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# SECURITY CLEARANCE REVIEW: EMPLOYEES OF AMERICAN INDUSTRY VIS-A-VIS CIVIL SERVANTS AND MILITARY MEMBERS

Robert Robinson Gales\*

## Purpose of the Monograph:<sup>1</sup>

The purpose of this monograph is to provide the reader with an enhanced understanding of the nature and duties of the Trial Judiciary of the Defense Office of Hearings and Appeals ("DOHA"), under Executive Order 10,865, *"Safeguarding Classified Information Within Industry,"* as amended, and implemented by Department of Defense Directive 5220.6, *"Defense Industrial Personnel Security Clearance Review Program,"* dated January 2, 1992 ("the Directive"); as well as under Executive Order 12,968, *"Access to Classified Information,"* as implemented by Department of Defense Regulation 5200.2-R, *"Personnel Security Program,"* dated January 1987 ("the Regulation"), as amended by Change 3, dated November 8, 1995 ("Change 3 to the Regulation"). It is not intended to be a learned treatise, but rather a primer for attorneys who may have some current or anticipated future involvement in DOHA security clearance *due process* hearings for employees of industry,<sup>2</sup> and the *new process* personal appearances for public employees (civil service and military members)<sup>3</sup> under Executive Order 12,968.

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<sup>1</sup>This article is derived from presentations made on behalf of The District of Columbia Bar/George Washington University Law School Continuing Legal Education Program. The views set forth herein are those of the author and do not purport to reflect the views or positions of the Department of Defense, DOHA, or any other component of the federal government.

<sup>2</sup>Employees of American industry who are applicants for a security clearance are referred to as "applicants."

<sup>3</sup>Federal employees, including civil servants and members of the military, who are applicants for a security clearance, and who have appealed a revocation or denial of such clearance, are referred to as "appellants."

## Basis of Process for American Industry

Executive Order 10,865,<sup>4</sup> "*Safeguarding Classified Information Within Industry*," as amended, issued by President Eisenhower on February 20, 1960, directed the Secretary of Defense, among others, to prescribe regulations for the safeguarding of classified information within industry. It admonished that an authorization for access to such information may be given *only upon a finding that it is clearly consistent with the national interest to do so*.<sup>5</sup> Furthermore, the Executive Order prescribed a broad range of procedural *rights* for the employees of American industry seeking or holding a security clearance, including, but not limited to the following:<sup>6</sup>

(1) **A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits;**

(2) **A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons;**

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be prescribed by regulations issued by the head of the department concerned, **an opportunity to appear personally** before the head of the department concerned or his designee, including, but not limited to, those officials named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf;

(4) **A reasonable time to prepare for that appearance;**

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<sup>4</sup>25 Fed. Reg. 1583 (1960).

<sup>5</sup>Exec. Order No. 10,865, § 2 (1960).

<sup>6</sup>Exec. Order No. 10,865, § 3 (1960).

- (5) **An opportunity to be represented by counsel;**
- (6) **An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant; and,**
- (7) **A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.**

Ten years later, the Supreme Court, in examining decision-making procedures, divided *judicial or quasi-judicial trial procedures* into a variety of constituent elements which combined to form a *fair hearing* to provide *fundamental fairness*. The elements set forth by the court were:

- (1) **Timely and adequate notice detailing the reasons for the proposed action;<sup>7</sup>**
- (2) **An effective opportunity to defend by confronting any adverse witnesses;<sup>8</sup>**
- (3) **Oral presentation of arguments;<sup>9</sup>**
- (4) **Oral presentation of evidence;<sup>10</sup>**
- (5) **Cross-examination of adverse witnesses;<sup>11</sup>**

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<sup>7</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

<sup>8</sup> *Id.* at 268.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 269.

- (6) Disclosure of the opposing evidence;<sup>12</sup>
- (7) The right to retain an attorney;<sup>13</sup>
- (8) A determination resting solely on the legal rules and evidence adduced at the hearing;<sup>14</sup>
- (9) The decision maker should state the reasons for his determination and indicate the evidence he relied on;<sup>15</sup> and,
- (10) An impartial decision maker is essential.<sup>16</sup>

Since the issuance of Executive Order 10,865 and its implementing directives, no provision of those directives has failed constitutional scrutiny.<sup>17</sup>

### Basis of Process for Government Employees

On August 2, 1995, President Clinton issued Executive Order 12,968,<sup>18</sup> "*Access to Classified Information*," to establish a uniform federal personnel security program for *employees*<sup>19</sup> seeking initial or continued security clearances for access to classified information. The preamble of the Executive Order states, in part:

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<sup>12</sup>*Id.* at 270.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 271.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>See generally J. Moore, D. Martin, & S. Menefee, *An Investigation of Case Law Pertaining to Due Process for DoD Personnel With Denied, Revoked, or Suspended Security Clearances*, in *DUE PROCESS IN MATTERS OF CLEARANCE DENIAL AND REVOCATION: A REVIEW OF THE CASE LAW 56* (E. Haag & R. Denk ed.) (1988).

