

Fiscal Year 2023

Second Chances Part II: History of Criminal Conduct and Suitability for Federal Employment

U.S. Equal Employment Opportunity Commission

Research, Evaluation, & Applied Data Division | Office of Federal Operations

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Executive Summary

Federal equal employment opportunity (EEO) laws do not prohibit the consideration of arrest or conviction records in making employment decisions unless doing so results in discrimination based on race, national origin, or another protected category.¹ However, the U.S. Equal Employment Opportunity Commission (EEOC) has identified the use of background checks in recruitment and hiring among its national substantive area priorities, as background checks disproportionately impact African Americans and Latinos.²

Federal agencies may consider “criminal or dishonest conduct” as a factor when determining the suitability of applicants for Federal employment.³ For most positions, however, criminal convictions do not automatically disqualify an applicant from Federal employment.⁴

In this report, the EEOC uses data from the Defense Counterintelligence Security Agency to learn how often background investigations found criminal conduct issues, and how often cases with criminal conduct issues received an unfavorable suitability determination. The report also examines data from a survey on Federal sector suitability adjudication policies and practices.

Main Findings

- Between FY 2018 and FY 2020, 22.3% of Federal background investigations for civil service positions found criminal conduct issues. For positions with an unknown service type,⁵ 21.3% of investigations found criminal conduct issues.

¹ U.S. Equal Employment Opportunity Commission. (2012, April 25). Enforcement guidance on the consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act. U.S. EEOC. Retrieved May 20, 2022, from <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>

² U.S. Equal Employment Opportunity Commission. (n.d.). *U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017 - 2021*. U.S. EEOC. Retrieved May 20, 2022, from <https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021>

³ Suitability, 5 CFR § 731.202(b)(2) (2021).

⁴ U.S. Office of Personnel Management. (2022). Guide to Federal employment for second chance applicants. Retrieved July 25, 2023, from https://chcoc.gov/sites/default/files/Memo-with-Guide-to-Federal-Employment-for-Second-Chance-Applicants_508.pdf.

⁵ The dataset included adjudications for civilian, military, and contractor positions. In unknown service type cases, agencies did not report the type of position associated with the adjudication.

- Of adjudications that included criminal conduct as an issue, only 2.0% had unfavorable determinations leading to actions such as not hiring the job candidate or removing the applicant from their position after starting.
- In cases with criminal conduct as an issue, over three-fourths of determinations were favorable, allowing the candidate to work in the Federal Government (76.0% of civil service adjudications and 88.4% of unknown service type adjudications).
- When criminal conduct was an issue in civil service cases, applicants and appointees were more likely to withdraw their applications, resign, or be removed from their position before an adjudication determination was made (21.7% vs. 14.5% of all civil service cases).
- Similarly, in unknown service type cases, applicants and appointees were more likely to withdraw their applications, resign, or be removed from their position before an adjudication determination was made when criminal conduct was an issue (7.2% vs. 4.7% of all unknown service type cases).
- Qualitative data showed that in 2022, Federal agencies were aware of the suitability adjudication requirements in 5 CFR Part 731 and had positive opinions on those regulations.

Main Recommendations

Based on these findings, the EEOC recommends that:

- The Federal Government widely publicize this report's finding that Federal agencies are hiring persons with criminal conduct issues in their background checks.
- Federal agencies continue to assess the length of their suitability process and look for ways to streamline it.
- Federal agencies assess the results of exit surveys from appointees who resigned before receiving a suitability determination in cases where criminal conduct had been flagged as an issue.
- When conducting background checks, employers should take a holistic approach with consideration for mitigating circumstances.

With certain exceptions, a hiring agency may not make specific inquiries concerning an applicant's criminal or credit background in oral or written form unless the hiring agency has made a conditional offer of employment to the applicant. Persons with a history of arrest, incarceration, or criminal conduct who have rehabilitated and present a low risk for recidivism need opportunities for stable employment. Employment in the Federal Government may help address some of the barriers that persons with past criminal conduct face and ease their reintegration into society.

Introduction

Executive Order 10577 directs the U.S. Office of Personnel Management (OPM) to determine whether persons are suitable for Federal employment. During suitability determinations, OPM or an agency with delegated authority considers whether a person's character or conduct may have an impact on the integrity or efficiency of Federal service and decides whether the person is suitable for Federal employment.⁶ This includes a background investigation when an individual is being considered for a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, or a career position in the Senior Executive Service.⁷ However, with certain exceptions, a hiring agency may not make specific inquiries concerning an applicant's criminal or credit background in oral or written form—including through the OF-306 or other forms used to conduct suitability investigations for Federal employment, USAJOBS, or any other electronic means— unless the hiring agency has made a conditional offer of employment to the applicant.⁸

OPM's regulations at 5 CFR Part 731 require OPM and delegated agencies to consider "criminal or dishonest conduct," including conduct that did not result in arrest, charges, or conviction, during suitability determinations.⁹ If criminal conduct is found, OPM or the delegated agency, as it deems pertinent, considers the nature, seriousness, circumstances and recency of the conduct, as well as age at the time of the conduct, contributing societal conditions, and evidence of rehabilitation. The nature of the position and its risk and sensitivity levels are also considered.¹⁰

