

**DEPARTMENT OF THE INTERIOR****Bureau of Indian Affairs****25 CFR Part 63**

RIN 1076-AC 97

**Indian Child Protection and Family Violence Prevention**

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

**SUMMARY:** The Bureau of Indian Affairs (BIA) is establishing regulations as mandated by the Indian Child Protection and Family Violence Prevention Act that prescribe minimum standards of character and suitability of employment for individuals whose duties and responsibilities allow them regular contact with or control over Indian children, and establish the method for distribution of funds appropriated for Indian child protection and family violence prevention programs, including appropriate caseload standards and staffing requirements for these tribally operated programs.

**EFFECTIVE DATE:** These regulations take effect on July 22, 1996. However, affected parties do not have to comply with the information collection requirements in §§ 63.15, 63.33 and 63.34 until the Bureau of Indian Affairs publishes in the Federal Register the control numbers assigned by the Office of Management and Budget to these information collection requirements. Publication of the control number notifies the public that OMB has approved these information requirements under the Paperwork Reduction Act of 1995.

**SUPPLEMENTARY INFORMATION:** The authority to issue rules and regulations is vested in the Secretary of the Interior by 5 U.S.C. 301 and sections 463 and 465 of the Revised Statutes, 25 U.S.C. 2 and 9.

**Background**

In enacting the Indian Child Protection and Family Violence Prevention Act (Act), Pub. L. 101-630, 104 Stat. 4544, 25 U.S.C. 3201-3211, the Congress recognized there is no resource more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe.

The purpose of this rule is:

- To establish minimum standards of character and suitability for

employment for individuals whose duties and responsibilities allow them regular contact with or control over Indian children as required by Title IV, Section 408 of the Act, 25 U.S.C. 3207.

- To establish the method for distribution of funds to support tribally operated programs to protect Indian children and reduce the incidents of family violence in Indian country as authorized by Title IV, Section 411 of the Act, 25 U.S.C. 3210(f)(3).

- To establish appropriate caseload standards and staffing requirements for Indian child protection and family violence prevention programs as required by Title IV, Section 411 of the Act, 25 U.S.C. 3210(f)(2).

This rule was developed in consultation with tribes. A working group of tribal and BIA representatives developed a draft of each section which was then presented to participants at a national tribal consultation meeting in Oklahoma City, Oklahoma, August 31 through September 1, 1994. Participants accepted a two part formula in which 49% of appropriated funds are distributed equally to all tribes and 49% is distributed on a per capita basis according to the population of children residing in the service area (25 U.S.C. 3210(f)(3) (A)-(B)), with a two percent set aside for special circumstances (25 U.S.C. 3210(f)(3)(D)). In any year appropriations do not exceed fifty percent of the authorization, funds will be equitably distributed (25 U.S.C. 3210(f)(5)), with a two percent set aside for special circumstances (25 U.S.C. 3210(f)(3)(D)).

The formula does not include projected number of cases per month because many tribes have not developed statistics. The formula serves as an interim formula until baseline data using the standard assessment methodology developed for the Indian Child Welfare Act (ICWA) program has been developed. Indian Child Protection and Family Violence Prevention Program grants may be combined with ICWA grants to avoid duplication of effort and paperwork. The caseload standards included in this rule do not reflect the variety of activities contemplated by the Act, e.g., prevention and public education. These are merely benchmarks that may indicate whether funding is sufficient to support a child protection and family violence prevention program, and are not intended to dictate program design and staffing requirements at the local level.

It is with appreciation to the many tribal representatives who gave of their time and experience that this rule is published.

## Review of Public Comments

*Section 63.3 Definitions*

Pursuant to comments received, the definition of *Family violence* has been amended to include persons with whom such person has, or had, intimate or continuous social contact and household access.

Several comments requested a clarification of the term crimes against persons as it is used in §§ 63.12, 63.15 and 63.19. Section 63.3, Definitions, has been amended to include *Crimes against persons*. 25 U.S.C. 3207(b) requires that the minimum standards of character prescribed under this rule ensure that no individual appointed to a position which involves regular contact with or control over Indian children has been found guilty of, or entered a plea of nolo contendere or guilty to, any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; or crimes against persons.

*Section 63.17 How does an employer determine suitability for employment and efficiency of service?*

Section 63.17(e) was corrected to read "adjudicating official" rather than background investigation.

Section 63.17(f)(7), the degree of public trust and the possibility the public would be placed at risk if the individual is appointed to the position, has been deleted to conform with proposed changes to United States Office of Personnel Management (OPM) rules on personnel suitability and investigations, 5 CFR 731.202.