<sup>18</sup>3 C.F.R. 391 (1995); 60 Fed. Reg. 40,245 (1995).

<sup>19</sup>"Employee" is defined as "[A] person, other than the President and Vice President, employed by, detailed or assigned to, an agency, including members of the Armed Forces; an expert or consultant to an agency; an industrial or commercial contractor, licensee, certificate holder, or grantee of an agency, including all subcontractors; a personal services contractor; or any other category of person who acts for or on behalf of an agency as determined by the appropriate agency head" (emphasis added). See Exec. Order No. 12,968, § 1.1.(e) (1995).

The national interest requires that certain information be maintained in confidence through a system of classification in order to protect our citizens, our democratic institutions, and our participation within the community of nations. The unauthorized disclosure of information classified in the national interest can cause irreparable damage to the national security and loss of human life.

Security policies designed to protect classified information must ensure consistent, cost effective, and efficient protection of our Nation's classified information, while providing fair and equitable treatment to those Americans upon whom we rely to guard our national security.

In spite of the broad definition of *employee*, as indicated above, it is expressly provided that the order "shall not diminish or otherwise affect the . . . denial and revocation procedures provided to individuals covered by Executive Order No. 10,865, as amended . . . ." <sup>20</sup> This provision is especially significant because of the different processes and protections currently available to employees of industry, as compared with the processes and protections available to public employees. Employees of American industry are afforded a fair hearing in an *adversary process*. Public employees are afforded a personal appearance in a *non-adversary process*.

Executive Order 10,865 admonishes that an authorization for access to classified information may be given "only upon a finding that it is *clearly consistent with the national interest* to do so." Executive Order 12,968 offers several alternatives: Sections 1.2.(b) and 3.1.(d) use the following language: "*clearly consistent with the interests of national security*;" Section 3.1(b) says: "*clearly consistent with the national security interests of the United States. . .*," and Section 5.2.(e) states: "*in the interests of national security*." The general consensus

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<sup>20</sup>See Exec. Order No. 12,968, § 7.2.(c) (1995).

is that the language "*clearly consistent with the interests of national security*" is the appropriate standard.

Under Executive Order 12,968, applicants and employees who had been determined not to meet the eligibility standards for access to classified information would be:

(1) **provided as comprehensive and detailed a written explanation of the basis for that conclusion** as the national security interests of the United States and other applicable law permit;<sup>21</sup>

(2) **provided** within 30 days, upon request and to the extent the **documents** would be provided if requested under the Freedom of Information Act . . . or the Privacy Act . . . , as applicable, any documents, records, and reports upon which a denial or revocation is based;<sup>22</sup>

(3) **informed of their right to be represented by counsel** or other representative at their own expense; to request any documents, records, and reports as described [above] upon which a denial or revocation is based; and to request the entire investigative file, as permitted by the national security and other applicable law, which, if requested, shall be promptly provided prior to the time set for a written reply;<sup>23</sup>

(4) **provided a reasonable opportunity to reply in writing** to, and to request a review of, the determination;<sup>24</sup>

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<sup>21</sup>*Id.*, § 5.2.(a)(1) (emphasis added).

<sup>22</sup>*Id.*, § 5.2.(a)(2) (emphasis added).

<sup>23</sup>*Id.*, § 5.2.(a)(3) (emphasis added).

<sup>24</sup>*Id.*, § 5.2.(a)(4) (emphasis added).

(5) **provided written notice of and reasons for the results of the review, the identity of the deciding authority, and written notice of the right to appeal;**<sup>25</sup>

(6) **provided an opportunity to appeal in writing to a high level panel, appointed by the agency head, which shall be comprised of at least three members, two of whom shall be selected from outside the security field. Decisions of the panel shall be in writing, and final except as provided in subsection (b) of this section;**<sup>26</sup> and

(7) **provided an opportunity to appear personally and to present relevant documents, materials, and information at some point in the process before an adjudicative or other authority, other than the investigating entity, as determined by the agency head. A written summary or recording of such appearance shall be made part of the applicant's or employee's security record, unless such appearance occurs in the presence of the appeals panel. . . .**<sup>27</sup>

### **Change 3 to Department of Defense Regulation 5200.2-R, "Personnel Security Program"**

Executive Order 12,968, was implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. It sets forth the basis for safeguarding classified information within the federal civil service and military components. Although Executive Order 12,968 became effective immediately (August 2, 1995), there was a built-in delay in the processing as the Security Policy Board had been granted 180 days from the effective date of the order to: develop a common set of adjudicative guidelines for determining eligibility for access to classified information, including access to special access

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<sup>25</sup>*Id.*, § 5.2.(a)(5) (emphasis added).