If the subject of the investigation is found unsuitable, OPM or a delegated agency may take one or more of the following suitability actions: cancel eligibility, remove the appointee or employee, cancel reinstatement eligibility, or debar the applicant,

⁶ Suitability, 5 CFR § 731.101(a) (2021). <https://www.govinfo.gov/content/pkg/CFR-2021-title5-vol2/xml/CFR-2021-title5-vol2-part731.xml>. On September 1, 2023, OPM published a rule to amend regulations related to suitability to reflect the requirements of the Fair Chance to Compete for Jobs Act of 2019. With certain exceptions, the Fair Chance Act prohibits Federal employers from asking applicants about criminal history until a conditional employment offer has been made. See Fair Chance to Compete for Jobs. A Rule by the Personnel Management Office, 88 FR 60317 (to be codified at 5 CFR pts. 302, 317, 319, 330, 731, 754, & 920). <https://www.federalregister.gov/documents/2023/09/01/2023-18242/fair-chance-to-compete-for-jobs>.

⁷ Suitability, 5 CFR § 731.104(a) (2021).

⁸ S.387 - 116th Congress (2019-2020): Fair Chance Act. (2019, April 10). <https://www.congress.gov/bill/116th-congress/senate-bill/387>.

⁹ Suitability, 5 CFR § 731.202(b)(2) (2021). U.S. Office of Personnel Management. (2019, March 19). *Suitability orientation* [Video]. YouTube. <https://youtu.be/dOsLSw1AMB8>.

¹⁰ Suitability, 5 CFR § 731.202(c) (2021).

appointee, or employee.¹¹ The applicant, appointee, or employee may appeal certain suitability actions to the Merit Systems Protection Board.¹² Data from the Defense Counterintelligence and Security Agency (DCSA) provided to the EEOC by OPM also show that suitability determinations can result in lesser negative outcomes such as counseling, letter of warning, reprimand, or suspension from duty.

Criminal convictions do not automatically disqualify an applicant from employment in the competitive civil service, with a few exceptions.¹³

On January 3, 2017, an OPM final rule titled *Recruitment, Selection, and Placement (General) and Suitability* went into effect that updated regulations on suitability inquiries to generally prohibit agencies from inquiring about an applicant's criminal background until making a conditional offer of employment.¹⁴ Later, The Fair Chance to Compete for Jobs Act of 2019 "prohibit[ed] Federal agencies and Federal contractors from requesting that applicants for employment disclose criminal history record information before receiving a conditional offer of employment."¹⁵ These types of ban-the-box (BTB) policy remove questions about criminal history from job applications and require that employers defer inquiring about criminal history until later in the hiring process. Deferring inquiries on criminal records may help individuals with an arrest or conviction record advance through the interview process and improve their chances of getting hired.¹⁶

Federal EEO laws do not prohibit the consideration of arrest or conviction records in making employment decisions unless doing so results in discrimination based on a protected category, such as race, color, religion, sex, or national origin.¹⁷ However, persons with arrest or conviction records face barriers to employment. In particular, these barriers disproportionately affect African Americans, Latinos, and American

¹¹ Suitability, 5 CFR § 731.203(a) (2021).

¹² Suitability, 5 CFR § 731.501(a) (2023).

¹³ Suitability, 5 CFR § 731.202(c) (2021). See also U.S. Equal Employment Opportunity Commission. (2011, July 26). *Written testimony of Robert H. Shriver, III Senior Policy Counsel U.S. Office of Personnel Management*. <https://www.eeoc.gov/meetings/meeting-july-26-2011-eeoc-examine-arrest-and-conviction-records-hiring-barrier/shriver>.

¹⁴ Recruitment, Selection, and Placement (General) and Suitability, 81 Fed. Reg. 86555 (December 1, 2016) (to be codified at 5 CFR pts. 330 & 731). Retrieved July 25, 2023, from <https://thefederalregister.org/81-FR/86555>.

¹⁵ S.387 - 116th Congress (2019-2020): Fair Chance Act. (2019, April 10). <https://www.congress.gov/bill/116th-congress/senate-bill/387>.

¹⁶ Craigie, T. A. (2020). Ban the box, convictions, and public employment. *Economic Inquiry*, 58(1), 425-445.

¹⁷ U.S. Equal Employment Opportunity Commission. (2012, April 25). Enforcement guidance on the consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act. <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.

Indians/Alaska Natives—groups that face disproportionately high arrest and incarceration rates relative to their representation in the population.¹⁸ As a result, the EEOC identified the use of background checks in recruitment and hiring among its national substantive area priorities in its Fiscal Year (FY) 2017-2021 Strategic Enforcement Plan.¹⁹

Furthermore, in June 2021, President Biden signed Executive Order 14035 on *Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce* that identified formerly incarcerated individuals as an underserved community facing employment barriers.²⁰ This Executive Order required the evaluation of barriers to Federal employment faced by formerly incarcerated individuals, which may in turn support their reintegration into society.²¹ The order also underscored the need for the EEOC to continue to explore the impact of criminal background checks on applicants for Federal employment.

