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January 13, 2009

MEMORANDUM FOR NEVA IKNER
SENIOR PROGRAM ANALYST
CRIMINAL INVESTIGATION DIVISION

FROM: Neil B. Worden
Chief, Claims, Labor and Personnel Law Branch

SUBJECT: Section 1204 and Career Connector Application

This memorandum responds to your request for our opinion regarding whether certain questions in a Career Connector application utilize records of tax enforcement results (ROTERTs) in violation of RRA '98 Section 1204.¹ Specifically, you asked us to review two portions of the Career Connector Rating and Ranking Questions contained in the application for the position of GS-13 Criminal Investigator-Special Agent. In our opinion, the first portion at issue does not implicate ROTERTs. We believe, however, that the second portion at issue does utilize ROTERTs in violation of Section 1204 and the relevant regulations.

Section 1204 prohibits the Service from using records of tax enforcement results (1) to evaluate employees; or (2) to impose or suggest production quotas or goals on employees. 26 C.F.R. Section 801.3T(e). A "tax enforcement result" is defined as the "outcome produced by an IRS employee's exercise of judgment in recommending or determining whether or how the IRS should pursue enforcement of the tax laws," and includes such things as liens filed; levies served; seizures executed; amounts assessed and collected; and fraud referrals. 26 C.F.R. Section 801.6T(d)(1); IRM 1.5.2.6. A record of tax enforcement results (ROTERT) is data, statistics, compilations of

¹ Career Connector is an on-line automated recruitment system which collects information about job applicants to determine if they meet the minimum qualifications and eligibility requirements for specific job announcements. IRS employees may use Career Connector to apply for internal positions on-line, and the information they provide may be used to rate and rank them.

information or other numerical or quantitative recordations of the tax enforcement results reached in one or more cases. 26 C.F.R. Section 801.6T(d)(2); IRM 1.5.2.7.

The fundamental purpose of the restrictions on the use of ROTERs is to ensure IRS employees make recommendations and decisions on pursuing enforcement of tax laws (including but not limited to determining tax liability and ability to pay) based solely on the correct application of the law to the facts of each case and on the exercise of reasonable judgment. IRM 1.5.2.1. RRA'98 Section 1204 and the relevant regulations at 26 C.F.R. Section 801 prohibit tax enforcement results from being used in ways that might inappropriately influence IRS personnel to act in a manner inconsistent with these principles. This is why ROTERs may not be used to evaluate any employee or to impose or suggest production quotas or goals for any employee. 26 C.F.R. Section 801.3T(e)(1)

The first portion of the Career Connector application in question provides a “list of collateral duties” and asks the applicant to indicate how many of those collateral duties he or she has performed for at least one year.² In our opinion, this question does not involve ROTERs. It does not request information regarding the outcome produced by an IRS employee’s exercise of judgment in recommending or determining whether or how the IRS should pursue enforcement of the tax laws. It asks the applicants about the number and type of extra responsibilities they have shouldered, but it does not ask about any resulting recommendations they made regarding whether or how the IRS should pursue tax enforcement. In fact, if an applicant indicates he or she performed “Other Collateral Duty not mentioned above,” the applicant is asked merely to specify “the title of the collateral duty.” In other words, this section essentially seeks a list of the titles of collateral duties an applicant has assumed without asking about the outcome. Therefore, we do not believe this implicates ROTERs.

