GENERAL ADMINISTRATION
EMPLOYEE

044 EMPLOYMENT AND SEPARATION

044.4 Criminal History Record Checks Policy

044.4.1 Purpose

The purpose of this policy is to establish the process for the Human Services Department (HSD) to conduct criminal background checks, including Criminal History Record Checks, on HSD Employees, Prospective Employees, Contractors, subcontractors, prospective Contractors and prospective subcontractors with access to Federal Tax Information (FTI) as required by Federal or State Regulations.

044.4.2 Employees Affected

This policy and these procedures apply to HSD Employees, Prospective Employees, Contractors, subcontractors, prospective Contractors and prospective subcontractors with access to FTI.

044.4.3 Definitions

A. "Appeal" means a review of a determination of suitability made by HSD.

B. "Background Investigation Suitability Approval" means a written decision by the Director of Office of Human Resources (OHR), or designee, that an Employee, Prospective Employee, or a Contractor, prospective Contractor, or an Employee of HSD, is authorized to have access to FTI.

C. "Conditional Employment" means a period of employment status for a Prospective Employee prior to the OHR final disposition of the background investigation.

D. "Contractor" means a person or business who signs an agreement to furnish services or materials for a set price or rate with the State of New Mexico. For purposes of this policy Contractor includes subcontractors, prospective Contractors and prospective subcontractors.

E. "Conviction" means a plea, judgment, or verdict of guilt, no contest, nolo contendere, conditional plea of guilty, or any other plea that would result in a conviction for a crime in a court of law in New Mexico or any other state.

F. "Criminal History Record Check" means a name-based and fingerprint-based criminal history check that uses, at the minimum, the Federal Bureau of Investigation's (FBI) National Crime Information Center and the Integrated

Automated Fingerprint Identification database and the State's repository records.

G. "Criminal Record" means a record of a person's criminal history, generally used by employers, lenders, courts, law enforcement, etc., to assess a person's background and trustworthiness. The information included in a criminal record may include all non-expunged criminal offenses, traffic offenses (e.g., speeding and drunk-driving), and arrests. It may also include dismissed or pending charges, and charges of which a person has been acquitted.

H. "Disqualifying Offenses" means a conviction for any felony or misdemeanor or another offense whose nature of which indicates that the person constitutes an unreasonable and immediate risk to the security of FTI or confidential taxpayer information unless the Office of Human Resources (OHR) determines there are mitigating circumstances that sufficiently remediate the existing risks.

I. "Employee" *for the purposes of this policy*, means any person who is currently employed with HSD and has access to FTI.

J. "Federal Tax Information (FTI)" means return or return information received directly from the Internal Revenue Service (IRS) or obtained through an authorized secondary source, such as Social Security Administration, Federal Office of Child Support Enforcement, Bureau of the Fiscal Service or Centers of Medicare and Medicaid Services or another entity acting on behalf of the IRS.

K. "Fingerprint Provider" means an HSD-authorized provider for fingerprinting services.

L. "Form I-9" means an Employment Eligibility Verification form issued by the IRS. It is used for verifying the identity and employment authorization of individuals hired for employment in the United States.

M. "National Crime Information Center (NCIC)" means a computerized index of criminal justice information maintained by the Federal Bureau of Investigation (FBI) that is available to Federal, State, and local law enforcement and other criminal justice agencies.

N. "Prospective Employee" *for the purposes of this policy*, means an applicant who has been tentatively selected through the interview process to fill a position with HSD and is awaiting hire approval from OHR, and whose proposed job duties will require access to FTI.

044.4.4 Policy

A. All Employees in or Prospective Employees being considered for an HSD position that require a criminal background check by federal or state law must submit to a background check which includes a Criminal History Record Check.

The background check must include the validation of references from prior employment, a name-based and fingerprint-based Criminal History Records Check, and employment verification otherwise required by law.

B. HSD shall incur the cost of the Criminal History Record Check for Employees and Prospective Employees. Contractors with HSD shall incur the cost of Criminal History Record Checks for their Employees.