*Section 63.18 Are the requirements for Bureau of Indian Affairs adjudication different from the requirements for Indian tribes and tribal organizations?*

Pursuant to comments, § 63.18 has been amended to clarify that the BIA background investigation must include the OPM National Agency Check and Inquiries which includes a search of the OPM Security/Suitability Investigations Index (SII) and the Defense Clearance and Investigations Index (DCII), and any additional standards which may be established by the BIA.

Both credit checks and searches by state human services agencies have been deleted because these are BIA, not OPM, requirements and do not constitute minimum standards for this rule. Subsection (c) has been added to clarify that the requirements for BIA are not mandatory for the tribes. Tribes and tribal organizations are only required to certify minimum standards of character (§ 63.12) and this is accomplished through the adjudication process

described in § 63.17. In addition, the BIA requires that all employees who have regular contact with or control over Indian children be reinvestigated every five years.

*Section 63.19 When should an employer deny employment or dismiss an employee?*

One comment correctly indicated that subsections (a) and (b) are similar.

Section 63.19(a) reflects the requirements of Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. 3207(b).

Section 63.19(b) has been amended to more clearly reflect the requirements of the Crime Control Act of 1990, Pub. L. 101-647, as amended, 42 U.S.C. 13041. Subtitle E, Child Care Worker Employee Background Checks, requires that Federal agencies and facilities operated under contract with the Federal Government which employ individuals to provide child care services to children under the age of 18 must assure that all existing and newly-hired employees undergo criminal history background checks. Any conviction for a sex crime, an offense involving a child victim, or a drug felony, may be a reason for denying employment or for dismissal of an employee. Conviction of a crime other than a sex crime may be considered if it bears on an individual's fitness to have responsibility for the safety and well-being of children. 42 U.S.C. 13041(c).

The Indian Child Protection and Family Violence Prevention Act applies specifically to Indian tribes and tribal organizations and requires that they conduct background investigations for all persons employed in positions which involve regular contact with or control over Indian children. The Crime Control Act of 1990 applies to Federal contractors, including Indian tribes and tribal organizations. The Crime Control Act includes conviction for a drug felony as a reason to deny employment and only requires a fingerprint check, rather than the full background investigation. Because both laws may apply to an Indian tribe or tribal organization, they are included in this section.

*Section 63.21 Are there other factors that may disqualify an applicant, volunteer or employee from placement in a position which involves regular contact with or control over Indian children?*

One comment requested a definition of public trust, sensitive and non-sensitive positions. Public trust positions are designated by the employer. "Sensitive" and "non-sensitive" positions are terms used by the OPM and refer to the national

security positions. The Bureau of Indian Affairs no longer uses sensitive and non-sensitive designations for positions involving regular contact with or control over Indian children; therefore § 63.21(c) has been deleted.

Pursuant to this comment, § 63.21 has been amended. The term "non-sensitive position" has been deleted and the terms "public trust position" and "sensitive position" have been replaced in the final rule by "positions which involve regular contact with or control over Indian children".

*Section 63.22 Can an employer certify an individual with a prior conviction or substantiated misconduct as suitable for employment?*

Comments also requested a section be added that addresses the suitability of individuals in alcohol or drug recovery for employment in positions which involve regular contact with or control over Indian children.

*Individuals convicted for a drug felony.* The Crime Control Act of 1990 addresses convictions for a drug felony. Subtitle E, Child Care Worker Employee Background Checks, provides that conviction of a crime other than a sex crime may be considered in denying employment to an individual or dismissing an employee, if it bears on the individual's fitness to have responsibility for the safety and well-being of children, 42 U.S.C. 13041(c). Note that any conviction for a sex crime, an offense involving a child victim, or a drug felony, may be a reason for denying employment or for dismissal of an employee, 42 U.S.C. 13041(c). Section 63.19(b) has been amended to include drug felonies.

The Indian Child Protection and Family Violence Prevention Act does not enumerate drug felonies among the offenses which would preclude the BIA from hiring or continuing the employment of an individual in a position which involves regular contact with or control over Indian children. We note that the Crime Control Act of 1990 is applicable to any Federal agency, every facility operated by the Federal Government, and every facility operated under contract with the Federal Government that hires individuals involved with the provision of child care services, 42 U.S.C. 12041(a)(1). The Crime Control Act of 1990 defines child care services as child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching), foster care, residential care, recreational or rehabilitative programs, and detention,

correctional, or treatment services, 42 U.S.C. 13041(a)(2).