<sup>26</sup>*Id.*, § 5.2.(a)(6) (emphasis added).

<sup>27</sup>*Id.*, § 5.2.(a)(7) (emphasis added).



programs; develop a common set of investigative standards for background investigations; develop a common set of reinvestigative standards;<sup>28</sup> and Change 3 to the Regulation stated that the new process would become effective no later than 120 days after the date of the change.<sup>29</sup>

### **Title of DOHA**

Effective May 20, 1994, the organization previously designated the Directorate for Industrial Security Clearance Review ("DISCR"), was redesignated as DOHA. That change is reflected in Change 2 to the Directive.

### **Chain of Command**

DOHA is a component of the Defense Legal Services Agency, Office of the Secretary of Defense, reporting to the Department of Defense General Counsel.

### **Overall Jurisdiction of DOHA**

DOHA is, in many ways, similar to a central hearing agency, for it conducts hearings to determine the security clearance eligibility and suitability of persons employed by private industry and other organizations, as described below; and conducts personal appearances, under the *new process*, to determine the security clearance eligibility and suitability of federal employees, both civilian and military. In addition, pursuant to delegations of authority, by memoranda of agreement, memoranda of understanding, or by *ad hoc* assignment, as appropriate, DOHA conducts adjudicatory hearings in a variety of other administrative proceedings.<sup>30</sup>

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<sup>28</sup> See Exec. Order No. 12,968, § 3.1.(f), 3.2.(b), and 3.4(c) (1995).

<sup>29</sup> See Change 3 to the Regulation, § 8-202, at VIII-5 (1995).

<sup>30</sup> DOHA conducts hearings for:

a. The TRICARE Management Activity, previously known as the Office of the Civilian Health and Medical Program of the Uniformed Services of the Department of Defense ("OCHAMPUS"), to determine entitlements, benefits, and liabilities of medical providers and patients covered under TRICARE/CHAMPUS;

## Industrial Security Clearance Review Jurisdiction of DOHA<sup>31</sup>

Executive Order No. 10,865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960; as amended by Executive Order 10,909,<sup>32</sup> "*Amendment of Executive Order No. 10,865, Safeguarding Classified Information Within Industry*," dated January 17, 1961; as further amended by Executive Order No. 11,382,<sup>33</sup> "*Amendment of Executive Orders Relating to Functions of the Department of Transportation*," dated November 28, 1967; as extended by Executive Order 11,633,<sup>34</sup> "*Security Clearance Program for United States Citizens Employed Directly by the North Atlantic Treaty Organization, the South-East Asia Treaty Organization, and the Central Treaty Organization*," dated December 3, 1971; as modified by Executive Order No. 12,038,<sup>35</sup> "*Relating to Certain Functions Transferred to the Secretary of Energy by the Department of Energy Organization Act*," dated February 3, 1978; as amended by Executive Order No. 12829,<sup>36</sup> "*National Industrial Security Program*," dated January 6, 1993; and as further amended by Executive Order 12,968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995; and Department of Defense Directive 5220.6, "*Defense Industrial*

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b. The Department of Defense Domestic Dependent Elementary and Secondary Schools, previously known as "Section 6 Schools," operated within the United States and certain designated territories to determine substantive rights and early intervention services for eligible children with disabilities, and a free appropriate education and related services for eligible children with disabilities as required by the Individuals with Disabilities Education Act;

c. The Department of Defense Dependent Schools operated overseas to determine substantive rights and early intervention services for eligible children with disabilities, and a free appropriate education and related services for eligible children with disabilities as required by the Individuals with Disabilities Education Act; and,

d. The Composite Health Care System Program Office of the Department of Defense to determine the trustworthiness and suitability of contractor personnel performing in certain unclassified automated data processing sensitivity positions.

<sup>31</sup> Generally referred to as ISCR (Industrial Security Clearance Review) cases.

<sup>32</sup> 26 Fed. Reg. 508 (1961).

<sup>33</sup> 3 C.F.R. 691 (1967).