C. A criminal offense appearing on a Criminal History Record Check alone does not disqualify an applicant from employment or a current Employee from continuing to perform their job duties. There are, however, certain disqualifying offences that would affect their ability to become employed or remain employed. .

D. Information obtained in a Criminal History Record Check shall be used to determine if a person for whom a warrant is outstanding, who has been indicted or has admitted to acts which constitute a disqualifying offense.

E. A Prospective Employee may be given Conditional Employment with HSD pending the completion of the background investigation. The Prospective Employee must complete a Criminal Background Investigation Requirement form acknowledging the Conditional Employment is based on the results of the background investigation and that they shall not have access to FTI until OHR issues a Background Investigation Suitability Approval.

F. OHR will receive all of the information obtained from all background and Criminal History Record Checks.

G. Anyone who misuses the information gathered in the Criminal History Record Check may be subject to disciplinary action up to and including dismissal.

H. Each HSD division must identify a complete listing of the corresponding position titles and numbers located in the respective divisions and provide the listing to OHR. The listing will be maintained by OHR and updated as necessary.

I. All Contractors with HSD must perform background investigations, as defined in this policy, on any Employee with access to FTI. Background investigation language and requirements will be included in all contracts in which access to FTI is necessary for the Contractor to fulfill the requirements of the contract. Contractors and subcontractors shall not have access to FTI until OHR issues a Background Investigation Suitability Approval as to that Contractor or subcontractor, or any Employee thereof designated to have access to FTI. Within ten (10) days of adoption of this policy, the Secretary, or designee, shall inform, in writing, any current Contractor with access to FTI that it, and any subcontractors with access to FTI, will have thirty (30) days from receipt of the notice to complete the Background Investigation Suitability Approval process. If

good faith is shown, the Secretary, or designee, may grant an extension of the approval deadline.

044.4.5 Compliance

A. Supervisors of current Employees and Prospective Employees with access to FTI will sign a Consent and Release for Criminal Background Investigation form and provide all necessary information to complete the background investigation.

B. OHR will provide Supervisors with fingerprinting instructions for the Employee or Prospective Employee to perform the background investigation.

C. Any additional information deemed necessary to perform the background investigation must be provided by the Employee or Prospective Employee.

D. Upon initial employment, all Employees must complete an Employment Eligibility Varication Form I-9 with appropriate documentation. The I-9 form will be processed and maintained by OHR through the E-Verify system for eligibility to legally work in the United States.

E. At a minimum, a federal background investigation will be conducted every ten (10) years after the initial background investigation. OHR shall maintain records of approvals, and order future background checks, as necessary, to ensure there is no lapse in compliance.

F. If an HSD Employee has a break in employment of 90 days or less and the background investigation is less than five (5) years old, the original background investigation will be considered valid.

G. If an HSD Employee transfers or is promoted to another area within the Department that has access to FTI and the background investigation is less than five (5) years old, the original background investigation will be considered valid.

044.4.6 Suitability Determination

A. The Office of Human Resources (OHR) will consider the following disqualifying offenses in determining an individual's suitability to access FTI: 1. Theft 2. Larceny 3. Burglary 4. Robbery 5. Fraud 6. Identity Theft 7. Illegal Credit Card Use of Another 8. Any crime involving fraud, deceit, or dishonesty with a potential for financial gain to the individual or for the benefit of another 9. Any crime with a direct link to the individual's specific job functions. 10. Material or intentional false statement, deception or fraud in examination or appointment; or 11. Any statute or regulatory bar which prevents the lawful employment of the person involved in the position in question.

B. OHR may consider any of the following additional considerations to the extent OHR deems any of them pertinent to the individual's case showing mitigating circumstances that sufficiently remediate the existing risks: 1. The nature of the position for which the person is applying or in which the person is employed 2. The nature and seriousness of the conduct 3. The circumstances surrounding the conduct 4. The time since the conduct 5. The age of the person involved at the time of the conduct; and 6. The absence or presence of rehabilitation or efforts towards rehabilitation.

C. Current Employees found to have a disqualifying offense will no longer be considered qualified for their current job and may be subject to termination.