*Individuals convicted for an alcohol-related offense.* The Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. 3207(b), mandates that the BIA cannot hire or continue the employment of an individual who has been found guilty of, or entered a plea of nolo contendere or guilty to any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution; or crimes against persons. The purpose of the minimum standards of character is to ensure that individuals who have been found guilty of, or entered a plea of nolo contendere or guilty of these offenses are not hired or retained in positions which involve regular contact with or control over Indian children. It is not the abuse of alcohol, but the criminal behavior that is addressed by the Act.

*The Bureau of Indian Affairs may hire or continue the employment of an individual who has been found guilty of, or entered a plea of nolo contendere or guilty to these offenses in a position that does not involve regular contact with or control over Indian children.* The adjudicating officer must determine that the individual's prior conduct will not interfere with the performance of duties and will not create a potential for risk to the safety and well-being of Indian children. Section 63.22(a) has been modified to reflect this standard.

*Indian tribes and tribal organizations must identify those positions which permit contact with or control over Indian children and establish standards to determine suitability for employment.* Section 63.17(f) addresses the relevance of prior conduct, including an individual's commitment to rehabilitation and a change in behavior. An adjudicating officer may determine prior conduct such as alcohol abuse is not relevant if the applicant or employee demonstrates a change in behavior. Section 63.22 has been amended to clarify that although a person may be found unsuitable for employment in a position which involves regular contact with or control over Indian children, that person may be employed in a position that does not involve contact with or control over Indian children. The proposed § 63.22 is now § 63.23, and the proposed § 63.23 is now § 63.24.

*Section 63.34 How are Indian child protection and family violence prevention program funds distributed?*

Section 63.34(a)(3)(ii) has been amended to clarify that when the BIA redistributes the unallocated special

circumstances funds the BIA will not retain a second 2% percent set aside; all unallocated special circumstances funds will be distributed in the fourth quarter of each fiscal year.

#### Evaluation and Certification

##### *Executive Order 12778*

The Department has certified to the Office of Management and Budget (OMB) that this final rule meets the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order 12778.

##### *Executive Order 12866*

The Office of Management and Budget has determined this final rule is a significant regulatory action under Executive Order 12866.

#### *Regulatory Flexibility Act*

Depending upon the number of positions for which determinations of suitability for employment are required, the cost of background investigations (including the cost of each Federal Bureau of Investigation fingerprint check) may have an economic effect on each tribal government and tribal organization under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and require additional outlays by tribal governments, tribal organizations, and the Federal Government. However, these costs are not projected to exceed \$100,000 and are minimal when compared to the long-term societal and economic impact on families and communities when children are the victims of crimes of violence, sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution.

##### *Executive Order 12630*

In accordance with Executive Order 12630, the Department has determined that this final rule does not have significant "takings" implications. The final rule does not pertain to "taking" of private property interests, nor does it impact private property.

##### *Executive Order 12612*

The Department has determined that this final rule does not have significant federalism effects under Executive Order 12612 and will not interfere with the roles, rights and responsibilities of states.

#### *National Environmental Policy Act*

The Department has determined that this final rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the

National Environmental Policy Act of 1969.

#### *Unfunded Mandates Act of 1995*

This rule imposes no unfunded mandates on any governmental or private entity and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

#### *Paperwork Reduction Act of 1995*

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information contained in §§ 63.15, 63.33 and 63.34 until the Office of Management and Budget has approved the information requirements and issued control numbers. The information collection requirements contained in this final rule will be approved by the Office of Management and Budget as required by 44 U.S.C. 1320 *et seq.*

#### Drafting Information

The primary authors of this document are Judy A. Baggett, Janice Ruffin, and Bettie Rushing, Office of Tribal Services, Bureau of Indian Affairs.

#### List of Subjects in 25 CFR Part 63

Child welfare, Employment, Indians, Maternal and child health.

For the reasons given in the preamble, part 63 is added to chapter I of title 25 of the Code of Federal Regulations to read as follows.

### **PART 63—INDIAN CHILD PROTECTION AND FAMILY VIOLENCE PREVENTION**

#### **Subpart A—Purpose, Policy, and Definitions**

##### Sec.

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- 63.2 Policy.
- 63.3 Definitions.
- 63.4 Information Collection.
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#### **Subpart B—Minimum Standards of Character and Suitability for Employment**

