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27 September 2013
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SUBJECT: Request for Investigation of Negligent Hiring Pursuant to Pattern of Failure to Abide by the Long Extant Profile Data on Avoiding Hiring Applicants in the Foreseeably Dangerously Mental Disordered Profile Group

Government Accountability Office
441 G St., NW
Washington, DC 20548

Pursuant to your function "to support the Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people," http://www.gao.gov/about/index.html, which includes to engage in

"auditing agency operations to determine whether federal funds are being spent efficiently and effectively;
investigating allegations of illegal and improper activities;
reporting on how well government programs and policies are meeting their objectives,"

this is a request that you, "undertake research under the authority of the Comptroller General," and pursuant to federal laws and regulations conferring authority upon agencies, to hire and to develop forms such as Standard Form 78, "Certificate of Medical Examination," http://www.ok.ngb.army.mil/j1/library/forms/sf_78.pdf, to contract with contractors, and to grant security clearances to persons hired by agencies and contractors, with respect to hiring practices, specifically, negligent hiring as relates to failure to avoid hiring (or enlisting) applicants in the foreseeably dangerously mentally disordered profile. We refer to that as the "do-not-hire" profile.

Such research will enable you to "advise Congress and the heads of executive agencies about ways to make government more efficient, effective, ethical, equitable and responsive" in regard to the cited hiring and security clearance granting practices.

The most recent incident is the Washington D.C. Navy Yard shooting of twelve employees on base, an incident making news nationwide and reportedly triggering narrow focus investigations by the Departments of Defense and/or Navy. Such investigations, limited to the issue of granting security clearances, will foreseeably fail to address the underlying condition precedent situation, negligent hiring, that enabled granting a clearance in the first place to even arise. That incident is only the most recent in the long term pattern of negligent hiring.

As a matter of law, negligent hiring is not allowed. Court precedents which themselves come into existence pursuant to pertinent laws show this. Your authority to investigate therefore accrues also pursuant to the laws enabling judicial review. As a matter of judicial economy, preventing incidents from arising in the first place prevents subsequent litigation arising from foreseeable natural and probable consequences of the negligent hiring.

Avoiding incidents that lead to employee deaths disrupts and even shuts down agency components, as was so recently and tragically confirmed, is important to agency functioning. Your researching the ongoing negligent hiring practices, of which the recent incident is "tip of the iceberg," will enable you to fulfill your function to "advise Congress and the heads of executive agencies about ways to make government more efficient, effective, ethical, equitable and responsive" with respect to this important matter of grave public concern and necessity.

In hiring situations, applicants both within and without the profile typically exist. There is thus no basis for hiring/enlisting someone in the "do-not-hire" profile. Regardless, the rule of law does not authorize such hiring. Below is a summary of background knowledge and precedents on point:

In the crime prevention field, it is well established, as recognized for a long time, that 90% of crimes are committed by mentally ill persons with one specific behavior aka mental disorder. It is listed in the *International Classification of Diseases, ICD-9* (Washington, D.C., U.S. Department of Health and Human Services, 1980), page 233, medical code number 305.1, and all subsequent editions, for example, page 267 of the most recent, 2007, edition.

The key underlying terminology of this mental disorder has long been judicially alluded to, in multiple contexts. See century long line of precedents, e.g.,

- *Carver* v *State*, 69 Ind 61; 35 Am Rep 205; 1879 WL 5712 (Indiana Supreme Court, 1879)
- *State* v *Ohmer*, 34 Mo App 115; 1879 WL 1764 (Missouri Court of Appeals, 1889)
- *Austin* v *State*, 101 Tenn 563; 48 SW 305; 70 Am St Rep 703; 50 LRA 478 (Tennessee Supreme Court, 1898) aff'd 179 US 343; 21 S Ct 132; 45 L Ed 224 (US Supreme Court, 1900)
- *Palmer* v *Keene Forestry Assn*, 80 N H 68; 112 A 798; 13 ALR 995 (New Hampshire Supreme Court, 1921);
- *Tanton* v *McKenney*, 226 Mich 245; 197 NW 510; 33 ALR 1175 (Michigan Supreme Court, 1924)
- *Ploch* v *City of St. Louis*, 345 Mo 1069; 138 SW2d 1020, 1023 (Missouri Supreme Court, 1940)
- *McAfee* v *Travis Gas Corp*, 137 Tex 314; 153 SW2d 442 (1941)
- *Robinson* v *California*, 370 US 660, 670; 82 S Ct 1417, 1422; 8 L Ed 2d 758 (U.S. Supreme Court, 1962)