A related report from the EEOC's Research, Evaluation, and Applied Data Division (READD) explored the impact of past arrests, past incarceration, and BTB laws on employment. Specifically, using nationally representative survey data from 2007 to 2017, the EEOC found that persons with histories of arrest or incarceration were significantly less likely to work in the Federal sector than people without arrest or incarceration histories. The EEOC also found that BTB laws were associated with more private sector charges of employment discrimination alleging misuse of criminal history as an issue. In jurisdictions with local BTB laws, the EEOC more often found reasonable cause to believe that discrimination had occurred in cases alleging misuse of criminal history.²²

Purpose of This Report

This report summarizes data on Federal employment suitability determinations in cases in which the background investigation identified a criminal conduct issue. This report

¹⁸ Federal Bureau of Investigation. (2019, September 22). *Table 43. Arrests by race and ethnicity, 2019*. <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43>; The Sentencing Project. (2018, April 19). *Report to the United Nations on racial disparities in the U.S. criminal justice system*. <https://www.sentencingproject.org/publications/un-report-on-racial-disparities>; Carson, E.A. (2021, December 14). *Prisoners in 2021 – statistical tables*. Bureau of Justice Statistics. <https://bjs.ojp.gov/library/publications/prisoners-2021-statistical-tables>.

¹⁹ U.S. Equal Employment Opportunity Commission. (n.d.). *U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017 - 2021*. <https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021>.

²⁰ Exec. Order No. 14035, 3 C.F.R. 34593 (2021). <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce>.

²¹ Exec. Order No. 14035, 3 C.F.R. 34593 (2021).

²² U.S. Equal Employment Opportunity Commission. (2023). [Second Chances Part I: Federal Employment for Workers With Past Arrests or Convictions](#).

also explores agency-level Federal sector suitability policies. A related READD report, [Second Chances Part I: Federal Employment for Workers With Past Arrests or Convictions](#), served a similar purpose to this subsequent report. Both reports were written in response to Executive Order 14035, which focused on diversity, equity, inclusion, and accessibility in the Federal workforce. *Second Chances Part I: Federal Employment for Workers With Past Arrests or Convictions* looked at 1) the likelihood that persons with past arrests or criminal convictions would be employed in the Federal sector, and 2) whether regulating the timing of background checks during the recruiting process could protect applicants with a criminal history from discrimination.

This report incorporates distinct data sources. First, the EEOC obtained data from OPM and the DCSA on Federal sector suitability adjudications including cases flagged for criminal conduct. With these data, the EEOC examined how often persons with a history of criminal conduct were hired into Federal positions. In addition, this report used data from a new EEOC survey on Federal agencies' policies and practices concerning the adjudication of suitability.

Understanding how criminal background checks impact the hiring process can benefit multiple audiences. First, the findings of this report can provide Federal employers the opportunity to evaluate their policies in relation to adjudication in the hiring process. This opens room for discussion and may lead to policy changes. In addition, the general public, including persons interested in applying to Federal positions, may better understand the employment opportunities available to someone with a history of criminal conduct. This may lower the barriers to employment faced by persons with histories of arrest or incarceration.

Data and Methodology

This report answers three questions:

- How many background investigations for Federal employment are flagged for criminal conduct?
- Are applicants with histories of criminal conduct considered suitable for Federal employment?
- What are agencies' policies and practices concerning suitability adjudications?

To answer these questions, the EEOC used two data sources:

- 1) FY 2018 through FY 2020 suitability adjudication data collected by the DCSA and provided by the OPM.
- 2) A 2022 survey of Federal agencies conducted by the EEOC on suitability adjudications and suitability adjudication policies.

As described below, both quantitative and qualitative data analyses were used.

DCSA Suitability Adjudication Data

The Defense Counterintelligence Security Agency (DCSA) conducts background investigations at the request of hiring Federal agencies. DCSA conducts background investigations for civil service positions, but also for Federal contractors and military positions. After DCSA conducts the investigation, DCSA sends the investigative file to the hiring agency (or, in rare cases, OPM) to make the suitability determination. Once the determination is made and the applicant or appointee is notified, the adjudication is closed.²³ For recordkeeping and data collection purposes, the hiring agency reports back to DCSA the results of the adjudication.

The FY 2018-20 DCSA data covered the outcomes of closed suitability adjudications for 79 Federal agencies plus a category for "Other agencies." The EEOC limited the data to agencies known to be under the EEOC's jurisdiction. The dataset only included adjudications related to non-sensitive positions with no national security sensitivity.

The dataset sorted cases into four categories by service type: civil service, military service, contractor, and missing/unknown service type. A case may have an unknown service type because the hiring agency did not report the service type to DCSA. There were almost seven times more cases with an unknown service type than cases known to be from the civil service. Since the EEOC's Office of Federal Operations focuses on civilian positions and the missing/unknown service type cases likely include civilian positions, the research team reviewed cases in the civil service and with an unknown or missing service type.