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- 63.11 What is a determination of suitability for employment and efficiency of service?
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- 63.13 What does the Indian Child Protection and Family Violence Prevention Act require of the Bureau of Indian Affairs and Indian tribes or tribal organizations receiving funds under the Indian Self-Determination and Education Assistance Act or the Tribally Controlled Schools Act?
- 63.14 What positions require a background investigation and determination of suitability for employment or retention?
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- 63.19 When should an employer deny employment or dismiss an employee?
- 63.20 What should an employer do if an individual has been charged with an offense but the charge is pending or no disposition has been made by a court?
- 63.21 Are there other factors that may disqualify an applicant, volunteer or employee from placement in a position which involves regular contact with or control over Indian children?
- 63.22 Can an employer certify an individual with a prior conviction or substantial misconduct as suitable for employment?
- 63.23 What rights does an applicant, volunteer or employee have during this process?
- 63.24 What protections must employers provide to applicants, volunteers and employees?
- 63.25–63.29 [Reserved]

#### **Subpart C—Indian Child Protection and Family Violence Prevention Program**

- 63.30 What is the purpose of the Indian child protection and family violence prevention program?
  - 63.31 Can both the Bureau of Indian Affairs and tribes operate Indian child protection and family violence prevention programs?
  - 63.32 Under what authority are Indian child protection and family violence prevention program funds awarded?
  - 63.33 What must an application for Indian child protection and family violence prevention program funds include?
  - 63.34 How are Indian child protection and family violence prevention program funds distributed?
  - 63.35 How may Indian child protection and family violence prevention program funds be used?
  - 63.36 What are the special requirements for Indian child protection and family violence prevention programs?
  - 63.37–63.50 [Reserved]
- Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 13, 200, 3201 *et seq.*; 42 U.S.C. 13041.

#### **Subpart A—Purpose, Policy, and Definitions**

##### **§ 63.1 Purpose.**

The purpose of these regulations is to prescribe minimum standards of character and suitability for employment for individuals whose duties and responsibilities allow them regular contact with or control over Indian children, and to establish the method for distribution of funds to support tribally operated programs to protect Indian children and reduce the

incidents of family violence in Indian country as authorized by the Indian Child Protection and Family Violence Prevention Act of 1990, Pub. L. 101-630, 104 Stat. 4544, 25 U.S.C. 3201-3211.

### § 63.2 Policy.

In enacting the Indian Child Protection and Family Violence Prevention Act, the Congress recognized there is no resource more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. The minimum standards of character and suitability of employment for individuals ensure that Indian children are protected, and the Indian child protection and family violence prevention programs will emphasize the unique values of Indian culture and community involvement in the prevention and treatment of child abuse, child neglect and family violence.

### § 63.3 Definitions.

*Bureau* means the Bureau of Indian Affairs of the Department of the Interior;

*Child* means an individual who is not married, and has not attained 18 years of age.

*Child abuse* includes but is not limited to any case in which a child is dead, or exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, or soft tissue swelling, and this condition is not justifiably explained or may not be the product of an accidental occurrence; and any case in which a child is subjected to sexual assault, sexual molestation, sexual exploitation, sexual contact, or prostitution.

*Child neglect* includes but is not limited to, negligent treatment or maltreatment of a child by a person, including a person responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened.

*Crimes against persons* are defined by local law. Adjudicating officers must contact local law enforcement agencies to determine if the crime for which an applicant or employee was found guilty (or entered a plea of *nolo contendere* or guilty) is defined as a crime against persons.

*Family violence* means any act, or threatened act, of violence, including any forceful detention of an individual, which results, or threatens to result, in physical or mental injury, and is committed by an individual against

another individual to whom such person is, or was, related by blood or marriage or otherwise legally related, or with whom such person is, or was, residing, or with whom such person has, or had, intimate or continuous social contact and household access.

*Indian* means any individual who is a member of an Indian tribe.

*Indian child* means any unmarried person who is under age eighteen and is either a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

*Indian country* means:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof; and,

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Unless otherwise indicated, the term "Indian country" is used instead of "Indian reservation" for consistency.

*Indian reservation* means any Indian reservation, public domain Indian allotment, former Indian reservation in Oklahoma, or lands held by incorporated Native groups, regional corporations, or village corporations under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*).

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Inter-tribal consortium* means a partnership between an Indian tribe or tribal organization of an Indian tribe, and one or more Indian tribes or tribal organizations of one or more Indian tribes.

*Must* is used in place of shall and indicates a mandatory or imperative act or requirement.

*Local child protective services agency* is an agency of the Federal Government, state, or Indian tribe that has the primary responsibility for child protection on any Indian reservation, or

within any community in Indian country.

*Local law enforcement agency* is that Federal, tribal, or state law enforcement agency that has primary responsibility for the investigation of an instance of alleged child abuse within the involved Indian jurisdiction.

*Person responsible for a child's welfare* is any person who has legal or other recognized duty for the care and safety of a child, and may include any employee or volunteer of a children's residential facility, and any person providing out-of-home care, education, or services to children.