<sup>34</sup> 3 C.F.R., 1971-1975 Comp., at 631; 36 Fed. Reg. 23,197 (1971).

<sup>35</sup> 3 C.F.R. 136 (1978).

<sup>36</sup> 3 C.F.R. 570 (1993).

*Personnel Security Clearance Review Program*," dated January 2, 1992, as amended by its own Change 3, dated February 13, 1996 ("the Directive"), sets forth the basis for safeguarding classified information within industry. The Directive implements those orders and the Regulation. Change 3 to the Directive officially became effective February 16, 1996, except for those cases in which a Statement of Reasons, a term described below, had already been issued. Those cases were to be continued and processed under the earlier version of the Directive.

The Directive applies to the Office of the Secretary of Defense, the Military Departments, Organization of the Joint Chiefs of Staff, and the Defense Agencies. In addition, by mutual agreement, it also extends to twenty other federal agencies, including: the Departments of Agriculture, Commerce, Interior, Justice, Labor, State, Transportation, and Treasury, as well as Environmental Protection Agency, Federal Emergency Management Agency, Federal Reserve System, General Accounting Office, General Services Administration, National Aeronautics and Space Administration, National Science Foundation, Small Business Administration, United States Arms Control and Disarmament Agency, United States International Trade Commission, United States Trade Representative, and United States Information Agency.

In addition, the Directive covers any U.S. citizen who is a direct-hire employee or selectee for a position with the North Atlantic Treaty Organization ("NATO") and who holds or requires NATO certificates of security clearance or security assurances for access to United States or foreign classified information; or any U.S. citizen nominated by the Red Cross or United Service Organizations ("USO") for assignment with the Military Services overseas.

The Directive pertains to cases referred to DOHA by the Defense Investigative Service Operations Center - Columbus, previously known as the Defense Industrial Security Clearance Office (henceforth referred to as "DCC"), for an Administrative Judge to render a *final decision* as to *whether it is clearly consistent with the national interest to grant or continue a security clearance for access to classified information* by those classes of persons identified above.

The Directive does not apply to cases for access to *sensitive compartmented information* ("SCI")<sup>37</sup> or to a *special access program* ("SAP").<sup>38</sup>

### **Federal Civil Service and Military Component Security Clearance Review Jurisdiction of DOHA<sup>39</sup>**

The new adjudicative guidelines and personal appearance process were established by DoD on November 8, 1995, and DOHA implemented them effective January 1, 1996, but the various civilian components and military services enacted and implemented changes to their respective regulations and instructions at different subsequent times.

The Army, on February 29, 1996, issued a *Personnel Security Update 96-2*, in message form, revising Army Regulation 380-67, "*Security - Personnel Security Program*," dated September 9, 1988; the Navy, on March 20, 1996, issued OPNAV NOTICE 5510, "*Changes to the Adjudicative Criteria and Appeals Process for Unfavorable Personnel Security Determinations*," revising OPNAV INSTRUCTION 5510.1H, "*Department of the Navy Information and Personnel Security Program Regulation*," dated August 24, 1990; the Air Force, on April 22, 1996, issued *Air Force Implementing Instructions*, unnumbered, revising Air Force Instruction 31-501, "*Personnel Security Program Management*," dated May 2, 1994, and, inferentially, Air Force Policy Directive 31-5, "*Security - Investigations, Clearances, and Access Requirements*," dated April 5, 1993; and the Director of Central Intelligence ("DCI") issued Director of Central Intelligence Directive No. 1/14, "*Personnel Security*

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<sup>37</sup>Sensitive compartmented information is: "Classified information concerning or derived from intelligence sources, methods, or analytical processes requiring handling exclusively within formal access control systems established by the DCI." See, Director of Central Intelligence Directive No. 1/14, *Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information (SCI)*, § 1.h.

<sup>38</sup>A special access program is any program imposing "need-to-know" or access controls beyond those normally provided for access to Confidential, Secret, or Top Secret information. See the Directive, § B.6., at 3; and the Regulation, ch. I, § 1-323, at 1-5.

<sup>39</sup>Generally referred to as PA (Personal Appearance) cases.

*Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information (SCI)*," dated July 2, 1998 ("DCID 1/14").

Change 3 to the Regulation applies to cases referred to DOHA through the various central adjudication facilities ("CAFs") for an Administrative Judge to render a *recommended decision* as to whether it is *clearly consistent with the interests of national security* to grant or continue access to classified information or employment in sensitive duties.

Change 3 to the Regulation applies to SCI access, and requires that the personnel security standards of DCID 1/14 be met. As for SAPs, while the Regulation applies, rules regarding such access may differ from those set forth in the Regulation.