Part of this dataset separately reported cases in which a criminal conduct issue was identified in the background investigation. The EEOC aggregated the data and delineated it by the adjudication's determination (or outcome) and the type of service (civil or unknown service). The EEOC delineated the suitability determinations as follows:

- Favorable
- Resigned, terminated, or withdrew application prior to determination
- Other action taken
- Unfavorable

The decision to make an unfavorable determination may or may not be due to the criminal conduct. For example, a case may involve minor criminal conduct which would not alone result in an unfavorable determination, but that case may involve

²³ After closure, certain unfavorable determinations are subject to appeal. This report does not address appeals.

other more serious factors that may result in an unfavorable determination.²⁴

Unfavorable cases resulted in the following outcomes:

- Reprimand, such as counseling, letter of warning, suspension from duty, and security clearance revoked or denied.
- Not appointed based on suitability/security determination.
- Removed based on suitability/security determination.

Many cases did not include the adjudication outcome. The EEOC excluded these cases, except when examining the percentage of all cases that involved criminal history issues.

Using the DCSA data, the EEOC calculated the number of closed adjudications and the number of closed adjudications with criminal history issues. In addition, the EEOC calculated the percentage of adjudications with favorable, unfavorable, and other suitability determinations; these calculations were done for all adjudications and separately for adjudications with criminal conduct issues.

FY 2022 EEOC Survey on Suitability Adjudications

In FY 2022, the EEOC surveyed Federal agencies on suitability adjudication policies. The EEOC emailed a survey link to EEO Directors and officials representing approximately 190 agencies. The EEOC received 87 responses between February 15, 2022 and March 2, 2022. The analysis excluded responses from agencies that responded more than once and agencies that reported that their responses were not agency-specific, resulting in 76 valid responses.²⁵ Most respondents worked in personnel security or EEO.

The survey focused on the hiring of applicants with criminal histories, delays in suitability determinations, suitability adjudication policies and processes, and the frequency of suitability issues. The survey used both multiple choice and open-ended questions.

Using the EEOC survey data, the EEOC calculated the percentage of agencies that reported having a formal written adjudication policy, when the formal policy (if present) was updated and reviewed for effectiveness, and whether hiring managers were involved in the suitability adjudication process.

The EEOC survey also included open-ended items, such as “What are the pre-established criteria used to make determinations regarding criminal history?” and “Please share any additional insights you have regarding the Federal suitability adjudication process or suitability determinations, in general.” Many agencies

²⁴ The other factors considered in suitability determinations can be found at 5 CFR § 731.202(b) (2021).

²⁵ Respondents were not required to answer all questions. The results indicate whether agencies that did not respond are included in calculating percentages.

answered these questions by providing information found in government-wide regulations and guidance, such as 5 CFR Part 731 and OPM's Suitability Handbook. EEOC researchers evaluated all responses to the open-ended questions and identified common themes. Summaries of those themes and related quotations are provided.

Results

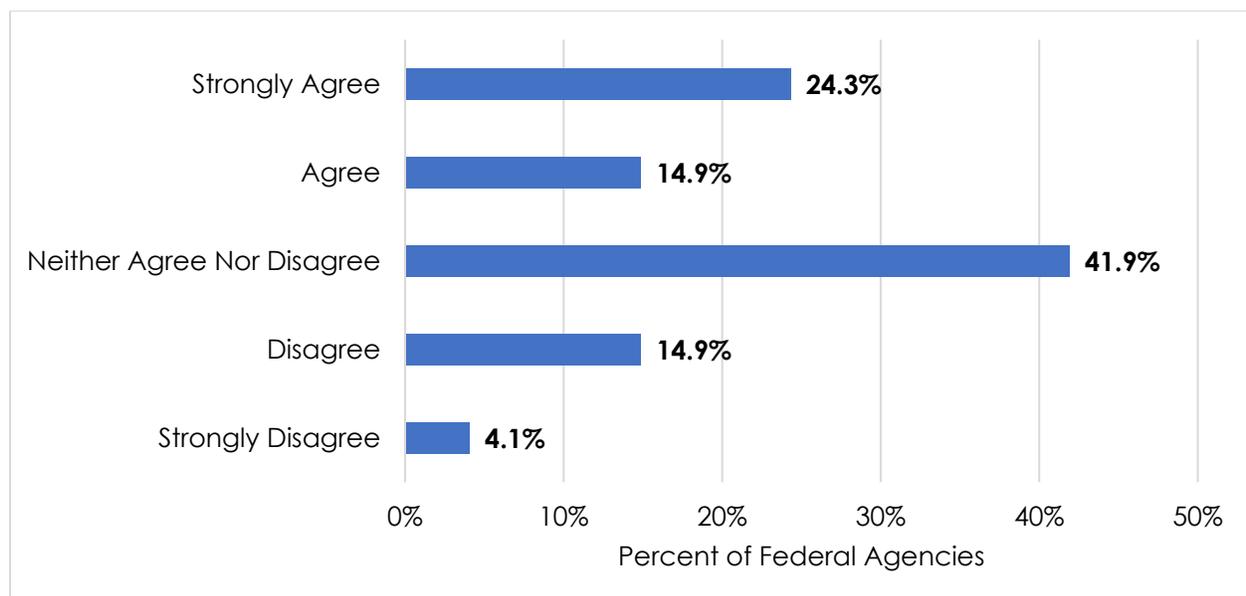
How Many Background Investigations Were Flagged for Criminal History?