*Related assistance* means the counseling and self-help services for abusers, victims, and dependents in family violence situations; referrals for appropriate health-care services (including alcohol and drug abuse treatment); and may include food, clothing, child care, transportation, and emergency services for victims of family violence and their dependents.

*Secretary* means the Secretary of the Interior.

*Service* means the Indian Health Service of the Department of Health and Human Services.

*Shelter* means the temporary refuge and related assistance in compliance with applicable Federal and tribal laws and regulations governing the provision, on a regular basis, of shelter, safe homes, meals, and related assistance to victims of family violence or their dependents.

*Tribal organization* means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let, a grant is awarded, or funding agreement is made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe must be a prerequisite to the letting or making of such contract, grant, or funding agreement.

### § 63.4 Information Collection.

The information collection requirement contained in § 63.15, § 63.33 and § 63.34 will be approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), and assigned clearance number \_\_\_\_\_.

**§§ 63.5–63.9 [Reserved]****Subpart B—Minimum Standards of Character and Suitability for Employment****§ 63.10 Purpose.**

The purpose of this part is to establish:

(a) Procedures for determining suitability for employment and efficiency of service as mandated by the Indian Child Protection and Family Violence Prevention Act; and

(b) *Minimum standards of character* to ensure that individuals having regular contact with or control over Indian children have not been convicted of certain types of crimes or acted in a manner that placed others at risk or raised questions about their trustworthiness.

**§ 63.11 What is a determination of suitability for employment and efficiency of service?**

(a) *Determinations of suitability measure the fitness or eligibility* of an applicant, volunteer, or employee for a particular position. Suitability for employment does not evaluate an applicant's education, skills, knowledge, experience, etc. Rather, it requires that the employer investigate the background of each applicant, volunteer, and employee to:

(1) Determine the degree of risk the applicant, volunteer, or employee brings to the position; and

(2) Certify that the applicant's, volunteer's, or employee's past conduct would not interfere with his/her performance of duties, nor would it create an immediate or long-term risk for any Indian child.

(b) *Efficiency of service* is the employer's verification that the applicant or employee is able to perform the duties and responsibilities of the position, and his/her presence on the job will not inhibit other employees or the agency from performing their functions.

**§ 63.12 What are minimum standards of character?**

Minimum standards of character are established by an employer and refer to identifiable character traits and past conduct. An employer may use character traits and past conduct to determine whether an applicant, volunteer, or employee can effectively perform the duties of a particular position without risk of harm to others. Minimum standards of character ensure that no applicant, volunteer, or employee will be placed in a position with regular contact with or control over Indian children if he/she has been

found guilty of or entered a plea of nolo contendere or guilty to any offense under Federal, state, or tribal law involving crimes of violence, sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution, or crimes against persons.

**§ 63.13 What does the Indian Child Protection and Family Violence Prevention Act require of the Bureau of Indian Affairs and Indian tribes or tribal organizations receiving funds under the Indian Self-Determination and Education Assistance Act or the Tribally Controlled Schools Act?**

(a) The *Bureau of Indian Affairs* must compile a list of all authorized positions which involve regular contact with or control over Indian children; investigate the character of each individual who is employed, or is being considered for employment; and, prescribe minimum standards of character which each individual must meet to be appointed to such positions.

(b) All *Indian tribes or tribal organizations* receiving funds under the authority of the Indian Self-Determination and Education Assistance Act or the Tribally Controlled Schools Act of 1988 must conduct a background investigation for individuals whose duties and responsibilities would allow them regular contact with or control over Indian children, and employ only individuals who meet standards of character that are no less stringent than those prescribed for the Bureau of Indian Affairs.

**§ 63.14 What positions require a background investigation and determination of suitability for employment or retention?**

All positions that allow an applicant, employee, or volunteer regular contact with or control over Indian children are subject to a background investigation and determination of suitability for employment.

**§ 63.15 What questions should an employer ask?**

Employment applications must:

(a) Ask whether the applicant, volunteer, or employee has been arrested or convicted of a crime involving a child, violence, sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution, or crimes against persons;

(b) Ask the disposition of the arrest or charge;

(c) Require that an applicant, volunteer or employee sign, under penalty of perjury, a statement verifying the truth of all information provided in the employment application; and

(d) Inform the applicant, volunteer or employee that a criminal history record

check is a condition of employment and require the applicant, volunteer or employee to consent, in writing, to a record check.

**§ 63.16 Who conducts the background investigation and prepares the determination of suitability for employment?**

(a) The *Bureau of Indian Affairs* must use the United States Office of Personnel Management (OPM) to conduct background investigations for Federal employees. The BIA must designate qualified security personnel to adjudicate the results of background investigations.

