

April 17, 2023

Kiran Ahuja
Director, U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415-1000

Re: Reforms to the Hiring and Supervision of Law Enforcement Personnel

Dear Director Ahuja:

The NAACP Legal Defense and Educational Fund, Inc. (LDF)¹ submits recommendations to the Office of Personnel Management (OPM) pursuant to Section 3 of Executive Order 14074 (EO).² LDF is the nation’s first and foremost civil rights and human rights law organization, and throughout our history we have worked alongside advocates, directly impacted people, and community partners to challenge and remedy unlawful and discriminatory police practices.³ We are grateful for the opportunity to offer our expertise in this area and provide feedback to OPM regarding the hiring and oversight of law enforcement personnel.

The Executive Order highlights the need to “develop best practices for conducting background investigations and implementing properly validated selection procedures, including vetting mechanisms and ongoing employment screening, that . . . help avoid the hiring and retention of law enforcement officers who promote unlawful violence, white supremacy, or other bias[.]”⁴ Severe racial bias, including the presence of white nationalist and anti-governmental actors within agencies, is a grave and continuing problem in law enforcement. OPM can help address this by developing appropriate standards for federal law enforcement agencies, informing the Attorney General guidance developed under Section 3(d) of the EO, and serving as a model for local, state, and tribal law enforcement agencies.

¹ Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. It has been a separate organization from the NAACP since 1957.

² Exec. Order No. 14074, 87 Fed. Reg. 32945 (May 25, 2022) (“The Attorney General, in formulating standards for accrediting bodies, shall consult with . . . civil rights and community-based organizations.”) [hereafter “Exec. Order No. 14074”].

³ LDF’s work to address police violence and misconduct dates back to its inception. *See, e.g., Shepherd v. Florida*, 341 U.S. 50 (1951) (reversing the wrongful interracial rape convictions of Black men, who were brutally beaten by sheriff’s deputies in an attempt to force confessions); *Tennessee v. Garner*, 471 U.S. 1 (1985) (holding, for the first time, that police officers cannot shoot fleeing suspects who do not pose a threat to officers or members of the public). Today, LDF’s Justice in Public Safety Project uses litigation, policy advocacy, research, community organizing, and strategic communications to transform public safety systems, advance police accountability, and prevent and remedy the impact of racial bias in public safety.

⁴ Exec. Order No. 14074.

I. Policy solutions are urgently needed to address the threats posed by white nationalist and anti-governmental law enforcement officers.

In order to ensure justice and racial equity in our federal public safety systems, OPM must find solutions to prevent white nationalists and their sympathizers from joining and remaining employed by law enforcement agencies.⁵ The power that officers wield can endanger the physical safety, constitutional rights, and civil liberties of Black people and other vulnerable communities, who may be unjustly targeted for stops, searches, arrests, and use of force. It also has the potential to illicitly guide government policy toward the persecution of activists and organizers who are engaged in the struggle for civil rights.⁶ Federal agencies are also susceptible to more widespread and systemic racial bias – for example, a 2020 whistleblower complaint alleged that high-ranking DHS officials purposely minimized threat assessments prepared by employees that highlighted the danger posed by white supremacists.⁷ These threats to equal protection and civil rights should inform OPM’s efforts as it seeks to implement new hiring and oversight policies within law enforcement agencies.

OPM must be similarly vigilant about racial bias among state and local law enforcement officers who seek to participate in federal task forces. Too often, state and local agencies lack well-functioning internal accountability systems to ensure that officers and candidates who have demonstrated a lack of fitness to serve through misconduct or otherwise unacceptable behavior are screened from employment or appropriately disciplined. This failure has led to far too many injuries and deaths of disproportionately Black and Brown people, including several high-profile police killings like those of Eric Garner⁸ and Laquan McDonald.⁹ Officers with histories of misconduct are often celebrated internally for their enforcement activity, regardless of their discriminatory conduct or aggressive tactics—and then promoted or rewarded with opportunities such as serving on federal task forces.¹⁰ Agencies must prioritize public safety by ensuring that