For the civil service, out of 91,852 closed adjudication cases between FY 2018 and FY 2020, 22.3% (20,462) had been flagged for criminal conduct issues in the investigation. The EEOC found a similar result when looking at positions with an unknown service type. For positions with an unknown service type, out of 638,839 closed adjudications, 21.3% (135,810) had been flagged for criminal conduct issues.

Are Applicants With Criminal Histories Considered Suitable for Federal Employment?

In the EEOC Survey on Suitability Adjudications, the EEOC asked agencies whether they agree or disagree with the following statement: "Applicants with a criminal history are less likely to be hired than applicants without a criminal history." Although many respondents stated that the agency did not track this information, 74 out of 76 agencies offered their opinion (figure 1).

Figure 1. Are Applicants With a Criminal History Less Likely to be Hired than Applicants Without a Criminal History?



Note: Includes data from 74 valid responses.

Source: U.S. Equal Employment Opportunity Commission, Fiscal Year 2022 Survey on Suitability Adjudications.

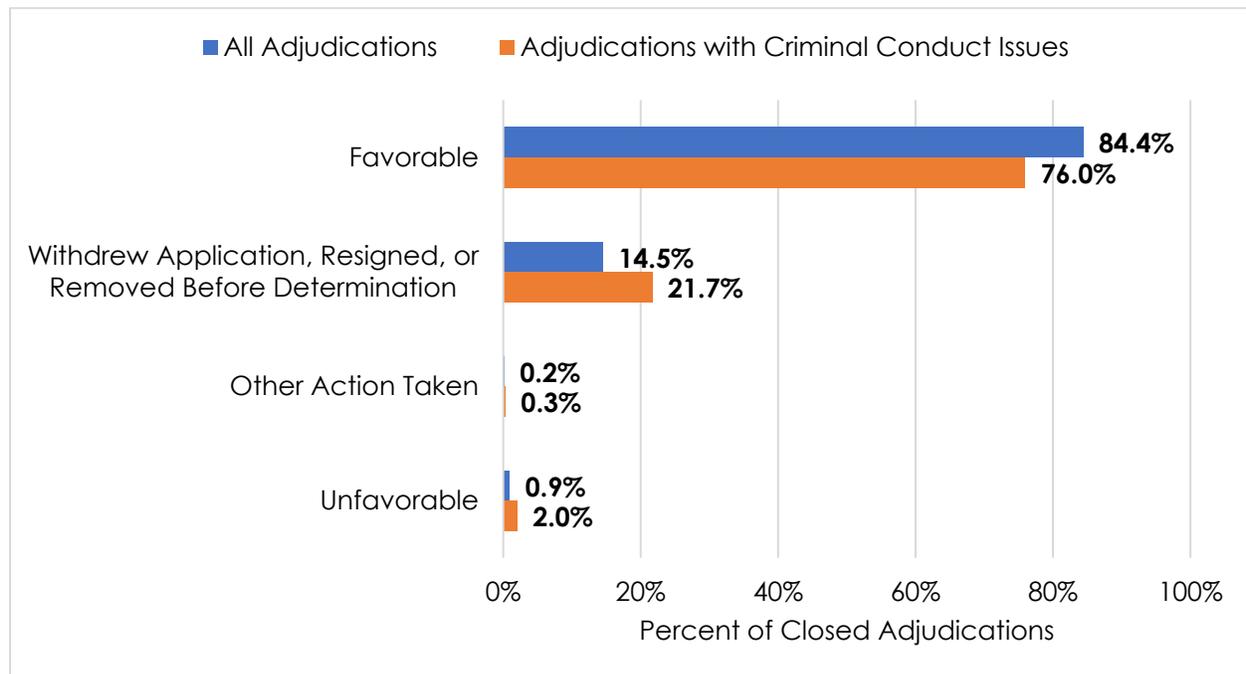
That “neither agree nor disagree” was the most common answer (41.9% of responding agencies) suggests that many Federal agencies may not have analyzed this issue, perhaps due to lack of data. About 39.2% of agencies strongly agreed or agreed that applicants with a criminal history were less likely to be hired than applicants without a criminal history. By comparison, 19.0% of agencies strongly disagreed or disagreed with that statement.

Based on the EEOC’s analyses of the DCSA adjudication data, agencies have found that applicants with criminal conduct issues are usually suitable for Federal employment. However, the data shows that these applicants were less likely to have favorable suitability determinations than applicants overall (see figures 2 and 3).

In civil service adjudications that were flagged for criminal conduct, 76.0% of adjudications resulted in favorable determinations. By comparison, 84.4% of all civil service adjudications resulted in favorable determinations.

Adjudications for positions with unknown service types were also less likely to have favorable outcomes when the case involved a criminal conduct issue. About 93.3% of all unknown service type adjudications resulted in favorable determinations, compared to 88.4% of adjudications with criminal conduct issues.