(b) *Indian tribes and tribal organizations* may conduct their own background investigations, contract with private firms, or request the OPM to conduct an investigation. The investigation should cover the past five years of the individual's employment, education, etc.

**§ 63.17 How does an employer determine suitability for employment and efficiency of service?**

(a) *Adjudication* is the process employers use to determine suitability for employment and efficiency of service. The adjudication process protects the interests of the employer and the rights of applicants and employees. Adjudication requires uniform evaluation to ensure fair and consistent judgment.

(b) Each case is judged on its own merits. All available information, both favorable and unfavorable, must be considered and assessed in terms of accuracy, completeness, relevance, seriousness, overall significance, and how similar cases have been handled in the past.

(c) An *adjudicating official* conducts the adjudication. Each Federal agency, Indian tribe, or tribal organization must appoint an adjudicating official, who must first have been the subject of a favorable background investigation.

(1) Indian tribes and tribal organizations must ensure that persons charged with the responsibility for adjudicating employee background investigations are well-qualified and trained.

(2) Indian tribes and tribal organizations should also ensure that individuals who are not trained to adjudicate these types of investigations are supervised by someone who is experienced and receive the training necessary to perform the task.

(d) Each adjudicating official must be thoroughly familiar with all laws, regulations, and criteria involved in making a determination for suitability.

(e) The adjudicating official must review the background investigation to determine the character, reputation, and trustworthiness of the individual. At a minimum, the adjudicating official must:

(1) Review each security investigation form and employment application and compare the information provided;

(2) Review the results of written record searches requested from local law enforcement agencies, former employers, former supervisors, employment references, and schools; and

(3) Review the results of the fingerprint charts maintained by the Federal Bureau of Investigation or other law enforcement information maintained by other agencies.

(f) Relevancy is a key objective in evaluating investigative data. The adjudicating official must consider prior conduct in light of:

(1) The nature and seriousness of the conduct in question;

(2) The recency and circumstances surrounding the conduct in question;

(3) The age of the individual at the time of the incident;

(4) Societal conditions that may have contributed to the nature of the conduct;

(5) The probability that the individual will continue the type of behavior in question; and,

(6) The individual's commitment to rehabilitation and a change in the behavior in question.

**§ 63.18 Are the requirements for Bureau of Indian Affairs adjudication different from the requirements for Indian tribes and tribal organizations?**

Yes.

(a) In addition to the minimum requirements for background investigations found in § 63.12, *Bureau of Indian Affairs'* adjudicating officials must review the OPM National Agency Check and Inquiries which includes a search of the OPM Security/Suitability Investigations Index (SII) and the Defense Clearance and Investigations Index (DCII), and any additional standards which may be established by the BIA.

(b) *All* Bureau of Indian Affairs employees who have regular contact with or control over Indian children must be reinvestigated every five years during their employment in that or any other position which allows regular contact with or control over Indian children.

(c) *Indian tribes and tribal organizations* may adopt these additional requirements but are not mandated to do so by law.

**§ 63.19 When should an employer deny employment or dismiss an employee?**

(a) An employer may deny employment or dismiss an employee when an individual has been found guilty of or entered a plea of guilty or nolo contendere to any Federal, state or tribal offense involving a crime of violence, sexual assault, sexual molestation, child exploitation, sexual contact, prostitution, or crimes against persons.

(b) An employer may deny employment or dismiss an employee when an individual has been convicted of an offense involving a child victim, a sex crime, or a drug felony.

**§ 63.20 What should an employer do if an individual has been charged with an offense but the charge is pending or no disposition has been made by a court?**

(a) The employer may deny the applicant employment until the charge has been resolved.

(b) The employer may deny the employee any on-the-job contact with children until the charge is resolved.

(c) The employer may detail or reassign the employee to other duties that do not involve contact with children.

(d) The employer may place the employee on administrative leave until the court has disposed of the charge.

**§ 63.21 Are there other factors that may disqualify an applicant, volunteer or employee from placement in a position which involves regular contact with or control over Indian children?**

Yes.

(a) An applicant, volunteer, or employee may be disqualified from consideration or continuing employment if it is found that:

(1) The individual's misconduct or negligence interfered with or affected a current or prior employer's performance of duties and responsibilities.

(2) The individual's criminal or dishonest conduct affected the individual's performance or the performance of others.

(3) The individual made an intentional false statement, deception or fraud on an examination or in obtaining employment.

(4) The individual has refused to furnish testimony or cooperate with an investigation.