The new process established several elements of trial-type procedures, but **specifically proscribed the opportunity to present or cross-examine witnesses.**<sup>40</sup> Those mandatory elements of the new process were:

(1) **A written statement of reasons, as comprehensive and detailed**<sup>41</sup> as the protection of sources afforded confidentiality and national security permit, as to why the unfavorable administrative action is being taken;<sup>42</sup>

(2) **An opportunity to reply in writing** to the CAF within 30 days after receipt of the statement of reasons;<sup>43</sup>

(3) **An opportunity to appeal the decision of the CAF:**

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<sup>40</sup>*Id.*, app. N, ¶ 5.d., at N-1.

<sup>41</sup>The statement of reasons should contain: (1) a summary of the security concerns and supporting adverse information; (2) instructions for responding to the statement of reasons; and (3) copies of relevant security guidelines. See *id.*, ch. VIII, § I, ¶ 8-201a, at VIII-3.

<sup>42</sup>*Id.*, ¶ 8-201a., at VIII-3.

<sup>43</sup>*Id.*, ¶ 8-201b., at VIII-4.

(a) **Directly to the component Personnel Security Appeals Board (“PSAB”), in writing, without a personal appearance;<sup>44</sup> or**

(b) **Directly to DOHA, requesting a personal appearance before an Administrative Judge;<sup>45</sup>**

(4) **The right to be represented by counsel or personal representative;<sup>46</sup>**

(5) **The right to submit documents relative to whether the decision should be overturned;<sup>47</sup>**

(6) **The right to make an oral presentation and respond to questions posed by the counsel, personal representative, or the Administrative Judge;<sup>48</sup> and**

(7) **The right to a “final written decision by the PSAB, including a rationale, to any submission . . . stating the final disposition of the appeal . . . .”<sup>49</sup>**

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<sup>44</sup>*Id.*, ¶ 8-201d.(1), at VIII-4; and app. L, ¶ A.2., at L-15.

<sup>45</sup>*Id.*, ¶ 8-201d.(2), at VIII-4; and app. L, ¶ A.1., at L-15.

<sup>46</sup>*Id.*, app. N, ¶ 5.a., at N-1.

<sup>47</sup>*Id.*, app. N, ¶ 5.c., at N-1.

<sup>48</sup>*Id.*, app. N, ¶ 5.b., at N-1.

<sup>49</sup>*Id.*, ¶ 8-201e., at VIII-4.

## Criteria for Determining Security Suitability - The Adjudication Policy

During the period 1985-95, the *Adjudication Policy*<sup>50</sup> set forth criteria for determining security eligibility and suitability within American industry remained unchanged. In fact, some cases, those in which the Statement of Reasons was issued prior to January 1, 1996, and which remain unresolved, continue to be processed under those criteria in effect at that time. They include, but are not limited to, the following:

### a. Loyalty

Commission of any act of **sabotage, espionage, treason**, terrorism, anarchy, sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any such act.<sup>51</sup>

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<sup>50</sup>The Adjudication Policy states:

While reasonable consistency in reaching adjudicative determinations is desirable, the nature and complexities of human behavior preclude the development of a single set of guidelines or policies that is equally applicable in every personnel security case. Accordingly, the . . . adjudication policy is not intended to be interpreted as inflexible rules of procedure. The . . . policy requires dependence on the adjudicator's sound judgment, mature thinking, and careful analysis as each case must be weighed on its own merits, taking into consideration all relevant circumstances, and prior experience in similar cases as well as the guidelines contained in the adjudication policy, which have been compiled from common experience in personnel security determinations.

Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis being placed on the seriousness, recency, frequency and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future. . . . Common sense may occasionally necessitate deviations from this policy guidance, but such deviations should not be frequently made and must be carefully explained and documented. See the Directive, Enclosure 2, app. I, at 2-4.

<sup>51</sup>See the Directive, Enclosure 2, § a., at 2-1; and the Regulation, ch. II, § 2-200a., at II-2 (emphasis added).

**b. Loyalty**

Establishing or continuing a **sympathetic association** with a saboteur, spy, traitor, seditionist, anarchist, terrorist, revolutionist, or with an espionage or other secret agent or similar representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or to alter the form of Government of the United States by unconstitutional means.<sup>52</sup>

**c. Loyalty**

Advocacy or use of **force or violence to overthrow the Government** of the United States or to alter the form of Government of the United States by unconstitutional means.<sup>53</sup>

**d. Loyalty**

Knowing **membership** with the specific intent of furthering the aims of, or adherence to and active participation in any foreign or domestic organization, association, movement, group or combination of persons (hereafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State or which seeks to overthrow the Government of the United States or any State or subdivision thereof by unlawful means.<sup>54</sup>

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<sup>52</sup> See the Directive, Enclosure 2, § b, at 2-1; and the Regulation, ch. II, § 2-200b, at II-2 (emphasis added).