- *Hammond* v *Hitching Post Inn*, 523 P2d 482 (Wyoming Supreme Court, 25 June 1974)
- *Porter* v *County of Cook*, 42 Ill App 3d 287; 355 NE2d 561 (Illinois Appeals Court, 1976)
- *Jacobs* v *Michigan Mental Health Dept*, 88 Mich App 503; 276 NW2d 627 (Michigan Court of Appeals, 1979)
- *Rum River Lumber Co* v *State of Minnesota*, 282 NW2d 882 (Minnesota Supreme Court, 1979);
- *NORML* v *Bell*, 488 F Supp 123, 138 (Federal District Court, D DC, 1980)
- *Shipley* v *City of Johnson City*, 620 SW2d 500 (Tennessee Appeals Court, 1981)
- *Caprin* v *Harris*, 511 F Supp 589, 590 n 3 (Federal District Court, D ND NY, 1981)
- *Gordon* v *Schweiker, Secretary of Health and Human Services*, 725 F2d 231, 236 (4th Federal Circuit Court of Appeals, 1984).
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Some classic cases of perpetrators who would clearly be in the 'do-not-hire' profile include:

- *Commonwealth* v *Mudgett*, 4 Pa. Dist. 739; 1895 WL 3712 (30 Nov 1895) aff'd 174 Pa 211; 34 A 588 (4 March 1896) (built a private gas chamber and crematorium in his 1880's hotel in downtown Chicago for the killing of 20-100 people)
- *Lisenba* v *State of California*, 89 P2d 39-108 (21 March 1939) aff'd 14 Cal 2d 403; 94 P2d 569-586 (5 Oct 1939) aff'd 314 US 219; 62 S Ct 280; 86 L Ed 166 (8 Dec 1941) (murdered his wives, 1932-1935, using hammer blows, snake bite, drowning, to collect accidental death insurance policies. The deaths looked so accidental the police were convinced, but the insurance company fortunately wasn't!)
- *Commonwealth* v *Farrell*, 322 Mass 606; 78 NE2d 697 (12 April 1948) (Sadistic Burning Case)
- *Crooker* v *State of California*, 47 Cal 2d 348; 303 P2d 753 (1957) aff'd 357 US 433; 78 S Ct 1287; 2 L Ed 2d 1448 (30 June 1958) (Crooker, a first year law student, murdered his girlfriend after she said she'd leave him)
- *Pate* v *Robinson*, 22 Ill 2d 162; 174 NE2d 820 (Illiniois Supreme Court, 1961) cert den 368 US 995 (U.S. Supreme Court, 1962) rev 345 F2d 691 (7th Federal Circuit Court of Appeals, 1966) affirmed 383 US 375; 86 S Ct 836; 15 L Ed 2d 815 (U.S. Supreme Court, 7 March 1966) (perpetrator in the profile killed his infant son and common-law wife, then shot himself in the head)
- *People* v *John Wayne Gacy*, 103 Ill 2d 1; 82 Ill Dec 391; 468 NE2d 1171 (Illinois Supreme Court, 1984) cert den 470 US 1037; 105 S Ct 1410; 84 L Ed 2d 799 (U.S. Supreme Court, 1985) (initial case); *People* v *John Wayne Gacy*, 125 Ill 2d 117; 125 Ill Dec 770; 530 NE2d 1340 (1988) cert den 490 US 1085; 109 S Ct 2111; 104 L Ed 671 (U.S. Supreme Court, 1989) (post-conviction issues); *Gacy* v *Welborn*, Illinois Federal District Court, 1992 WL 211018 aff'd 994 F2d 305 (7th Federal Circuit Court of Appeals, 1993) cert den 510 US 899; 114 S Ct 269; 126 L Ed 2d 220 (U.S. Supreme Court, 1993) (habeas corpus issues) (perpetrator in the profile exploited contractor job to entice victims, killed 33).

The fact of one specific behavior aka mental disorder linked to 90% of crime has long had judicial recognition, in other words. See, e.g., *Doughty* v *Board*, 731 F Supp 423, 424; 1989 WL 182545 (Federal District Court, D Colorado, 1989). "Nationwide, the [ratio] of [these mentally ill] [to non-mentally ill] in prisons is 90 percent." *McKinney* v *Anderson*, 924 F2d 1500, 1507 n 21; 59 USLW 2544 (9th Circuit Court of Appeals, 1991), affirmed and remanded, 509 US 25; 113 S Ct 2475; 125 L Ed 2d 22 (U.S. Supreme Court, 1993).