(5) The individual's alcohol or substance abuse is of a nature and duration that suggests the individual could not perform the duties of the position or would directly threaten the property or safety of others.

(6) The individual has illegally used narcotics, drugs, or other controlled

substances without evidence of substantial rehabilitation.

(7) The individual knowingly and willfully engaged in an act or activities designed to disrupt government programs.

(b) An individual must be disqualified for Federal employment if any statutory or regulatory provision would prevent his/her lawful employment.

**§ 63.22 Can an employer certify an individual with a prior conviction or substantiated misconduct as suitable for employment?**

(a) The *Bureau of Indian Affairs* must use Federal adjudicative standards which allow the BIA to certify that an individual is suitable for employment in a position that does not involve regular contact with or control over Indian children. The adjudicating officer must determine that the individual's prior conduct will not interfere with the performance of duties and will not create a potential for risk to the safety and well-being of Indian children.

(b) *Indian tribes and tribal organizations* must identify those positions which permit contact with or control over Indian children and establish standards to determine suitability for employment. Those standards should then be used to determine whether an individual is suitable for employment in a position that permits contact with or control over Indian children. If not, the individual may only be placed in a position that does not permit contact with or control over Indian children.

**§ 63.23 What rights does an applicant, volunteer or employee have during this process?**

(a) The applicant, volunteer, or employee must be provided an opportunity to explain, deny, or refute unfavorable and incorrect information gathered in an investigation, before the adjudication is final. The applicant, volunteer, or employee should receive a written summary of all derogatory information and be informed of the process for explaining, denying, or refuting unfavorable information.

(b) Employers and adjudicating officials must not release the actual background investigative report to an applicant, volunteer, or employee. However, they may issue a written summary of the derogatory information.

(c) The applicant, volunteer, or employee who is the subject of a background investigation may obtain a copy of the reports from the originating (Federal, state, or other tribal) agency and challenge the accuracy and completeness of any information maintained by that agency.

(d) The results of an investigation cannot be used for any purpose other than to determine suitability for employment in a position that involves regular contact with or control over Indian children.

(e) Investigative reports contain information of a highly personal nature and should be maintained confidentially and secured in locked files. Investigative reports should be seen only by those officials who in performing their official duties need to know the information contained in the report.

**§ 63.24 What protections must employers provide to applicants, volunteers and employees?**

(a) Indian tribes and tribal organizations must comply with the privacy requirements of any Federal, state, or other tribal agency providing background investigations. Indian tribes and tribal organizations must establish and comply with personnel policies that safeguard information derived from background investigations.

(b) The Bureau of Indian Affairs must comply with all policies, procedures, criteria, and guidance contained in the Bureau of Indian Affairs Manual or other appropriate guidelines.

(c) Federal agencies exercising authority under this part by delegation from OPM must comply with OPM policies, procedures, criteria, and guidance.

**§§ 63.25–63.29 [Reserved]**

**Subpart C—Indian Child Protection and Family Violence Prevention Program**

**§ 63.30 What is the purpose of the Indian child protection and family violence prevention program?**

The purpose of this program is to develop tribally-operated programs to protect Indian children and reduce the incidence of family violence on Indian reservations.

**§ 63.31 Can both the Bureau of Indian Affairs and tribes operate Indian child protection and family violence prevention programs?**

Yes. However, tribes are encouraged to develop and operate programs to protect Indian children and reduce the incidence of family violence in Indian country.

**§ 63.32 Under what authority are Indian child protection and family violence prevention program funds awarded?**

The Secretary is authorized to enter into contracts with Indian tribes, tribal organizations, or tribal consortia pursuant to the Indian Self-

Determination and Education Assistance Act, as amended, 25 U.S.C. 450 *et seq.*, for the development and establishment of Indian child protection and family violence prevention programs. This includes compacting with tribes under the Self-Governance program procedures.

**§ 63.33 What must an application for Indian child protection and family violence prevention program funds include?**

In addition to the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450 *et seq.*, contracting requirements, each application must provide the following information:

(a) The name and address of the agency or official to be responsible for the investigation of reported cases of child abuse and child neglect, the treatment and prevention of incidents of family violence, and the provision of immediate shelter and related assistance for victims of family violence and their dependents;

(b) Projected service population of the program;

(c) Projected service area of the program; and

(d) Projected number of cases per month.

**§ 63.34 How are Indian child protection and family violence prevention program funds distributed?**

(a) Funds will be distributed, subject to the availability of appropriations, and:

(1) In any fiscal year that the appropriation exceeds 50 percent of the level of funding authorized for this purpose by the Act, 49 percent must be distributed equally to all tribes and tribal organizations and 49 percent must be distributed on a per capita basis according to the population of children residing in the service area. Two percent of the annual appropriation will be set aside for distribution to tribes demonstrating special circumstances.