The second portion you asked us to review is more problematic. It asks the applicants to indicate how many of the following violations and program areas they have investigated and written case completion reports on:

1) Tax Evasion 2) Failure to File 3) Mortgage Fraud 4) Abusive Schemes (i.e. foreign and domestic trust) 5) QRP/RPP 6) Health Care Fraud 7) Bankruptcy Fraud 8) Entitlement Fraud 9) Telemarketing 10) Narcotics/OCDETF 11) Excise Tax 12) Securities Fraud 13) Embezzlement 14) Investment Fraud (Ponzi Scheme) 15) Terrorism Financing 16) Employment Tax 17) Corporate Fraud 18) Subscribing to a False Return 19) Corrupt or Forcible Interference (7212a)

² The list includes 1) On the Job Instructor 2) Undercover Agent 3) Undercover Shopper 4) Field Office Use of Force Coordinator 5) POD Use of Force Instructor 6) Cover Agent 7) Tech Agent 8) Field Office or Alternate Asset Forfeiture Coordinator 9) POD or Field Office PFP Coordinator 10) POD or Field Office QRP/RPP Coordinator 11) BOP Coordinator 12) POD or Field Office Fraud Referral Coordinator 13) Abusive Trust Coordinator 14) Corporate Fraud Coordinator 15) SAR Review Team Coordinator 16) POD or Field Office Recruitment Coordinator 17) Public Information Officer or Alternate 18) OWL Coordinator or 19) Other Collateral Duty not mentioned above.

In addition to providing the number of violations/program areas they have investigated, the applicants are asked to specify which of the above types of cases they have worked and to provide a brief description of each case. The instructions emphasize that descriptions should include the violation(s) investigated in each case.

You have explained to us that when a case is assigned to an Agent, the Agent initially approaches it as a general investigation by gathering information to determine whether there may be evidence of any violation of the tax code. The Agent then makes a recommendation to his or her manager regarding what type of case/violation may have taken place and whether to pursue further steps or to discontinue the case. Your office is in the best position to determine whether employees would be exercising Section 1204 judgment in this process. As we understand it, however, it seems that Agents are using their judgment regarding whether or how to pursue enforcement of the tax laws when they make these recommendations. In our opinion, by asking an Agent to provide the number and results of these tax enforcement determinations this portion of the Career Connector application seems to be asking for ROTERs.³

According to the relevant regulations, the prohibition against using ROTERs applies specifically to any process used to appraise or measure an employee's performance for the purpose of "assessment of an employee's qualifications for promotion, reassignment, or other change in duties." 26 C.F.R. § 801.3T(e)(1)(ii)(C). Additionally, IRM 1.5.5 specifically prohibits the use of ROTERs in "an assessment for or qualification for promotion or a similar type of managerial determination." IRM 1.5.5.3(2).⁴ Significantly, the same IRM section states employees may not use ROTERs when preparing self-assessments such as "Knowledge, Skills, and Abilities (KSA) Statements prepared and submitted as part of the promotion ranking package." IRM 1.5.5.3(10). Because Career Connector is collecting information for these very purposes, we believe this question violates the prohibitions against using ROTERs to evaluate an employee.

In addition to the above violation, we believe the question at issue improperly uses ROTERs to impose or suggest production quotas or goals. "To suggest a production quota or goal means to engage in conduct from which a reasonable person would infer that a manager would evaluate the employee more favorably if the employee achieved a specific enforcement result regardless of the merits of the particular case(s). Example: A suggestion occurs if an employee reasonably infers from conversations with his/her manager that the manager would evaluate the employee more favorably if the employee increased the number of seizures in a given period of time regardless of the merits of the particular cases." IRM 1.5.2.13

³ As you pointed out to us, the paragraph which follows the one in question asks applicants to describe their experience working on different types of cases and program areas. This could afford an opportunity to evaluate applicants' experience without the use of ROTERs.

⁴ IRM 1.5.5 is the section which provides guidance specifically for Criminal Investigation regarding Section 1204 and Regulation 801.

By evaluating applicants based on the number of different types of violations they have investigated and written about, the clear suggestion is the more the better. This could adversely impact the handling of general investigations by influencing Agents to categorize and investigate cases based on a desire to meet numerical and topical goals. Consequently, Agents' recommendations regarding how, or whether, to investigate cases would not be based solely on the correct application of the law to the facts of each case and on the exercise of reasonable judgment.

If you have any further questions regarding this matter, please contact Jennifer Gabel at (202) 927-0900.