D. Potential Employees found to have a disqualifying offense will be removed from consideration.

E. If the Criminal History Record Check reveals a disqualifying offense, the Employee or applicant will be given an opportunity to provide evidence to the contrary through the Appeals Process.

F. Criminal background investigations performed for Contractors will conform with applicable terms in the agreement between the Contractor and HSD. In the event that a Contractor, prospective Contractor, subcontractor, prospective subcontractor, or Employee of such an entity, is found to have a disqualifying offense, the Secretary, or designee, may:
   a. Rescind the offer.
   b. Terminate the contract.
   c. Prohibit further access to FTI.
   d. Prohibit a Contractor's or subcontractor's Employee from performing work that requires access to FTI.
   e. Take any reasonable steps to ensure compliance with relevant laws or regulations, including, but not limited to, requiring a corrective action plan or an amendment to the contract.

044.4.7 Records of Background Investigations Results

A. Information obtained through background investigations is confidential and will only be reviewed by the Secretary, OHR, Office of General Counsel and the Division Director or designee of the division requesting the background investigation. OHR will provide a Findings/No Findings letter to the Division.

B. The Findings/No Findings letter will be maintained in the Employee's official personnel file located in OHR. The results from the criminal background investigation will be maintained in a separate and confidential file as determined by the OHR Director.

044.4.8 Appeal Process

A. A Prospective Employee who has been denied employment based on the information obtained in the criminal background investigation or a current Employee who has been terminated has a right to appeal the decision. The appeal and request for review must be in writing and sent to OHR within eleven (11) days of the receipt of notice of denial of employment or receipt of Findings. If the appeal is sent by mail, it should be sent certified, registered or restricted delivery and three additional days will be provided.

B. Upon written request to OHR from the Employee or Prospective Employee, a copy of the local and FBI criminal history report will be provided. The copy will only be provided in person or mailed to the Employee or Prospective Employee by certified mail, restricted delivery. The Employee or Prospective Employee will be required to show proof of identity and personally sign for the mail at the post office. The contact information for OHR is:

Human Services Department
Office of Human Resources
P. O. Box 2348
Santa Fe, NM 87504-2348

044.4.9 Employee Reporting

A. Employees who are already in positions that are covered by Federal, State statutes or regulations and who are charged with offenses that might disqualify them as Employees or affect their ability to perform their duties, must immediately notify their supervisors of any pending criminal charges. Supervisors, in turn, will report the charges through their Division Director, who will work with OHR and the Office of the Secretary to determine if any disciplinary action is warranted including dismissal.

B. Employees who fail to notify their supervisors of any pending criminal charges may be subject to disciplinary action up to and including dismissal.

044.4.10 Authority

Criminal Offender Employment Act, NMSA 1978, §§ 28-2-1 through -6
Background investigation; duties; Employees; condition of employment, NMSA 1978, Section 9-11-10.1.
Background checks for covered Employees, Title 6 CFR § 37.45 (2008).
Employment Screening, State Commission of Public Records, 1.21.2.206 NMAC (10/1/2015).
Administration, Recruitment/Assessment/Selection, State Personnel Board, 1.7.5.1 through .12 NMAC (7/7/01 as amended through 11/14/02).
Secretary; duties and general powers, NMSA 1978, §§ 9-8-6B-5(a) to (j)

044.4.11 References

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Title 49 – Transportation

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Pt. 1572

PART 1572—CREDENTIALING AND SECURITY THREAT ASSESSMENTS

§ 1572.103 Disqualifying criminal offenses.

(a) *Permanent disqualifying criminal offenses.* An applicant has a permanent disqualifying offense if convicted, or found not guilty by reason of insanity, in a civilian or military jurisdiction of any of the following felonies:

(1) Espionage or conspiracy to commit espionage.

(2) Sedition, or conspiracy to commit sedition.

(3) Treason, or conspiracy to commit treason.

(4) A federal crime of terrorism as defined in 18 U.S.C. 2332b(g), or comparable State law, or conspiracy to commit such crime.