(2) In any fiscal year that the appropriation does not exceed 50 percent of the level of funding authorized for this purpose by the Act, funding must be distributed in equal amounts to all tribes. Two percent of the annual appropriation will be set aside for distribution to tribes demonstrating special circumstances.

(3) Special circumstances include but are not limited to a high incidence of child sexual abuse, a high incidence of violent crimes, a high incidence of violent crimes against women, or the existence of a significant victim population within the community.

(i) This 2 percent will be subject to discretionary distribution by the

Assistant Secretary—Indian Affairs, or his or her designee. Tribes may request these funds through their respective area offices. All requests must demonstrate a high incidence of child sexual abuse, a high incidence of violent crimes, a high incidence of violent crimes against women, or the existence of a significant victim population within the community.

(ii) Special circumstances funds will remain available through the third quarter of each fiscal year. In the fourth quarter, unallocated special circumstances funds will be redistributed as set forth in paragraphs (a)(1) and (a)(2) of this section, except that there will be no additional set aside for special circumstances.

(b) Any tribe not wishing to receive Indian child protection and family violence prevention funds must inform its respective area office in writing within 90 days after receiving notice of the allocation from the area office. Each area office may reallocate unused Indian child protection and family violence prevention program funds as provided in this section.

(c) Funds may be used as matching shares for other federally funded programs which contribute to and promote prevention of child abuse, child neglect, and family violence on Indian reservations, but may not be used to supplant funds available for the same general purposes.

(d) Any income resulting from the operation of Indian child protection and family violence prevention programs may be retained and used to promote prevention of child abuse, child neglect, and family violence on Indian reservations.

**§ 63.35 How may Indian child protection and family violence prevention program funds be used?**

Indian child protection and family violence prevention program funds may be used to:

(a) Establish child protective services programs.

(b) Establish family violence prevention and treatment programs.

(c) Develop and implement multidisciplinary child abuse investigation and prosecution programs.

(d) Provide immediate shelter and related assistance to victims of family violence and their dependents, including construction or renovation of facilities to establish family violence shelters.

(e) Purchase equipment to assist in the investigation of cases of child abuse and child neglect.

(f) Develop protocols and intergovernmental or interagency

agreements among tribal, Federal, state law enforcement, courts of competent jurisdiction, and related agencies to ensure investigations of child abuse cases to minimize the trauma to the child victim, to define and specify each party's responsibilities, and to provide for the coordination of services to victims and their families.

(g) Develop child protection codes and regulations that provide for the care and protection of children and families on Indian reservations.

(h) Establish community education programs for tribal members and school children on issues of family violence, child abuse, and child neglect.

(i) Establish training programs for child protective services, law enforcement, judicial, medical, education, and related services personnel in the investigation, prevention, protection, and treatment of child abuse, child neglect, and family violence.

(j) Establish other innovative and culturally relevant programs and projects that show promise of successfully preventing and treating family violence, child abuse, and child neglect.

**§ 63.36 What are the special requirements for Indian child protection and family violence prevention programs?**

(a) Each tribe must develop appropriate standards of service, including caseload standards and staffing requirements. The following caseload standards and staffing requirements are comparable to those recommended by the Child Welfare League of America, and are included to assist tribes in developing standards for Indian child protection and family violence prevention programs:

(1) Caseworkers providing services to abused and neglected children and their families have a caseload of 20 active ongoing cases and five active investigations per caseworker.

(2) Caseworkers providing services to strengthen and preserve families with children have a caseload of 20 families. If intensive family-centered crisis services are provided, a caseload of 10 families per caseworker is recommended.

(3) It is recommended that there be one supervisor for every six caseworkers.

(b) The negotiation and award of contracts, grants, or funding agreements under these regulations must include the following requirements:

(1) Performance of background investigations to ensure that only those individuals who meet the standards of character contained in § 63.12 are employed in positions which involve regular contact with or control over Indian children.

(2) Submission of an annual report to the contracting officer's representative which details program activities, number of children and families served, and the number of child abuse, child neglect, and family violence reports received.

(3) Assurance that the identity of any person making a report of child abuse or child neglect will not be disclosed without the consent of the individual and that all reports and records collected under these regulations are confidential and to be disclosed only as provided by Federal or tribal law.

(4) Assurance that persons who, in good faith, report child abuse or child neglect will not suffer retaliation from their employers.

**§§ 63.37—63.50 [Reserved]**

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Ada E. Deer,

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