The bottom line is that 90% of crimes are committed by mentally ill persons with one specific mental disorder, medical coding number 305.1, *International Classification of Disease*. Crime prevention, in short, means prevention of that one mental disorder involved in 90% of crime, as long known so much so as to be judicially recognized (like the sunrise) as above-cited.

Applying These Facts to a Specific Case

Look us analyze the above context, and apply to the 16 September 2013 Washington D.C. Navy Yard shooter, Aaron Alexis. His clearance to enter on-base was granted for reasons including his prior Navy service, 2007-2011. But the Navy knew to have not enlisted people in the above profile, including him, in the first place.

The Navy knew this pursuant to anti-negligent hiring principles (1905-present), military precedents from the 1880's - 1890's alluded to in the above-cited *Austin* case (1898), hiring criteria precluding hiring applicants with “medical findings which . . . would make him a hazard to himself or others,” per Federal Government Standard Form 78, “Certificate of Medical Examination,” http://www.ok.ngb.army.mil/j1/library/forms/sf_78.pdf, (“Conclusions” section, 1969 ed).

A significant body of case law exists on the duty to avoid doing negligent hiring, i.e., the duty to do proper hiring. People who are unlawfully hurt, injured, or worse, by dangerous workers are entitled to sue, to win, and to obtain redress. Cases and case collections include but are not limited to the following:

- *Bowen* v *Illinois Central Ry Co*, 136 F 306; 70 LRA 915; 69 CCA 444 (8th Federal Circuit Court of Appeals, 1905)
- Annot., 70 LRA 915 (1905)
- *Duckworth* v *Apostalis*, 208 F 936 (Federal District Court, Tennessee, 1913)
- *Davidson* v *Chinese Republic Restaurant Co*, 201 Mich 389; 167 NW 967; LRA 1918E, 704 (Michigan Supreme Court, 1918)
- Annot., 40 ALR 1215 (1926)
- Annot., 114 ALR 1041 (1938)
- *Bradley* v *Stevens*, 329 Mich 556; 46 NW2d 382; 34 ALR2d 367 (1951)
- Annot., 34 ALR2d 372, 390 § 9 (1954)

- *Hersh* v *Kentfield Builders*, 385 Mich 410; 189 NW2d 286 (1971)
- *Samson* v *Saginaw Professional Building, Inc*, 393 Mich 393; 224 NW2d 843 (Michigan Court of Appeals, 1975)
- *Ponticas* v *KMS Investments*, 331 NW2d 907 (Minnesota, 1983)
- *Welsh Mfg* v *Pinkerton's, Inc*, 474 A2d 436 (RI, 1984)
- Annot., 44 ALR4th 603 (1984)

The federal Occupational Safety and Health Act of 1970, 29 USC § 651 - § 678 requires adherence to the "duty" to eliminate hazards, and that "duty" is "unqualified and absolute," says *National Rlty. & C. Co, Inc* v *Occ. Safety & Health Rev Commission*, 160 US App DC 133, 141; 489 F2d 1257, 1265 (D.C. Federal Circuit Court of Appeals, 1973).

- P 1267 says, "To establish a violation of the general duty clause, hazardous conduct need not actually have occurred, for a safety program's feasibly curable inadequacies may sometimes be demonstrated before employees have acted dangerously."

- P 1268 says, "Because employers have a general duty to do virtually everything possible to prevent and repress hazardous conduct by employees, violations exist almost everywhere."

- P 1264, n 27, says "permission often means only a failure to prevent . . . ." And: "An employer, of course, enjoys vast physical authority over his employees and their workplace, a fact which Congress stressed in drafting the general duty clause. *See, e.g.*, S.Rep.No.91-1282, 91st Cong., 2d Sess., 9 (Oct. 6, 1970), U.S.Code Cong. & Admin.News 1970, p. 5177, *and* H.R.Rep.No.91-1291 . . . ."

- Pp 1266-7, n 37, say, "we emphasize that an instance of hazardous employee conduct may be considered preventable even if no employer could have detected the conduct, or its hazardous character, at the moment of its occurrence. Conceivably, such conduct might have been precluded through feasible precautions concerning the hiring, training, and sanctioning [disciplining] of employees."

