[redacted]

November 3, 2009

Federal Bureau of Investigation
Security Division
Special Agent Clearance Unit
Attn: Unit Chief/Acting Unit Chief
935 Pennsylvania Ave. NW
Washington, D.C. 20535

Re: Special Agent Applicant File [redacted]

Subject: Amended Request for Notice of Appellate Procedure

Dear Unit Chief/Acting Unit Chief,

Applicant respectfully references his pending FOIPA requests of 7/23/2009, 8/20/2009, 9/7/2009, 9/20/2009, and 10/21/2009, pending FOIPA appeals of 9/9/2009 and 9/20/2009, letters to Acting Unit Chief [redacted] of 9/16/2009 and 9/23/2009, and a letter to the current Unit Chief/Acting Unit Chief dated 10/20/2009. Applicant writes on this further occasion to provide an update and to further request notice and an opportunity to be heard regarding the negative suitability determination made in applicant's case.

Applicant mentioned a Merit Systems Protection Board appeal in his letters of 9/23/2009 and 10/20/2009. Applicant reaffirms that he anticipates his MSPB appeal filed 9/25/2009 will be dismissed for lack of jurisdiction, despite a number of relevant Requests for Admission being unexpectedly admitted by default. For example, those pertaining to jurisdiction as well as "Admit that all of applicant's self-reported conduct in his written application was adjudicated in applicant's favor (i.e., the self-reported conduct did not cause applicant to be unsuitable)."

As part of a 10/26/2009 filing by the FBI in the MSPB appeal, applicant was provided a partially redacted negative suitability determination prepared by SACU Analyst [redacted] dated 6/30/2009 and previously withheld from applicant under FOIPA exemptions. Other new documents were provided, including a

FD-302 dated 6/25/2009 prepared by a SACU Special Agent, and what appears to be an alternate version of the Acting Unit Chief's letter dated 7/1/2009 terminating applicant's conditional appointment. This is the first time applicant has seen the alternate version of the 7/1/2009 letter, as the rejection letter applicant received on 7/5/2009 was one page and did not advise of a suitability determination occurring or its basis.

Applicant provides supplemental details herein without prejudice to his appeal, in order to supersede his prior letters stating from partial information what applicant believed the suitability grounds were and that applicant would contend that a misunderstanding or other issues caused them. Applicant renews his request for notice of the appropriate forum and procedure for an appeal involving matters such as those stated in the letter of 10/20/2009 and herein.

The stated ground in the synopsis of the suitability determination dated 6/30/2009 is drug use by applicant. However, the stated ground at the conclusion of the determination is criminal conduct by applicant. An unstated ground of a believed lack of candor of applicant appears between the lines.

The stated ground in the alternate version of the Acting Unit Chief's rejection letter is drug use, but not criminal conduct. Applicant seeks notice of which suitability grounds were actually relied upon, and (due to the redaction in the determination) whether a finding of Criminal Copyright Infringement was ever relied upon due to a misunderstanding or otherwise, as previously presented and discussed in applicant's MSPB appeal.

If CCI has nothing to do with the determination, then it appears to applicant that both suitability grounds in the 6/30/2009 determination arise out of the only drug-related or crime-related information in the determination, which was a purchase of less than $100 of marijuana by one of applicant's college friends from another of applicant's college friends in May 2008, while applicant was visiting from out of town and was present for part of the transaction.

The incident involved no drug use or criminal conduct by applicant, or even an ethical violation of the [redacted] applicable to applicant's profession. The FD-302 and the suitability determination make statements and give the strong impression to the contrary, and omit information developed by other personnel that contradict both documents. If considered in isolation, the determination could even be read as suggesting that applicant somehow beat the polygraph and misrepresented his non-use of drugs in the subject transaction, thus implicating an unstated ground of a lack of candor. Likewise, if the FD-302 were read in isolation, the impression could be given that despite passing the polygraph examination applicant had misrepresented his prior youthful experimentation.

Applicant is at a loss as to why the FD-302 is offered as the only support in the determination, in part because it does not state the specific factual basis of applicant's conduct as was partially developed by the author. In addition, applicant is at a loss as to why the FD-302 and suitability determination omit mention of applicant's SF-86 drug use attachment, Personnel Security Interview Form, PSI drug disclosure, polygraph report, and polygraph examiner's notes, all of which contradict the FD-302 and the suitability determination in confirming that applicant (1) did not use drugs in May 2008, (2) merely "accompanied a friend" who was purchasing a small amount of marijuana without substantive involvement by applicant, and (3) has past youthful experimentation within policy limits. Applicant is also at a loss as to why his denial of use or monetary or other contribution to the transaction—upon questioning by the SACU Special Agent—is omitted from the agent's FD-302 recording the very same phone conversation and therefore omitted from the suitability determination. Applicant is also at a loss as to why his verifiers, whose information the Special Agent requested and was provided, were never contacted, and why this information is also omitted from the FD-302. Applicant is most confused about why the FD-302 was backdated to 6/25/2009.

