In 1978, the Second Circuit held in Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978) that private citizens seeking damages against the United States for unauthorized opening of their mail stated a cause of action under New York common law for invasion of privacy. It reasoned that Roberson was decided in, and should be limited to, the context of commercial misapropriation. Id. at 323. Noting that a majority of states recognize a common law right to be free from unwarranted intrusions into an individual's personal affairs, the court concluded that the New York Court of Appeals would probably do likewise if presented with the appropriate case. Id. at 325. A few district courts have followed Birnbaum in predicting future decisions of New York courts. See Spock v. United States, 464 F. Supp. 510, 513 (S.D.N.Y. 1978)(federal government's unauthorized interception of citizen's wire and telegraph communications); Socialist Workers' Party v. Attorney General, 463 F. Supp. 515, 524 (S.D.N.Y. 1978)(relying on Birnbaum, plaintiff association had cause of action

where government infiltrated and eavesdropped on private meetings and read and copied private documents).

Since Birnbaum, however, the New York Court of Appeals has consistently stated that there is no common law cause of action for invasion of privacy in New York, save that provided for in the New York Civil Rights Act. See, e.g., Freihofer v. Hearst Corp., 65 N.Y.2d 135, 490 N.Y.S.2d 735, 739 (1985); Stefano v. New Group Pubs., Inc., 64 N.Y.2d 174, 485 N.Y.S.2d 220, 223 (1984); Arrington v. New York Times Co., 55 N.Y.2d 433, 449 N.Y.S.2d 941, 943 (1982), cert. denied, 459 U.S. 1146 (1983). Although these cases generally involved commercial misappropriation or false publication claims, other New York courts have consistently refused to recognize a common law right of privacy in a variety of contexts. See, e.g., Simpson v. New York City Transit Auth., 112 A.D.2d 89, 491 N.Y.S.2d 645, 647 (1st Dept. 1985)(disclosure of confidential information by the Transit Authority); Carpenter v. City of Plattsburgh, 105 A.D.2d 295, 484 N.Y.S.2d 284, 286 (4th Dept. 1985)(disclosure of personnel records by the City); MacDonald v. Clinger, 84 A.D.2d 482, 446 N.Y.S.2d 801, 803 (4th Dept. 1982)(doctor's disclosure of confidential information to patient's wife); Novel v. Beacon Operating Corp., 86 A.D.2d 602, 446 N.Y.S.2d 118, 119 (2d Dept. 1982)(landlord's unauthorized entry into apartment and taking of pictures therein). See also People v. Fitzgerald, 101 Misc.2d 712, 422 N.Y.S.2d 309, 312-123 (Westchester Co. 1979)(regarding existence of parent-

child privilege where the court noted that New York recognizes only a statutory and not a common law right of privacy); In re Dora P., 68 A.D.2d 719; 418 N.Y.S.2d 597, 603 n.2 (1st Dept. 1979). Moreover, in MacDonald, supra, 446 N.Y.S.2d at 803, the Appellate Division specifically rejected the federal courts' prediction of New York law. Therefore, it appears that the New York courts have not followed the direction predicted by Birnbaum.

Even if Birnbaum, Spock and Socialist Workers' Party were persuasive authority in New York, I believe it would be inappropriate to extend their reach to these facts. Those cases concerned government interference with the private communications and activities of private citizens. Here the alleged invasion of privacy consists of a minimally intrusive investigation by a federal agency entrusted with maintaining the national security of an employee in a critically sensitive post. I think it most unlikely that the courts of New York would hold that the FBI had violated New York law by such acts, even if New York courts recognized an actionable right of privacy.[6/]

Moreover, Birnbaum and the other cases relied in part on the existence of New York criminal statutes, N.Y. Penal Law Art. 250, which prohibit conduct basically identical to that engaged in by the defendants in those cases -- unauthorized wiretapping and interception of private mail. Plaintiff has cited no comparable New York authority which makes illegal the conduct at issue here.

In sum, the FBI's request of its agent for a urine sample as a test of drug use cannot be seen as an unreasonable intrusion into plaintiff's privacy. The FBI has a compelling security interest in assuring that its agents, who have access to highly classified information, are not subject to compromise. Drug use by FBI agents would expose the national security to a high risk of breach. To the extent that these considerations require an FBI agent to choose between submitting to a urine test or having his refusal used against him, this is minimally intrusive and necessary to the national security. It does not constitute a tort under either New York law or under the Constitution.

* * *

Defendants' motion for summary judgment is granted.

Dated: New York, N.Y.
April 17, 1986

SO ORDERED:

Pierre N. Leval, U.S.D.J.

Notes

[1/] The complaint seeks relief under inter alia, the FTCA. As discussed below, although the FTCA constitutes a waiver of sovereign immunity for certain state torts, plaintiff has no viable claim for relief under this Act.

The complaint also asserts jurisdiction based on the Back Pay Act, 5 U.S.C. § 5596, although plaintiff does not appear to press this claim in his motion papers. In any event, this claim fails either because the court has no jurisdiction to award plaintiff damages under this Act or because plaintiff has no cause of action for back pay under the Act.