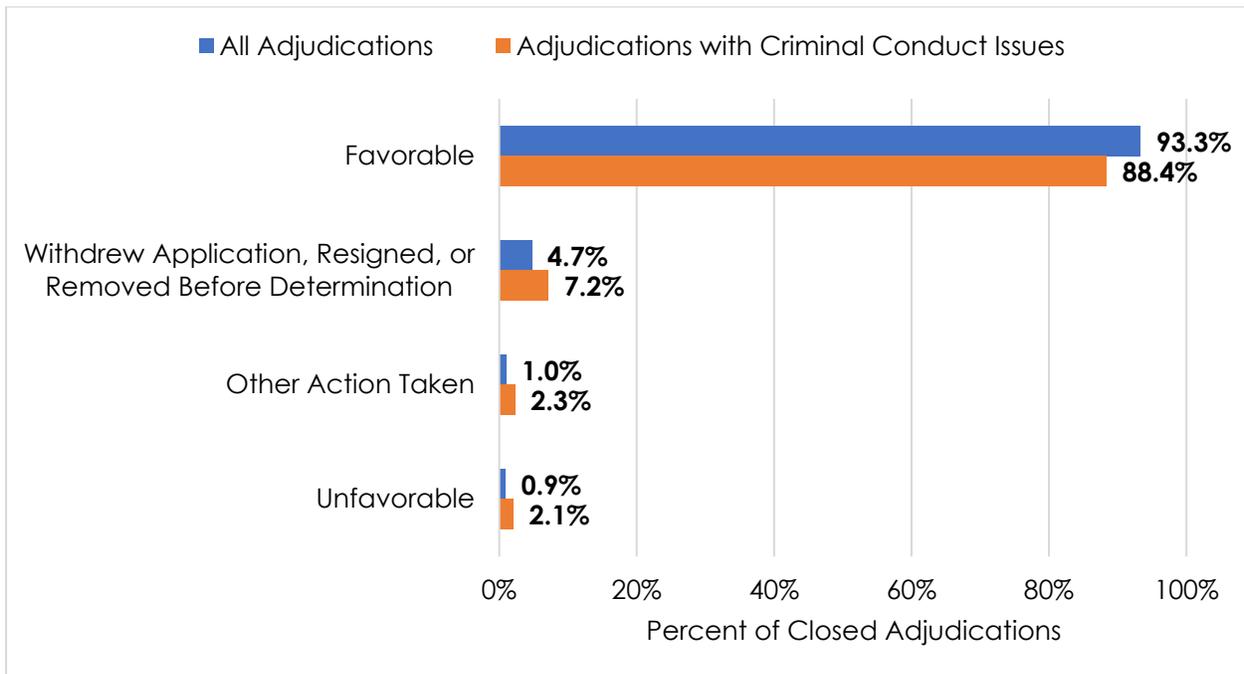
Figure 2. Determinations in Closed Suitability Adjudications for Civil Service Positions, FY 2018–20



Notes: Data only includes cases known to be for civil service positions. Federal agencies may, but are not required to, provide the service type when reporting adjudication outcomes to the DCSA. Data does not include cases with missing determinations.

Source: U.S. Equal Employment Opportunity Commission calculations using data from the Defense Counterintelligence Security Agency.

Figure 3. Determinations in Closed Suitability Adjudications for Positions With an Unknown Service Type, FY 2018–20



Notes: Positions with an unknown service type include civil service, military service, and Federal contractor positions. Federal agencies may, but are not required to, provide the service type when reporting adjudication outcomes to the DCSA. Data does not include cases with missing determinations.

Source: U.S. Equal Employment Opportunity Commission calculations using data from the Defense Counterintelligence Security Agency (DCSA).

Although unfavorable determinations were rare overall, they were more common in cases with criminal conduct issues. In civil service cases, 0.9% of all adjudications had unfavorable determinations, but 2.0% of those with criminal conduct issues had unfavorable determinations. The results were similar for cases with unknown service types: 0.9% of all adjudications had unfavorable determinations, compared to 2.1% of those with criminal conduct issues. Most unfavorable determinations involved reprimands, as opposed to the applicant not being appointed to the position or being removed from a position.

Cases with criminal conduct issues were more likely to end before a determination was made. Across all civil service adjudications, 14.5% ended before a determination was made because the application was withdrawn, the appointee resigned, or the appointee was removed. By comparison, 21.7% of civil service cases with criminal conduct issues ended before a determination was made for similar reasons. This was less common in cases for positions with unknown service type positions: 4.7% of all unknown service type adjudications and 7.2% of those with criminal conduct issues ended before a determination was made.

The data available do not distinguish between withdrawn applications, resignations, and removals that occurred pre-determination. If a preponderance of these cases is due to withdrawn applications, the length of the adjudication process should be examined. If pre-appointment adjudications are too long in duration, they may result in applicants accepting other positions. If a preponderance of these cases is due to resignations, exit interview and exit survey data should be examined to determine why appointees are separating from Federal positions before their adjudications are complete. Indeed, the Office of the Director of National Intelligence and OPM have led the effort to reduce the background investigation inventory and improve efficiencies in personnel vetting.²⁶ However, if delays are occurring in the adjudication process at the agency level, individual agencies should assess their internal processes.

What Are Agencies' Policies and Practices Concerning Suitability Adjudications?