Essentially, the FD-302 represents that multiple communications occurring over a weeklong period in different media all occurred in a single 6/25/2009 phone conversation. Applicant is not familiar enough with FBI protocol to know of specific issues that could be implicated, but applicant is wondering for what possible reason a Special Agent conducting a national security investigation might be allowed to backdate information and omit other important information from a FD-302—particularly when that other important information corroborates applicant's prior statements to FBI personnel and contradicts the suitability determination that relies upon the FD-302. To applicant, there is no apparent reason for the Special Agent not to simply file two FD-302's, one for each phone conversation, and file applicant's email messages as supplemental attachments to whichever FD-302 they were pertinent.

It is almost as if the FD-302 was the only information provided to the Acting Unit Chief in support of the determination. Because otherwise, in order to accept the FD-302 the Acting Unit Chief would have had to disbelieve three other Special Agents who questioned applicant about the same incident or reviewed his application and concluded the incident was harmless—or at least, harmless enough to state that applicant merely "accompanied a friend" and did not use or purchase drugs. And the Special Agent could not have been unaware of this other information, as applicant stated in a 6/25/2009 email message to the Special Agent containing much of the information reflected in the FD-302: "A final note- the polygraph examiner and I discussed my Attachment 23 and my friend's purchase of marijuana in 2008 in some detail. If you are able to see his report/notes, perhaps that may be of some assistance."

Although the FD-302 being considered in isolation might explain the approval of the determination, it seems to applicant that this might not answer the question of why the

Analyst did not include these other sources of information that contradict the FD-302 and the determination ultimately made. The three Special Agents who (1) reviewed applicant's SF-86 shortly after it was submitted, (2) questioned applicant at the Personnel Security Interview, and (3) conducted applicant's polygraph examination each reached different conclusions than the FD-302 and the suitability determination. Of particular note, the polygraph examiner and the reviewing Supervisory Special Agent also concluded that applicant was telling the truth—including advising in the pre-test interview that applicant had not used any of the drug purchased by his friend, and was not present for the actual crime, because he had left the room and therefore had limited personal knowledge. The polygraph examiner had appropriately questioned applicant about possibly lawyering his written statement through use of the phrase "I believe" as to the key portion of the transaction, but applicant's explanation was accepted and is truthful.

Had the SACU Special Agent only contacted the verifiers that he asked for and whom applicant provided on both 6/25/2009 and 6/30/2009, the Special Agent would have been advised—as applicant later was—that the extent of applicant's "involvement" in the "negotiation" was at worst comic relief to his friends, and that applicant was actually not involved and should never have reported the incident. And of course, that applicant did not use any of the drugs purchased by his friend, just as applicant advised the SACU Special Agent.

Applicant did not contact either verifier in advance of the SF-86 or his rejection, first in an effort to be as honest as possible in the event their memories might differ from applicant's, and second to prevent anyone from later contending that the verifiers were ever asked to "cover for" applicant, their friend. The friends' upset at being identified to the FBI as participants in and verifiers of a drug transaction without being asked in advance demonstrated to applicant the sincerity of their recollections as well as the friends' statements to applicant that they were never contacted by the FBI. They got over it; applicant was persuasive in apologizing when he advised his friends that the FBI would never use information developed in an applicant background investigation against verifiers, because that would encourage dishonesty by applicants. When applicant was questioned by his friends why he even reported the transaction, applicant advised that he thought he was involved but that after discussing it with his friends, realized he was not after all. Applicant advised that he didn't believe the incident was the cause of his rejection, because the FBI would never punish an applicant for inadvertently over-disclosing negative information, especially without actually contacting the very witnesses it had asked for and who were in the best position to judge applicant's "involvement."

Based on the issues stated above and on others it would be premature to disclose, applicant will contend in the appeal that the FD-302, which is the sole basis for the grounds of drug use, lack of candor, and criminal conduct apparently relied upon in the negative suitability determination, is a materially false investigative record.

The grounds for this contention will be among others the attribution of statements to applicant that applicant never made; the omission of important information developed in the same and other communications that if it had been reported would contradict the grounds and the supporting facts in the suitability determination; and the backdating of the document when there was no apparent reason not to prepare a separate FD-302 for each interview of applicant. Applicant will also contend that the FD-302 and the suitability determination omit statements necessary to make the statements made in both documents not misleading. Applicant intends to support both contentions under the standards he anticipates are prescribed in the Manual of Administrative Operations and Procedures (applicant's FOIPA request for that document is pending), some of which are discussed in *Ludlum v. Department of Justice* (2002) 278 F.3d 1280.

In *Ludlum v. Department of Justice*, a Special Agent was fired for a lack of candor in reporting the number of times he had picked up his daughter from day care using his Bureau car. The sanction was reduced on appeal to a 120 day suspension.

A quote from the Manual of Investigative Operations and Guidelines follows:

> No work is more important than properly interviewing, evaluating and investigating applicants for the Special Agent (SA) position with the FBI.

67-95 MIOG § 67-17.1(1) (2/1998 version).