The Back Pay Act grants an employee a cause of action for back pay if he is subjected to "unjustified or unwarranted personnel action" "under applicable law, rule, regulation or collective bargaining agreement." 5 U.S.C. § 5596(b)(1). Under the Tucker Act, 28 U.S.C. § 1346(a)(2), the district court has concurrent jurisdiction with the Court of Claims for actions based on Acts of Congress, the Constitution or agency regulations for amounts not exceeding $10,000; jurisdiction for claims exceeding $10,000 lies exclusively with the Claims Court. See Doe v. Department of Justice, 753 F.2d 1092, 1101 (D.C. Cir. 1985). Although plaintiff's complaint for $1 million compensatory damages does not specify how much of that claim is for back pay, it surely exceeds $10,000; this court lacks jurisdiction to hear the claim. See id.; Bruzzone v. Hampton, 433 F. Supp. 92, 95 (S.D.N.Y. 1977).

To the extent that plaintiff's back pay claim is less than $10,000, it fails as a matter of law. To prove a claim under the Back Pay Act, an employee must show that the personnel action violated some statute or regulation. See United States v. Connolly, 716 F.2d 882, 887 (Fed. Cir. 1983); Crimaldi v. United States, 651 F.2d 151 (2d Cir. 1981). As shown below, an FBI agent has no

right to continued employment nor to any pretermination procedures. No action for damages lies under the Back Pay Act.

2/ In his motion papers, plaintiff argues that the United States waived its sovereign immunity as to liability for constitutional torts under a 1974 amendment to the FTCA contained in 28 U.S.C. § 2680(h) which provides, in essence, that the Government shall be liable for the intentional torts of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" if committed by federal officers. There is nothing in the language of this amendment or the cases construing it to support plaintiff's argument.

Plaintiff cites two cases, Carlson v. Green, 446 U.S. 14 (1980); Brown v. United States, 653 F.2d 196 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982) which, despite his assertions to the contrary, directly refute his position. Carlson holds that a plaintiff has a Bivens remedy against an individual officer even though the officer's conduct would give rise to a cause of action against the United States under the intentional torts provision of the FTCA. The Court noted that actions under the FTCA must assert claims actionable under the relevant state law. 446 U.S. at 23; see also id. at 28 n. 1 (Powell, J., concurring). In Brown, 653 F.2d at 201, the Fifth Circuit dismissed plaintiff's constitutional claims against the United States and specifically held that the 1974 amendment in § 2680(h) did not constitute a waiver of sovereign immunity as to constitutional torts.

3/ Although certain military veterans of the excepted service are entitled to protections similar to those accorded members of the competitive civil service, see, e.g., 5 U.S.C. §§ 2108, 7511(a)(1)(B), plaintiff does not contend that he qualifies for such benefits.

4/ The FBI Personal Conduct Policy Memorandum (Defendants' Exhibit E attached to affidavit of Charles E. Mandigo), provides for the following relevant procedures in investigating allegations of employee misconduct:

> An administrative inquiry shall be conducted which shall include an opportunity for employees against whom allegations are made to furnish information. Each employee interviewed shall be informed of the general nature of the allegations that have prompted the inquiry. The inquiry shall not be complete until the specific charge(s) that may justify disciplinary action is made known to the employee who may be disciplined and the employee is afforded reasonable time to answer the specific charge(s). An employee may be required to answer orally and/or in writing to the official designated to conduct the inquiry. . . .
>
> . . . . If . . . removal is proposed for any employee, the Assistant Director, Administrative Services Division, shall notify the employee in writing of the proposed disciplinary action and the specific reasons and furnish other guidance as may be required. . . .
>
> . . . . Disciplinary action may be taken only on the following conditions: the action was based on a specific charge(s) which previously was made known to the employee or reasonable efforts were made to notify the employee; the employee was afforded an opportunity to answer the specific charge(s); and, the employee's answer, if any, is included in the record.

5/ Plaintiff also argues that the Government is liable for tortious interference with his employment. He cites no authority to support this assertion and it is not clear what he is claiming. To the extent he is arguing breach of employment contract, this court has no jurisdiction to hear the claim. See 28 U.S.C. § 2680(h). Moreover, because his employment was terminable at will,

plaintiff has no grounds to argue unjust dismissal under New York law. See Steward v. World-Wide Automobiles Corp., 20 Misc.2d 188, 189 N.Y.S.2d 540, 549 (Queens Co. 1959); Harris v. Home Indemnity Co., 16 Misc.2d 702, 185 N.Y.S.2d 287, 288 (N.Y. Co. 1959).

6/ Even if a state's courts or legislature purported to do so, a question would surely arise whether the Federal Tort Claims Act, in spite of its broad language, should be construed to go so far in subjecting the Federal Government to state law. If, for example, a state made it a violation of the right of privacy for any prospective employer to conduct a background security investigation of a prospective employee, I cannot conceive that the FTCA would be held to bar the Federal Government from screening candidates for employment by the CIA, the FBI or the State Department or for presidential appointment to the Cabinet or high positions in the diplomatic corps, the defense, the national security, the judiciary and others.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum of Points and Authorities of Amicus Curiae United States in Support of Defendants' Motion to Dismiss was served this 18th day of September, 1986 by Federal Express to:

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