<sup>53</sup> See the Directive, Enclosure 2, § c, at 2-1; and the Regulation, ch. II, § 2-200c, at II-2 (emphasis added).

<sup>54</sup> See the Directive, Enclosure 2, § d, at 2-1; and the Regulation, ch. II, § 2-200d, at II-2 (emphasis added).



**e. Security Responsibility Safeguards**

**Unauthorized disclosure** to any person of classified information, or of other information, disclosure of which is prohibited by Statute, Executive Order or Regulation.<sup>55</sup>

**f. Foreign Preference**

Performing or attempting to perform one's duties, acceptance and active maintenance of dual citizenship, or other acts conducted in a manner which serve or which could be expected to **serve the interests of another government** in preference to the interests of the United States.<sup>56</sup>

**g. Security Responsibility Safeguards**

Disregard of public law, Statutes, Executive Orders or Regulations including **violation of security regulations or practices**.<sup>57</sup>

**h. Criminal Conduct**

Criminal or dishonest conduct.<sup>58</sup>

**i. Poor Judgment**

Acts of omission or commission that indicate poor judgment, unreliability or untrustworthiness.<sup>59</sup>

**j. Mental or Emotional Disorders**

Any behavior or illness, including any mental condition, which, in the opinion of competent medical authority,

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<sup>55</sup>See the Directive, Enclosure 2, § e, at 2-1; and the Regulation, ch. II, § 2-200e, at II-2 (emphasis added).

<sup>56</sup>See the Directive, Enclosure 2, § f, at 2-1; and the Regulation, ch. II, § 2-200f, at II-2 (emphasis added).

<sup>57</sup>See the Directive, Enclosure 2, § g, at 2-2; and the Regulation, ch. II, § 2-200g, at II-2 (emphasis added).

<sup>58</sup>See the Directive, Enclosure 2, § h, at 2-2; and the Regulation, ch. II, § 2-200h, at II-2 (emphasis added).

<sup>59</sup>See the Directive, Enclosure 2, § i, at 2-2; and the Regulation, ch. II, § 2-200i, at II-2 (emphasis added).

may cause a **defect in judgment or reliability** with due regard to the transient or continuing effect of the illness and the medical findings in such case.<sup>60</sup>

#### **k. Foreign Connections/Vulnerability to Blackmail or Coercion**

**Vulnerability to coercion**, influence, or pressure that may cause conduct contrary to the national interest. This may be (1) the presence of immediate family members or other persons to whom the applicant is bonded by affection or obligation in a nation (or areas under its domination) whose interests may be inimical to those of the United States, or (2) any other circumstances that could cause the applicant to be vulnerable.<sup>61</sup>

#### **l. Financial Matters**

Excessive indebtedness, recurring **financial difficulties**, or unexplained affluence.<sup>62</sup>

#### **m. Alcohol Abuse**

Habitual or episodic use of intoxicants to excess.<sup>63</sup>

#### **n. Drug Abuse**

Illegal or improper use, possession, transfer, sale or addiction to any controlled or psychoactive substance, narcotic, cannabis or other dangerous drug.<sup>64</sup>

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<sup>60</sup>See the Directive, Enclosure 2, § j, at 2-2; and the Regulation, ch. II, § 2-200j, at II-2 (emphasis added).

<sup>61</sup>See the Directive, Enclosure 2, § k, at 2-2; and the Regulation, ch. II, § 2-200k, at II-2 (emphasis added).

<sup>62</sup>See the Directive, Enclosure 2, § l, at 2-2; and the Regulation, ch. II, § 2-200l, at II-3 (emphasis added).

<sup>63</sup>See the Directive, Enclosure 2, § m, at 2-2; and the Regulation, ch. II, § 2-200m, at II-3 (emphasis added).

<sup>64</sup>See the Directive, Enclosure 2, § n, at 2-2; and the Regulation, ch. II, § 2-200n, at II-3 (emphasis added).