Agency-level policies and practices concerning suitability adjudication may result in different suitability determinations for persons with histories of criminal conduct by agency. OPM's Suitability Handbook and 5 CFR Part 731 provide thorough regulations and guidance on how the suitability adjudication process should work.

When Federal agencies make suitability determinations, to the degree they deem pertinent, they must consider:

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 recency of the conduct.
5. The age of the person involved at the time of the conduct.
6. Contributing societal conditions.
7. The absence or presence of rehabilitation, or efforts toward rehabilitation.²⁷

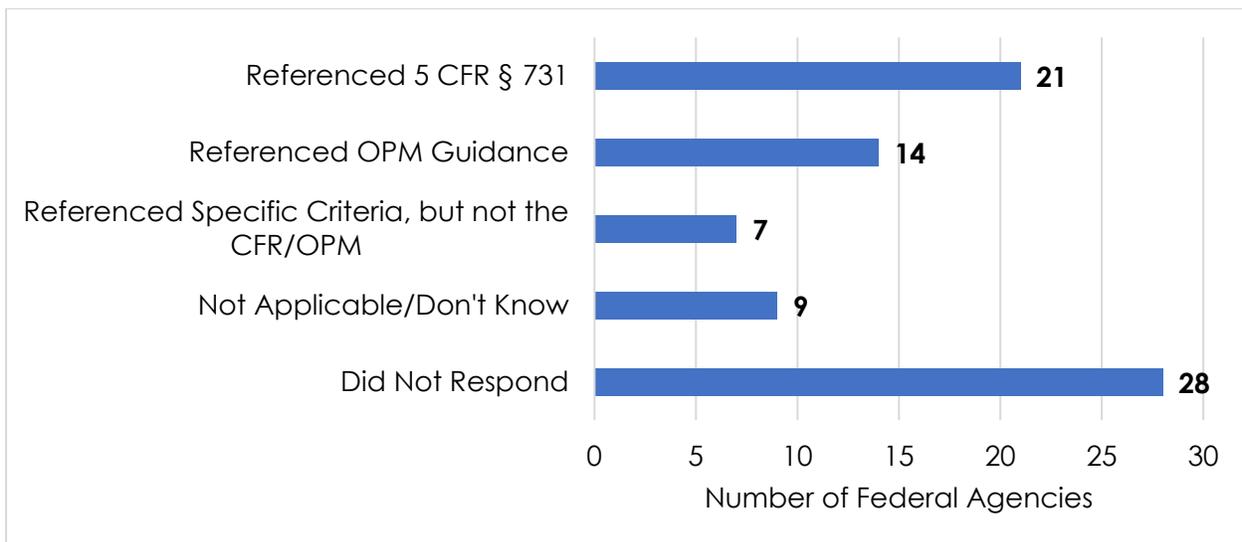
²⁶ Office of the Director of National Intelligence and U.S. Office of Personnel Management. (2022). Federal personnel vetting performance management guidelines. Retrieved July 25, 2023, from https://www.dni.gov/files/NCSC/documents/Regulations/Federal_Personnel_Vetting_Performance_Management_Guidelines_10FEB2022-15Jul22.pdf. Office of the Director of National Intelligence and U.S. Office of Personnel Management. (2021). Memorandum: Transforming Federal personnel vetting: Measures to expedite reform and further reduce the Federal Government's background investigation inventory. Retrieved July 25, 2023, from https://www.odni.gov/files/documents/FOIA/DF-2020-00285-Encl2-Memo_Transforming-Fed-Personnel-Vetting-Redacted-Stamped.pdf.

²⁷ Suitability, 5 CFR § 731.202(c) (2021).

These additional considerations align with DCSA's goal to "provide a holistic picture of the applicant" in its background investigations.²⁸

The EEOC examined whether Federal agencies understand these government-wide policies. Nearly half (48.7%) of the 76 agencies taking the survey did not respond or said they did not know (figure 4). Out of the 48 agencies that did respond to this survey question, 43.8% correctly referenced 5 CFR Part 731 and 29.2% correctly referenced OPM guidance. Another 14.6% did not mention 5 CFR Part 731 or OPM guidance but named specific criteria for making determinations found in 5 CFR Part 731.

Figure 4. What Are the Pre-Established Criteria Used to Make Determinations Regarding Criminal History?



Notes: Includes data from 76 Federal agencies. Agencies could be counted as having referenced both 5 CFR Part 731 and Office of Personnel Management (OPM) guidance.

Source: U.S. Equal Employment Opportunity Commission, Fiscal Year 2022 Survey on Suitability Adjudications.

In addition, when the EEOC asked agencies to share any additional insights about the Federal suitability adjudication process, many agencies expressed favorable opinions of 5 CFR Part 731 and stated ways that they use the concepts within it. For example, one agency wrote, "If agencies apply the standards in 5 CFR Part 731, it should ensure a fair process." Another agency added, "Federal policy and suitability guidelines provide agencies with direction to review a case (person) from a holistic perspective, meaning all relevant information is taken into consideration when making any adjudicative decision." Similarly, one agency wrote, "There are certain factors when determining

²⁸ Defense Counterintelligence and Security Agency. (n.d.) Personnel security. Retrieved July 26, 2023, from <https://www.dcsa.mil/Personnel-Security/>.

suitability, such as criminal, credit factors and if certain factors can be mitigated by time. We evaluate a person as a whole.”