Other employers comply with the applicant review duty to avoid hiring applicants in the 'do-not-hire' profile group, see, e.g.,

- *City of North Miami* v *Kurtz*, 653 So 2d 1025; 66 EPD ¶ 43,537; 63 USLW 2675; 1995 WL 231185; 20 Fla L Weekly S 170; 10 IER Cases (BNA) 865; 10.3 TPLR 2.73 (Fla, 20 April 1995) cert den 516 US 1043; 116 S Ct 701; 133 L Ed 2d 658 (8 Jan 1996) (profile policy upheld)

- *Fortunoff Fine Jewelry & Silverware, Inc* v *New York State Division of Human Rights*, 227 App Div 2d 557; 642 NYS2d 710; 8 NDLR ¶ 74; 11.5 TPLR 2.176 (20 May 1996) (profile policy upheld)

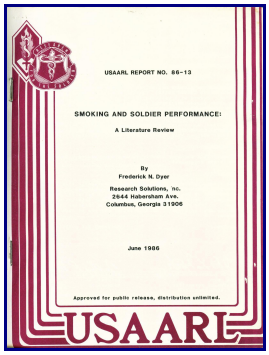
- *Stevens* v *Inland Waters, Inc*, 220 Mich App 212; 559 NW2d 61 (1996) (profile policy upheld)

And see below listed discharge cases 1890-2008. An employer can correct its error, can correct its negligent hiring of the applicant, can fire the in the-do-not-hire-profile employee thereafter, typically for misconduct committed after the negligent hiring had occurred. See long line of case law:

- *School Dist of Ft. Smith* v *Maury*, 53 Ark 471; 14 SW 669 (Arkansas Supreme Court, 1890)
- *Columbian Rope Co* v *United Farm Equipment and Metal Workers*, 7 Lab Arb (BNA) 450 (New York, 1947)
- *Standard Oil Co* v *Central States Petroleum Union*, 19 Lab Arb (BNA) 795 (Illinois, 1952)
- *Cit-Con Oil Corp* v *Oil, Chemical & Allied Workers International Union*, 30 Lab Arb (BNA) 252 (Louisiana, 1958)
- *U.S. Industrial Chemical Co* v *International Union of Operating Engineers*, 64-2 Lab Arb Awards (CCH) § 8481 (Illinois, 1964)
- *Caraco Ship Supply* v *Amalgamated Meat Cutters and Butcher Workmen of North America*, 64-3 Lab Arb Awards (CCH) § 8961 (California, 1964) (discharging the permissive supervisor)
- *U.S. Powder Co, Division of Commercial Solvents Corp* v *International Union of District 50, United Mine Workers of America,* 67-2 Lab Arb Awards (CCH) § 8454 (Illinois, 1967)
- *Ward Furniture Mfg Co* v *United Furniture Workers of America*, 68-2 Lab Arb Awards (CCH) § 8702 (Arkansas, 1968)
- *Royce Chemical Co* v *Oil, Chemical and Atomic Workers International Union*, 70-1 Lab Arb Awards (CCH) § 8138 (New Jersey, 1969)
- *U.S. Plywood-Champion Papers, Inc, Del-Mar Industries Division* v *International Woodworkers of Am*, 70-1 Lab Arb Awards (CCH) § 8340 (Georgia, 1970)
- *A. E. Staley Mfg Co* v *International Union, Allied Industrial Workers of Am*, 71-1 Lab Arb Awards (CCH) § 8203 (Illinois, 1971)
- *Hercules Inc* v *International Chemical Workers*, 74-2 Lab Arb Awards (CCH) § 8487 (1974)
- *Illinois Fruit & Produce Corp* v *International Bro of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 66 Lab Arb (BNA) 498 (Illinois, 1976)