**o. Falsification**

Any knowing and willful falsification, cover-up, concealment, misrepresentation, or omission of a material fact from any written or oral statement, document, form or other representation or device used by the Department of Defense or any other Federal agency.<sup>65</sup>

**p. Refusal to Answer**

Failing or refusing to answer or to authorize others to answer questions or provide information required by a congressional committee, court or agency in the course of an official inquiry whenever such answers or information concern relevant and material matters pertinent to an evaluation of the individual's trustworthiness, reliability, and judgment.<sup>66</sup>

**q. Sexual Misconduct**

Acts of sexual misconduct or perversion indicative of moral turpitude, poor judgment, or lack of regard for the laws of society.<sup>67</sup>

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<sup>65</sup>See the Directive, Enclosure 2, § o, at 2-2; and the Regulation, ch. II, § 2-200o, at II-3 (emphasis added).

<sup>66</sup>See the Directive, Enclosure 2, § p, at 2-2; and the Regulation, ch. II, § 2-200p, at II-3 (emphasis added).

<sup>67</sup>See the Directive, Enclosure 2, § q, at 2-3; and the Regulation, ch. II, § 2-200q, at II-3 (emphasis added).

## Criteria for Determining Security Suitability - The Adjudicative Guideline

The 1996 (Change 3) *Adjudicative Guidelines*<sup>68</sup> set forth criteria for determining security eligibility and suitability within both American industry *and* the federal civil service, as well as the military components, significantly modified the earlier version which was in place since 1985, and they include, but are not limited to the following:

### a. Allegiance to the United States

An individual must be of unquestioned allegiance to the United States. The willingness to safeguard classified information is in doubt if there is any reason to suspect an individual's allegiance to the United States.<sup>69</sup>

### b. Foreign influence

A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are: (1) not citizens of the

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<sup>68</sup>The Adjudicative Guidelines state:

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudication process is the careful weighing of a number of variables known as the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . .

Each case must be judged on its own merits and final determination remains the responsibility of the specific department or agency. Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security and considered final.

The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration of the [Adjudicative Guidelines]. . . . See, the Directive (Change 3), Enclosure 2, at 2-1-2. See also, the Regulation, app. L, § B.(4), at L-7.

<sup>69</sup>See the Directive (Change 3), Enclosure 2, § a, at 2-4; and the Regulation (Change 3), app. I, at I-4 (emphasis added).

United States or (2) may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.<sup>70</sup>

**c. Foreign preference**

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.<sup>71</sup>

**d. Sexual behavior**

Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgment or discretion.<sup>72</sup> (Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance).<sup>73</sup>

**e. Personal conduct**

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that

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<sup>70</sup>See the Directive (Change 3), Enclosure 2, § b, at 2-1; and the Regulation (Change 3), ch. II, § 2-200b, at II-2 (emphasis added).

<sup>71</sup>See the Directive (Change 3), Enclosure 2, § c, at 2-8; and the Regulation (Change 3), app. I, at I-6 (emphasis added).

<sup>72</sup>The adjudicator should also consider guidelines pertaining to criminal conduct (criterion J); or emotional, mental, and personality disorders (criterion I), in determining how to resolve the security concerns raised by sexual behavior.

<sup>73</sup>See the Directive (Change 3), Enclosure 2, § d, at 2-10; and the Regulation (Change 3), app. I, at I-7 (emphasis added).

the person may not properly safeguard classified information.<sup>74</sup>

**f. Financial considerations**

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.<sup>75</sup>

**g. Alcohol consumption**

Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.<sup>76</sup>

**h. Drug involvement**

Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.<sup>77</sup>

**i. Emotional, mental, and personality disorders**

Emotional, mental, and personality disorders can cause a significant deficit in an individual's psychological, social and occupational functioning. These disorders

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<sup>74</sup>See the Directive (Change 3), Enclosure 2, § e, at 2-11; and the Regulation (Change 3), app. I, at I-8 (emphasis added).

<sup>75</sup>See the Directive (Change 3), Enclosure 2, § f, at 2-13; and the Regulation (Change 3), app. I, at I-10 (emphasis added).

<sup>76</sup>See the Directive (Change 3), Enclosure 2, § g, at 2-14; and the Regulation (Change 3), app. I, at I-11 (emphasis added).

<sup>77</sup>See the Directive (Change 3), Enclosure 2, § h, at 2-16; and the Regulation (Change 3), app. I, at I-12 (emphasis added).

are of security concern because they may indicate a defect in judgment, reliability or stability.<sup>78</sup>

**j. Criminal conduct**

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.<sup>79</sup>

**k. Security violations**

Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information.<sup>80</sup>

**l. Outside activities**

Involvement in certain types of outside employment or activities is of security concern if it poses a conflict with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.<sup>81</sup>

**m. Misuse of Information Technology Systems**

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's trustworthiness, willingness, and ability to properly protect classified systems, networks, and information.<sup>82</sup>

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<sup>78</sup>See the Directive (Change 3), Enclosure 2, § i, at 2-18; and the Regulation (Change 3), app. I, at I-13 (emphasis added).