⁵ See Hassan Kanu, *Prevalence of White Supremacists in Law Enforcement Demands Drastic Change*, Reuters (May 12, 2022), <https://www.reuters.com/legal/government/prevalence-white-supremacists-law-enforcement-demands-drastic-change-2022-05-12/>; Alice Sperti, *Unredacted FBI Document Sheds New Light on White Supremacist Infiltration of Law Enforcement*, The Intercept (Sep. 29, 2020), <https://theintercept.com/2020/09/29/police-white-supremacist-infiltration-fbi/>; Rashad Robinson, *We Can't Trust Police to Protect Us From Racist Violence. They Contribute to It*, The Guardian (Aug. 21, 2019), <https://www.theguardian.com/commentisfree/2019/aug/21/police-white-nationalists-racist-violence>.

⁶ Robinson, *supra* note 5.

⁷ In re Brian Murphy, Whistleblower Reprisal Compl., Dep’t of Homeland Sec., Off. of Inspector Gen. 13-14 (Sep. 8, 2020), <https://int.nyt.com/data/documenttools/homeland-security-whistleblower/0819ec9ee29306a5/full.pdf>.

⁸ Kevin McCoy, *Choke-hold Cop Sued in Prior Misconduct Cases*, USA Today (Dec. 4, 2014), <https://www.usatoday.com/story/news/nation/2014/12/04/choke-hold-cop-pantaleo-sued/19899461/>.

⁹ Elliot McLaughlin, *Chicago Officer Had History of Complaints before Laquan McDonald Shooting*, CNN (Nov. 26, 2015), <https://www.cnn.com/2015/11/25/us/jason-van-dyke-previous-complaints-lawsuits/index.html>.

¹⁰ Sheriff Mark Lamb, founder of Protect America Now, an organization for constitutional, advertises his participation in a RICO task force on his webpage. See About Sheriff Mark Lamb, Pinal County, Ariz. Gov’t., <https://www.pinalcountyyaz.gov/sheriff/aboutpcso/pages/sheriff.aspx>; see LDF Letter, Growing Threat of “Constitutional Sheriffs” to our Multi-Racial Democracy, (Dec. 21, 2022), https://www.naacpldf.org/wp-content/uploads/2022.12.20-LDF-letter-to-AAG-Gupta-AAG-Clar_Puneet-Cheema.pdf.

joint task force assignments are not afforded to officers with complaints of racial bias which renders them unfit to receive these elite opportunities.¹¹

Additionally, there are officers with dangerous anti-governmental ideologies who serve in law enforcement agencies. At least one DEA officer was among the insurrectionists at the Capitol on January 6, 2021, and a number of U.S. Capitol Police have been investigated for potentially aiding the rioters.¹² At the state and local level, the Constitutional Sheriffs movement represents a growing anti-governmental ideology that undermines civil rights, democratic values, and public safety, and there is a threat that sympathizers of this movement can participate on joint task forces with federal agencies.

Federal agencies play a crucial role in upholding the constitutional rights of all and the hard-won civil liberties of Black people, which are constantly under threat. OPM can advance these goals by developing standards to ensure unfit candidates are not allowed to join federal law enforcement agencies, and that existing officers are monitored and disciplined, as necessary, so that harmful ideologies do not impact the administration of justice.

II. Appropriate screening practices should be implemented to prevent the hiring of officers with racial bias and anti-governmental ideologies.

OPM can mitigate the dangers outlined above by implementing hiring practices that ensure that officers who display harmful ideologies are not allowed to join federal agencies or participate in joint task forces in the first place. OPM can institute the hiring policies listed below for federal law enforcement agencies. Furthermore, the Attorney General's guidance, required by Section 3(d) of the EO for state and local law enforcement, should incorporate these to screen out unfit applicants in the pre-employment phase.