(5) A crime involving a transportation security incident. A transportation security incident is a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area, as defined in 46 U.S.C. 70101. The term "economic disruption" does not include a work stoppage or other employee-related action not related to terrorism and resulting from an employer-employee dispute.

(6) Improper transportation of a hazardous material under 49 U.S.C. 5124, or a State law that is comparable.

(7) Unlawful possession, use, sale, distribution, manufacture, purchase, receipt, transfer, shipping, transporting, import, export, storage of, or dealing in an explosive or explosive device. An explosive or explosive device includes, but is not limited to, an explosive or explosive material as defined in 18 U.S.C. 232(5), 841(c) through 841(f), and 844(j); and a destructive device, as defined in 18 U.S.C. 921(a)(4) and 26 U.S.C. 5845(f).

(8) Murder.

(9) Making any threat, or maliciously conveying false information knowing the same to be false, concerning the deliverance, placement, or detonation of an explosive or other lethal device in or against a place of public use, a state or government facility, a public transportations system, or an infrastructure facility.

(10) Violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.,* or a comparable State law, where one of the predicate acts found by a jury or admitted by the defendant, consists of one of the crimes listed in paragraph (a) of this section.

(11) Attempt to commit the crimes in paragraphs (a)(1) through (a)(4).

(12) Conspiracy or attempt to commit the crimes in paragraphs (a)(5) through (a)(10).

(b) *Interim disqualifying criminal offenses.* (1) The felonies listed in paragraphs (b)(2) of this section are disqualifying, if either:

(i) the applicant was convicted, or found not guilty by reason of insanity, of the crime in a civilian or military jurisdiction, within seven years of the date of the application; or

(ii) the applicant was incarcerated for that crime and released from incarceration within five years of the date of the TWIC application.

(2) The interim disqualifying felonies are:

(i) Unlawful possession, use, sale, manufacture, purchase, distribution, receipt, transfer, shipping, transporting, delivery, import, export of, or dealing in a firearm or other weapon. A firearm or other weapon includes, but is not limited to, firearms as defined in 18 U.S.C. 921(a)(3) or 26 U.S.C. 5 845(a), or items contained on the U.S. Munitions Import List at 27 CFR 447.21.

(ii) Extortion.

(iii) Dishonesty, fraud, or misrepresentation, including identity fraud and money laundering where the money laundering is related to a crime described in paragraphs (a) or (b) of this section. Welfare fraud and passing bad checks do not constitute dishonesty, fraud, or misrepresentation for purposes of this paragraph.

(iv) Bribery.

(v) Smuggling.

(vi) Immigration violations.

(vii) Distribution of, possession with intent to distribute, or importation of a controlled substance.

(viii) Arson.

(ix) Kidnapping or hostage taking.

(x) Rape or aggravated sexual abuse.

(xi) Assault with intent to kill.

(xii) Robbery.

(xiii) Fraudulent entry into a seaport as described in 18 U.S.C. 1036, or a comparable State law.

(xiv) Violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.,* or a comparable State law, other than the violations listed in paragraph (a)(10) of this section.

(xv) Conspiracy or attempt to commit the crimes in this paragraph (b).

(c) *Under want, warrant, or indictment.* An applicant who is wanted, or under indictment in any civilian or military jurisdiction for a felony listed in this section, is disqualified until the want or warrant is released or the indictment is dismissed.

(d) *Determination of arrest status.* (1) When a fingerprint-based check discloses an arrest for a disqualifying crime listed in this section without indicating a disposition, TSA will so notify the applicant and provide instructions on how the applicant must clear the disposition, in accordance with paragraph (d)(2) of this section.

(2) The applicant must provide TSA with written proof that the arrest did not result in conviction for the disqualifying criminal offense, within 60 days after the service date of the notification in paragraph (d)(1) of this section. If TSA does not receive proof in that time, TSA will notify the applicant that he or she is disqualified. In the case of an HME, TSA will notify the State that the applicant is disqualified, and in the case of a mariner applying for TWIC, TSA will notify the Coast Guard that the applicant is disqualified.

[72 FR 3595, Jan. 25, 2007; 72 FR 5633, Feb. 7, 2007; 72 FR 14050, Mar. 26