- *Wisconsin Steel Coal Mines of International Harvester Co* v *Progressive Mine Workers of America*, 76-2 Lab Arb Awards (CCH) § 8348 (Wisconsin, 1976)
- *Gladieux Food Service* v *International Ass'n of Machinists and Aerospace Workers*, 70 Lab Arb (BNA) 544 (Pennsylvania, 1978)
- *Bostik West, Division of USM Corp* v *Oil, Chemical and Atomic Workers International Union,* 78-2 Lab Arb Awards (CCH) § 8545; 71 Lab Arb (BNA) 954 (California, 1978)
- *Consolidation Coal Co, Robinson Run Mine, Jones Run Portal* v *United Mine Workers of Am*, 82-2 Lab Arb Awards (CCH) § 8600 (West Virginia, 1982)
- *Olin Corp, McIntosh Plant* v *International Ass'n of Machinists*, 83-2 Lab Arb Awards (CCH) § 8521; 81 Lab Arb (BNA) 644 (Alabama, 1983)
- *Golden* v *Communication Technology Corp*, 36 E.P.D. § 35,095; 1985 WL 1102 (Federal District Court, Georgia, 1985)
- *Moore* v *Inmont Corp*, 608 F Supp 919; 39 FEP Cas (BNA) 1382; 38 EPD ¶ 35,699 (Federal District Court, North Carolina, 1985)
- *Crockett* v *Eckerd Drugs of North Carolina, Inc*, 615 F Supp 528; 52 FEP Cas (BNA) 852 (Federal District Court, North Carolina, 1985)
- *Grusendorf* v *City of Oklahoma City*, 816 F2d 539; 1987 US App LEXIS 5133; 55 USLW 2588; 2 Indiv.Empl.Rts.Cas. (BNA) 51 (10th Federal Circuit Court of Appeals, 1987)
- *ADM/Growmark River Systems, Inc* v *Int'l Longshoremen's Ass'n, Local 1765*, 99 Lab Arb (BNA) 1033 (Missouri, 1992)
- *Century Products Co* v *Internat'l Ass'n of Machinists, District No. 28*, 101 LA (BNA) 1 (1993)
- *Robertson* v *Fiore and Hudson County Improvement Authority*, 62 F3d 596; 1995 WL 486415 (3rd Federal Circuit Court of Appeals, New Jersey, 1995)
- *Stevens* v *Inland Waters, Inc*, 220 Mich App 212; 559 NW2d 61 (Michigan Court of Appeals, 1996)
- *Clark County School District* v *Education Support Employees' Ass'n*, 108 LA (BNA) 1125 (1997)
- *Town of Plymouth* v *Civil Service Commission* and *Rossborough*, 426 Mass 1; 686 NE2d 188; 1997 Mass LEXIS 373 (Massachusetts, 1997)
- *In the Matter of the Claim of Karen M. Kridel* and Commissioner of Labor ex rel. *Dibble & Miller, PC*, 54 App Div 3d 465; 863 NYS2d 208 (New York Court, 2008).

Federal law 5 U.S.C. § 7902(d) mandates compliance with the foregoing duties, by requiring government employers, of which the Navy is one, to "encourage safe practices, and eliminate work hazards and health risks." A pertinent on-point advisory on the profile was provided to the Navy by the U.S. Army Aeromedical Research Laboratory (USAARL) Report No. 86-13, by Frederick N. Dyer, Ph.D. (Fort Rucker, AL) (June 1986), p 149,


USAARL REPORT NO. 86-13

SMOKING AND SOLDIER PERFORMANCE:

A Literature Review

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June 1986

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USAARL

saying to avoid enlisting applicants in the profile, saying that ". . . . the military somehow could restrict enlistments to [applicants not in the do-not-hire profile], there would be far fewer discipline, alcoholism, and drug abuse problems in the Army and other services."

The Navy breached its duty by committing all the foregoing disregards of duty.

Wherefore, the foreseeable result occurred as is foreseeable by someone in the profile group. The term for something foreseeable is "natural and probable consequence," meaning, events that "happen so frequently . . . that . . . they may be expected to happen again," says *Black's Law Dictionary*, 6th ed (St. Paul: West Pub Co, 1990), p 1026. "A person [organization] is presumed to intend the natural and probable consequences of his [its] voluntary acts," p 1185.

They did "happen again."

The contractor should have followed the same hiring criteria, should likewise have adhered to the legal duty and standard of care, should have followed the non-negligent hiring criteria so long documented and upheld. Applicant Alexis met the 'do-not-hire' profile, but was hired anyway. Hiring him was a further breach of the duties involved. The Navy knew not to have enlisted him, but did so anyway. That service paved the way for his being hired by the contractor, which in turned paved the way for his security clearance. At every step, his being in the 'do-not-hire' profile group should have been enough to have stopped the process.

Such incidents the result of negligent hiring can easily be avoided hereafter by correctly asking the pertinent questions, and when answer indicates the applicant meets the 'do-not-hire' criterion herein described via the above references, so stating as "medical findings which . . . would make him [the applicant] a hazard to himself or others," on Standard Form 78, "Certificate of Medical Examination," http://www.ok.ngb.army.mil/j1/library/forms/sf_78.pdf, ("Conclusions" section, 1969 ed), or equivalent form.

Wherefore, pursuant to your page 1 above-cited function, please research and report on federal agency and contractor compliance, if any, with the foregoing.

Sincerely,

Leroy J. Pletten