- 1) Define the characteristics that render an applicant or officer unfit to serve. The first step toward ensuring that agencies adopt strict anti-racist practices is to explicitly reject racial bias in clearly worded directives to its employees. Every agency should implement consistent messaging in its employment policies that direct hiring managers to reject applicants who have exhibited racial animus or anti-governmental ideology.
- 2) Impose background checks that explicitly screen for racial bias, including comprehensive reviews of a candidate's social media activity and their participation in hate-based online communities. Furthermore, personnel officers should maintain a database of tattoos, symbols, and codewords associated with white nationalism and related ideologies, so that they can more easily detect whether candidates espouse these views.¹³

¹¹ LDF Letter, DOJ Must Enhance Efforts to Address the National Security Threat Posed By Law Enforcement Officials With Ties to Anti-Governmental and White Nationalist Groups, (Sep. 13, 2022)

¹² Shawna Chen, *Federal Officer Charged in Jan. 6 Capitol Riot*, *Axios* (July 20, 2021), <https://www.axios.com/2021/07/20/capitol-riot-federal-officer-charged>.

¹³ *Alarming Incidents of White Supremacy in the Military – How to Stop It?*, *Hearing Before the Subcomm. on Mil. Personnel of the H. Comm. on Armed Svcs*, 116th Cong. 17 (2020) (statement of Heidi L. Beirich, Ph.D, Co-Founder, Global Project Against Hate and Extremism); Shannon Ryan, *APD Officers Appear To Take Photo with*

- 3) Implement psychological evaluations that are comprehensive enough to screen out candidates with fitness issues that are not readily apparent. While a candidate's prejudice against a racial minority might not be evident from their criminal record or employment history, it could be revealed by evaluations that properly screen for such characteristics. Accordingly, agencies should implement, as part of the hiring process, an interview with a qualified mental health professional who should submit a report regarding the candidate's fitness.¹⁴ Such interviews may include affirmative questions, as well as hypotheticals, that require candidates to demonstrate a showing of affinity to equity and test their responses to situations involving people being treated in a biased manner.
- 4) Reject candidates who have been decertified or terminated in any jurisdiction for reasons that bear on their fitness to serve. The need for this standard is demonstrated by numerous cases of once-terminated police officers gaining employment in other jurisdictions, only to commit grave acts of misconduct.¹⁵ In the interest of public safety, officers whose actions have proven they are unfit to serve as an armed law enforcement officer must not be allowed to move from one agency to another.¹⁶

These same standards must also apply to state and local officers who are considered for participation in joint task forces. These are considered to be highly prestigious assignments, and OPM should ensure that they are reserved for only the most fair-minded officers. Additionally, task forces should exclude officers with multiple allegations of race discrimination within certain time periods. This standard should not be contingent on such complaints being "sustained," as this would ignore the inadequacies of accountability systems at far too many state and local law enforcement agencies around the country.

In proposing these standards, we note that agencies will not be in violation of applicants' First Amendment rights by excluding applicants who have engaged in bigoted or extremist speech.¹⁷ Such speech is not protected by the relevant Constitutional standards, and law enforcement agencies have both the duty and the right to reject applicants who espouse hateful ideologies.

Protesters Using White Power Signs, Fox7 Austin (Nov. 2, 2020), <https://www.fox7austin.com/news/apd-officers-appear-to-take-photo-with-protesters-using-white-power-signs>; Frank E. Lockwood, *Police Chief Resigns in Marshall; Posts Urging election-related violence Drew Scrutiny*, Ark. Democrat Gazette (Nov. 8, 2020), <https://www.arkansasonline.com/news/2020/nov/08/police-chief-resigns-in-marshall/>

¹⁴ Hilary Rau et al., *State Regulation of Policing: POST Commissions and Police Accountability*, 11 U.C. Irvine L. Rev. 1349, 1373 (2021).

¹⁵ Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 Yale L.J. 1676, 1680-83 (2020).

¹⁶ *Accreditation and Standards: Hearings before the President's Commission on Law Enforcement and the Administration of Justice* (2020) (Testimony of Jeff Hughes, Chief, Brentwood, TN Police Dep't) ("I stress the need to mandate that every agency and every state be required to report to a national decertification database and mandate that every officer and agency use that database when hiring potential applicants who worked for another department. This way, you don't have cops with a less than desirable past jumping from one agency to another.")

