

NTEU

The National Treasury Employees Union

December 29, 2009

VIA FACSIMILE AND FIRST CLASS MAIL

Ana Mazzi
Deputy Associate Director
Center for Workforce Relations and
Accountability Policy
U.S. Office of Personnel Management
Room 7H28
1900 E Street, NW
Washington, DC 20415-8200

RE: RIN 3206-AL90--Suitability

Dear Ms. Mazzi:

The National Treasury Employees Union (NTEU) submits these comments in response to the notice of proposed rulemaking published in the *Federal Register* on November 3, 2009. 74 Fed. Reg. 56747. The Office of Personnel Management (OPM) is proposing regulations to implement its responsibility under Executive Order 13488, Sec. 5. That Executive Order, promulgated just four days before the end of the Bush Administration, specifies that individuals in positions of public trust "shall be subject to reinvestigation" and directs OPM to determine the "standards," including the "frequency," of that reinvestigation.

In the proposed regulation, OPM would revise 5 C.F.R. § 731.106(d)(1) to require agencies to ensure that a reinvestigation is conducted and an assessment is made regarding the continued employment of a person occupying a public trust position at least once every five years. In the Supplementary Information, OPM asks whether a cycle of five or fewer years is appropriate, considering the risk posed by employment in these positions and the availability of investigative resources.

Opposition to PRIs:

As an initial matter, I must emphasize that, in NTEU's considered view, any periodic reinvestigation (PRI) requirement is unwarranted. Public trust employees are long-term federal

employees who were closely investigated upon their initial hiring or assumption of their public trust position. They are already subject to close supervision in their daily work. As we discuss more fully below, there is insufficient need for a formal, periodic reexamination of the background of those employees to justify its high cost in terms of appropriated funds and investigative resources, as well as its more intangible costs in terms of the burden it imposes on the employees subjected to the process. NTEU calls on OPM to recommend to the new administration that it reexamine carefully the need. NTEU firmly believes that, upon reexamination, the Obama Administration would rescind the Bush Administration's Executive Order.

In any event, given OPM's evident intent to proceed with a PRI requirement, NTEU submits the following comments to the proposed regulation. As we explain, OPM has not provided us sufficient information to enable us to respond in a meaningful fashion. We cannot address the appropriate "frequency" of the reinvestigation when OPM has yet to address the substantive "standards" under which that reinvestigation will occur, *i.e.*, the scope or detail of the reinvestigation for each risk level. Making certain assumptions about the scope of that investigation, we argue below that a frequency of every ten years is sufficient to meet any articulated governmental needs.

Lack of Essential Information:

Although OPM states that a reinvestigation "typically" will be "more limited than the initial investigation," OPM's representatives indicated at the November 11 briefing that the scope of the PRI is still under study. Thus, at this point, we do not know whether employees undergoing a PRI will be subjected only to a few checks of public records, such as a criminal record check and a credit check, or whether the investigation will be more extensive and involve personal interviews and, if so, of whom. We also do not know whether the scope will be the same for employees in moderate risk public trust positions as it will be for employees in high risk public trust positions. The intrusiveness and burden of the PRI is a relevant factor in assessing the appropriate frequency.

In addition, OPM's representatives were unable to state the number of employees in public trust positions that would be subject to this requirement. NTEU believes that hundreds of

thousands of employees could be affected, which could impose a very heavy burden on agency budgets, as well as on investigative and adjudicative resources.¹ Without firm information regarding the scope and cost of the PRI process, it is impossible to address the question posed.

We will attempt, however, to offer some general views, given OPM's obvious intent to proceed with a decision on the frequency of the as-yet-undetermined reinvestigations.

Comments Regarding Frequency:

Assuming a PRI consisting of more than a mere check of criminal history, NTEU is opposed to a PRI frequency of every five years or sooner. An investigation every ten years, or upon assignment to a position with a higher risk level or sensitivity, would more than satisfy OPM's requirements.

Public trust employees have been subject to reinvestigation in the past only in limited circumstances, where agencies could premise a reinvestigation requirement on some separate statutory authority. While we understand that President Bush made a determination that PRIs should be conducted, thereby providing the requisite authority for OPM's current initiative, we are aware of no documented problems related to undiscovered suitability problems arising from the absence of a PRI. It appears as though the impetus to the Executive Order was a desire to further the reciprocal recognition of fitness and suitability determinations among agencies. In other words, the perceived need is more administrative than substantive. A frequency of every ten years should be sufficient to meet this need.