Applicant hopes that falsifying an investigative record in a national security investigation, for the purpose of providing a plausibly deniable basis upon which to adjudicate an applicant unsuitable, which results in the applicant being pretextually disqualified from the FBI and effectively disqualified from all Federal service for reportedly (through innuendo) misrepresenting his drug use, is taken as seriously as the matter in *Ludlum* was. Applicant having adopted a verifiable course of brutal honesty in his application process, going out of his way to disclose even the most minor negative information about himself, has no reason not to hold FBI personnel who received the benefit of applicant's honesty to the same standard as applicant practiced. Applicant invites contact with paralega[redacted] of the Employment Law Unit of the General Counsel's office, who may be in a position to comment on applicant's credibility in filings with the MSPB thus far.

In this fourth request for information from SACU, applicant renews his request for notice of the appropriate forum and any appellate procedures in which to present an appeal or request for reconsideration that raises concerns that may implicate FBI protocol, and potentially *Brady-Giglio* if applicant has read those cases accurately.

If there were a way to simply discuss applicant's concerns and/or the appropriate

forum for their presentation on a less formal basis than filing an appeal of this nature, applicant hopes it would not be a presumption to request that applicant might be contacted in some fashion so that applicant does not have to speculate on where to address potentially sensitive concerns. In the event that it is concluded for some reason that applicant intended to cause offense and thereby removed any chance at having the determination reconsidered, applicant advises that he regrets this but that because he appears to have been disqualified from all federal employment as applicant believes was demonstrated by his rejection from the CIA soon after discussing his FBI application with a recruiter, the negative suitability determination is about more than applicant's prospects with the FBI.

In addition, applicant would never make such serious contentions as will be made if he did not believe he had a reasonable basis. Applicant himself admits being in denial for a period of time because he did not want to believe that what he believes happened could ever happen in the FBI, which until 6/30/2009 wished to hire applicant despite applicant reporting an ample amount of negative information about himself on multiple prior occasions starting with the SF-86 and SF-86 Cover Sheet of 5/18/2009. Applicant represents that a fellow rejected attorney who [redacted] by a different SACU Special Agent under similar circumstances, but who has no interest in the outcome of applicant's case, as well as another attorney with whom applicant has had professional dealings but who has no interest in the outcome of this case, have both reviewed detailed narratives from applicant about the above contentions and their bases, and each agrees that applicant is reasonable in contending and concluding as will be contended and concluded in the appeal.

Applicant and the others are at a loss as to why there is no place in the FBI for an attorney who, while obviously not lily white, does not drink, smoke, use drugs, gamble, have any criminal convictions or arrests or unreasonable debts, and who most importantly, does not lie. But applicant and the others were less confused at least about points of view in light of a message applicant received over the internet from a person who is believed from other writings to be a former or current FBI executive, from whom applicant sought advice as to what might have caused his discontinuation:

> If I remember correctly, you had a rather sordid past in some areas. I understand the process, fully and completely and based only on what you wrote. I do not think you have a snowballs chance to get in. Now, I don't know any mitigating factors, or the severity, but what you wrote the first time, drinking, drug purchase participation . . . those are all serious considerations and when compared to someone without those issues, you are not competitive.

It was a surprise to learn that perceived moral character is a dimension of competitiveness at all, and that such decisions are made by SACU, particularly before

conducting a full background investigation to determine whether the applicants who were compared had both fully and accurately reported their past misdeeds.

This applicant understood from provisions in the FBI manual that discuss the ranking and merit of applicants that selection tests predict applicants' success in the FBI and therefore the applicants' value to the American people, not how palatable the applicants appear prior to a full background investigation being conducted. Further, the executive's message counters this applicant's current understanding of the Merit System Principles and other law, as well as official memoranda from the Department of Justice, all of which appear to applicant to hold that an applicant cannot be made to compete with other applicants in a dimension of moral character unless perhaps such comparisons are made on selection tests and/or rise to the level of OPM suitability. If the case were otherwise, the portions of the FBI manual that prescribe a specific procedure for ranking applicants based on their ability to serve would seem to need to be given less weight.

It would be less of a concern to applicant if [redacted] At the same time, the executive with whom applicant corresponded stated that he fully and completely understands the process and appeared certain of his point of view.

If the executive and not the manual is more accurate, applicant admits a certain sense of regret in not being advised prior to filing his SF-86 and SF-86 Cover Sheet that the executive's version of the process may occur. Assuming, of course, that the executive in question at least recently worked for the FBI, rather than in some earlier time period in which SACU personnel might have been authorized to judge on their own that an applicant did not deserve continued processing and then target the applicant for pretextual disqualification, rather than simply contacting the applicant, advising him he was not wanted, and providing an opportunity for the applicant to withdraw his application so that the applicant might be able to pursue other opportunities with more receptive agencies that serve the American people equally well.

If such a procedure were allowed and such a procedure were exercised in the manner in which it could be inferred from this applicant's case that it may have been, it would not only have to pretend that information developed by FBI personnel did not exist, it would also punish an applicant for ever presuming to believe that he might be worthy.

Applicant renews his request for notice of the appropriate forum and procedure in which to present these concerns, which of course require evidentiary support.

Sincerely,

[redacted]

[redacted]

cc: Applicant Coordinator
[redacted]