¹⁷ *Countering Bigotry and Extremism in the Ranks: A First Amendment Guide for Law Enforcement Agencies*, States United Democracy Ctr. & Georgetown Law Inst. for Const. Advocacy and Protection, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2022/04/2022.4.7.-Countering-Bigotry-and-Extremism-in-the-Ranks.pdf>.

III. Accountability systems must provide appropriate discipline for officers who have committed misconduct or demonstrated a lack of fitness to serve.

The failure of law enforcement agencies to implement and maintain well-functioning accountability systems for its employees can impose danger on vulnerable communities, and it has led to far too many injuries and deaths of disproportionately Black and Brown people. Agencies must prioritize public safety by ensuring appropriate discipline, including termination where warranted, for officers who commit serious misconduct on the job or who are ill-suited for service due to harmful ideologies they espouse.

In the modern age of social media, agencies must do more to monitor their officers for off-duty behavior that demonstrates a lack of fitness to serve.¹⁸ There have been many documented incidents across the country of officers posting bigoted or violent content online and participating in harmful or dangerous online communities, demonstrating an inability to protect the public and carry out their duties in a professional, unbiased manner.¹⁹ Agencies must make every reasonable effort to detect off-duty behavior that bears on an officer's fitness, and they must not hesitate to appropriately discipline officers that demonstrate violent, discriminatory or unlawful behavior, including termination where warranted.²⁰

Furthermore, there must be measures implemented to ensure that there is not a broader culture of racial animus within law enforcement agencies. In recent years, there have been a number of allegations of DEA staff discriminating against Black colleagues and supervisees,²¹ and of training officers making overtly racist comments to recruits at the Training Academy in Quantico, VA.²² Black and Brown officers at the FBI have similarly cited cultures of discrimination and alienation in the workplace.²³ When law enforcement agencies tolerate and incubate racial animus within their own offices, it should come as no surprise that racial disparities permeate their enforcement activities against the public.

* * *

OPM can play a crucial role in reducing harmful police conduct and ensuring that law enforcement agencies can be trusted to protect civil rights and human dignity. To meet this potential, it must implement proper hiring and oversight practices that promote equal protection while rejecting racist and anti-governmental ideologies. Should you have any questions about our

¹⁸ *Id.*

¹⁹ See, e.g., Johnson, *supra* note 6, at 223-24 (2019); William K. Rashbaum & Alan Feuer, *N.Y.P.D. Concludes Anti-Harassment Official Wrote Racist Online Rants*, N.Y. Times (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/nyregion/nypd-james-kobel-racist.html>.

²⁰ *Supra* note 17.

²¹ Jim Mustian, *Retired DEA agents say agency has legacy of discrimination*, Associated Press (June 18, 2020), <https://apnews.com/article/us-news-discrimination-race-and-ethnicity-racial-injustice-william-barr-e3f0a78d2d0b3cbee3ea4d36d8136c6b>.

²² Daniel Cassady, *Report: DEA Recruits Allege Culture of Racism at Training Academy*, Forbes (Oct. 16, 2020), <https://www.forbes.com/sites/danielcassady/2020/10/16/report-dea-recruits-allege-culture-of-racism-at-training-academy/?sh=733f98907967>.

²³ Alice Speri, *The FBI's Race Problem Is Getting Worse. The Prosecution of Terry Albury Is the Proof*, The Intercept (Apr. 21, 2018), <https://theintercept.com/2018/04/21/terry-albury-fbi-race-whistleblowing/>.

recommendations, please do not hesitate to contact David Moss, Legal Fellow at LDF's Justice in Public Safety Project, at dross@naacpldf.org or Puneet Cheema, Manager of the Justice in Public Safety Project, at pcheema@naacpldf.org. We thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink that reads "David Moss". The signature is written in a cursive style with a large, looped "D" and "M".

David Moss
Legal Fellow, Justice in Public Safety Project
NAACP Legal Defense and Educational Fund, Inc.