The lack of a substantive need for a PRI is further illustrated by the narrow nature of the suitability action that could result from the PRI. An "employee" (or one who has completed the first year of a subject-to-investigation appointment) is subject to a suitability action only in

¹ We note that OPM itself has estimated that 87,400 non-federal individuals will complete the SF 85P annually. 73 Fed. Reg. 35421, 35422 (June 23, 2008). The number of public trust federal employees is undoubtedly far greater. At many federal agencies, all or many of the workforce is designated "public trust." At U.S. Customs and Border Protection, for example, the vast majority of the 24,000 bargaining unit employees are "public trust," while a few are designated as "national security." No CBP employee is classified as nonsensitive.

extremely limited instances: in the event of material, false statement or deception or fraud in examination or appointment; refusal to furnish testimony; or a statutory or regulatory bar to employment. For all other issues unearthed in the PRI process, an agency's only option is to take action against the employee under 5 C.F.R. part 315, 359, or 752. See 5 C.F.R. 731.105(d) (listing grounds for OPM suitability actions against employees); 5 C.F.R. 731.203(f) (bases for actions by agencies against employees). Many issues that are explored in the investigative process, such as foreign travel or minor debts, would not result in disciplinary action, for the agency would not be able to establish a nexus to job performance and show that action against the employee would promote the efficiency of the service. In other words, a PRI sweeps broadly, capturing many minor hiccups in an employee's life that can not be the basis of a suitability action and do not arise to the level of a disciplinary matter. This broad brush cannot be justified. There are better, less intrusive, more targeted ways to uncover and correct employee misconduct--namely, an investigation in the event problems are perceived in an employee's performance on the job or allegations surface regarding off-duty misconduct.

It is also relevant to consider the potentially enormous cost of a five-year PRI requirement, particularly in light of its limited utility. While it is impossible to make a definitive assessment without knowing the scope of the PRI or the number of public trust employees, we note that a limited background investigation (LBI), or an initial background investigation for a public trust employee, cost approximately \$2,465 in FY 2008. The standard cost for periodic reinvestigations ranged from \$585 to \$2,517. A basic National Agency Check and Inquiries cost \$114. See Federal Investigations Notice No. 07-08 (Sept. 25, 2007), listing rates for FY 2008. When the cost per investigation is multiplied by the number of employees, it is apparent that a five-year PRI requirement represents a huge cost to agencies who have not budgeted for such an undertaking. It also would require the hiring of hundreds of additional investigators, which also represents a high cost to the government. Using a cost-benefit analysis, it is hard to see its justification.

Finally, the stressful and time-consuming nature of the process counsels strongly for longer intervals than every five years. Even a very basic investigation--including the completion of the background investigation form, the SF 85P; a

credit check; verification of fingerprints; and a criminal history check--is time-consuming for the employee and investigative personnel alike. OPM estimates that it takes approximately an hour to complete the SF 85P. 73 Fed. Reg. at 35422. In NTEU's experience, that estimate is far too low, for the typical employee requires time to review his past forms, check his records, verify his own past addresses and addresses of references, check his credit report, and perhaps seek advice from a union representative or other assistance. Time is then needed for the finger-printing process. If the PRI includes a personal interview, the time and stress mount exponentially. It is not uncommon for an interview itself to last an hour or more. On this occasion, many employees feel defensive or even, on occasion, traumatized, as they are queried about every detail on the forms and asked to elaborate about such personal matters as the reason for their divorce. The more stressed the employee, the slower and more difficult the investigative process.

No case has been made by OPM to justify subjecting long-term federal employees to this process as frequently as every five years. The employees at issue have undergone LBIs upon their appointment and are subject to daily scrutiny as they perform their responsibilities. Reinvestigation of these employees every five years (or more) throughout their career with the government is an appalling waste of scarce government resources.

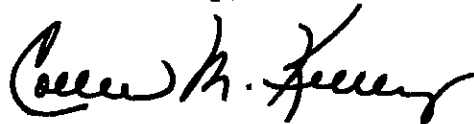
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In sum, NTEU believes it is premature to determine how often PRIs should be conducted. It urges OPM to reconsider the need for PRIs in the first place and, upon reexamination, recommend to the new administration that the Executive Order be rescinded. At a minimum, however, it should postpone determination of the appropriate frequency until it has addressed the scope of that investigation and determined the number of affected employees. If OPM refuses to do so and insists on promulgating a rule at this time to specify the frequency of PRIs, then NTEU proposes that OPM extend the time period to every ten years.

Ana Mazzi
December 29, 2009
Page 6 of 6

Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Colleen M. Kelley". The signature is fluid and cursive, with the first name being the most prominent.

Colleen M. Kelley
National President