A few agencies expressed that the adjudication process should be streamlined to encourage persons with criminal backgrounds to apply for Federal positions. Notably, one agency stated, “Fear of background checks for minor issues (credit; student loan default; cannabis charges) may be keeping highly qualified candidates from applying in the first place.” If true, that would make background checks a barrier to recruitment, not just the hiring process. Some persons with criminal backgrounds might not believe that they qualify for Federal employment to begin with. Thus, agencies should make it clear that a history of criminal conduct does not automatically disqualify one from Federal employment.

Agencies may have their own policies related to suitability, beyond government-wide policies. In the FY 2022 EEOC survey, among the 60 agencies that responded, about 70% had a formal written suitability adjudication policy. However, there was variation in how recently agencies had updated that policy:

- 17% had updated the policy within the past year.
- 38% had updated it more than a year ago, but within the past three years.
- 31% had updated it more than three years ago.
- 14% did not report when they had most recently updated the policy.

Agencies were more likely to have recently evaluated the policy for effectiveness than to have updated it. Among agencies with formal policies:

- 33% had evaluated the policy within the past year.
- 26% had evaluated it more than a year ago, but within the past three years.
- 19% had evaluated it more than three years ago.
- 7% had never evaluated the policy.
- 14% did not report when the policy was last evaluated.

To ensure the fairness of the adjudication process, agencies must be impartial. In particular, including hiring managers in the process may introduce bias to final determinations. Most agencies reported that hiring managers were not involved in the suitability determination process. Survey results show that:

- 75% of agencies did not consult with hiring managers and did not allow them to make the final decision.
- 17% consulted with hiring managers but did not allow them to make the final decision.
- 8% allowed hiring managers to make the final decision.

Survey data can only reveal limited information on organizational practices. However, it is encouraging to note that Federal agencies do hire persons with criminal conduct issues in their suitability adjudications, are aware of the relevant regulations, and generally find the regulations useful.

Recommendations

The EEOC identified that about 22.3% of suitability adjudications for civil service positions involved criminal conduct issues between FY 2018 and FY 2020. Data showed that, even with criminal conduct issues, most adjudications (76.0% of civil service and 88.4% of unknown service type) resulted in favorable determinations. This allowed persons with criminal histories to gain employment in the Federal Government.

Still, qualitative data from the survey suggested that some qualified candidates with histories of criminal conduct may hesitate to apply for Federal employment due to background checks. Therefore, the EEOC recommends that:

- The Federal Government widely publicize the finding that Federal agencies are hiring persons who had criminal conduct issues in their background checks.

The EEOC found that applicants and appointees for Federal positions often withdrew their applications, resigned, or were removed from the position before a suitability determination was made. This happened in 21.7% of adjudications with criminal conduct issues for the civil service and 7.2% of adjudications with criminal conduct issues for unknown service positions. The EEOC recommends that Federal agencies:

- Assess the length of their adjudication process and look for ways to streamline it.
- Review the results of exit surveys and exit interviews from appointees who resigned before receiving a suitability determination.

Finally, the EEOC examined suitability adjudication policies and practices. In open-ended responses, agencies often directly or indirectly referenced the correct regulation, 5 CFR Part 731, as the primary suitability policy for Federal employment. Agencies expressed positive opinions on the impact of these regulations, citing the holistic approach the regulations take when assessing suitability. Therefore, the EEOC recommends that:

- When conducting background checks, employers should take a holistic approach with consideration for mitigating circumstances.

Conclusion and Next Steps

To ensure that the Federal Government is inclusive and hires the best job candidates, qualified applicants with histories of arrest or conviction should have the opportunity to compete for federal jobs. This report found that applicants who make it to the suitability adjudication process rarely received unfavorable suitability determinations. However,

candidates with issues of criminal conduct were more likely to withdraw their applications, resign, or be removed from a position before a determination was made. They were also less likely to receive a favorable determination.

To the EEOC's knowledge, this is the first report detailing the outcomes of Federal sector suitability adjudications that involved criminal conduct issues. Due to the disproportionate treatment from the criminal justice system toward persons of color, job applicants with a history of criminal conduct face barriers toward equitable employment. This report provides important EEO findings and recommendations, including best practices that may be applicable nationwide.

However, the report had from some limitations. For example, the adjudications dataset did not include data on adjudications by race, gender, or other EEO protected categories. As a result, the EEOC could not examine whether having a history of criminal conduct had different effects depending on EEO protected categories. In addition, the data did not allow the EEOC to match agency-level policies and practices to agency-level adjudication results. Such data would better allow researchers to identify best practices.

Persons with a history of arrest, incarceration, or criminal conduct who have rehabilitated and present a low risk of recidivism need stable employment. Employment in the Federal Government may help address some of the barriers faced by persons with past criminal conduct and ease their reintegration into society. Persons with histories of criminal conduct should continue to apply for Federal employment. To ensure an equitable and diverse workforce, all employers should holistically consider all applicants for employment.