<sup>79</sup>See the Directive (Change 3), Enclosure 2, § j, at 2-20; and the Regulation (Change 3), app. I, at I-14 (emphasis added).

<sup>80</sup>See the Directive (Change 3), Enclosure 2, § k, at 2-21; and the Regulation (Change 3), app. I, at I-15 (emphasis added).

<sup>81</sup>See the Directive (Change 3), Enclosure 2, § l, at 2-22; and the Regulation (Change 3), app. I, at I-16 (emphasis added).

<sup>82</sup>See the Directive (Change 3), Enclosure 2, § m, at 2-23; and the Regulation (Change 3), app. I, at I-17 (emphasis added).

## Policy

All proceedings are to be conducted in a *fair and impartial* manner, and any determination authorizing a security clearance for access to classified information, or in the case of public employees, for access to classified information or employment in sensitive duties, is required to be based upon a finding that to do so is: *clearly consistent with the national interest* (in ISCR cases); or *clearly consistent with the interests of national security* (in PA cases), as set forth above. The person selected to make the decision is the Administrative Judge.

### Role of Administrative Judges Within DOHA in Security Clearance Review Matters

The role of the Administrative Judge is to develop an accurate and complete record; rule on questions of evidence and procedure (in ISCR cases); consider all relevant and material evidence; apply pertinent factors as set forth in the Directive or the Regulation; make findings of fact; draw conclusions; and arrive at a *final decision* (in ISCR cases), or a *recommended decision* (in PA cases), as appropriate, pertaining to the ultimate issue.

Each personnel security clearance decision must be a *fair and impartial common sense determination* based upon a consideration of all admissible, relevant and material evidence, both favorable and unfavorable, as well as the following factors:<sup>83</sup>

- (1) The nature, extent, and seriousness of the conduct;
- (2) The circumstances surrounding the conduct, to include knowledgeable participation;
- (3) The frequency and recency of the conduct;

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<sup>83</sup> See the Directive (Change 3), Enclosure 2, at 2-1-2; and the Regulation (Change 3), app. I, at I-1.



- (4) The individual's age and maturity at the time of the conduct;
- (5) The voluntariness of participation;
- (6) The presence or absence of rehabilitation and other pertinent behavioral changes;
- (7) The motivation for the conduct;
- (8) The potential for pressure, coercion, exploitation, or duress;
- (9) The likelihood of continuation or recurrence; and
- (10) The Adjudicative Guidelines set forth in Enclosure 2 to the Directive, or Appendix I to the Regulation, as appropriate.

### **Appointment of Administrative Judges**

A person selected to serve as an Administrative Judge within DOHA is appointed to such position by the DoD General Counsel, or his or her designee. As such, the Administrative Judge is a member of the executive judiciary and does not achieve membership in the Judicial Branch of the government. Furthermore, the Administrative Judge is *not* to be confused with the *Administrative Law Judge*<sup>84</sup> who is a creature of the Administrative Procedure Act.

Those with some familiarity with the earlier versions of the Directive may remember that it used the term *Hearing Examiner*. That was the official designation and title until June 6, 1990, when it was changed to *Administrative Judge* to more accurately portray the

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<sup>84</sup>The Administrative Conference of the United States ("ACUS") has characterized the Administrative Judges of DOHA as the functional equivalent of Administrative Law Judges in agencies operating under the Administrative Procedures Act because of the complexity and broad impact of DOHA cases which are of great significance to individuals because a serious curtailment of individual interests is at stake. See 1992 ACUS Rec. 92-7, *The Federal Administrative Judiciary*, at 1056.

quasi-judicial nature of DOHA proceedings and to largely ratify actual practice.

### **Qualifications of Administrative Judges**

A person considered for appointment as an Administrative Judge within DOHA must be a graduate of a law school accredited by the American Bar Association as well as a member in good standing of the bar of any State or Territory of the United States, or the District of Columbia. In addition, the person should have considerable trial or hearing experience.

The Administrative Judges presently within the Trial Judiciary of DOHA bring a wealth of diversity, proven judgment, and experience to DOHA and have served in a variety of capacities, including the following: military judge; hearing officer with state and federal agencies; adjunct professor of law; county public defender; county prosecutor; staff attorney, trial attorney, and counselor to federal agencies; staff assistant to member of congress and U.S. senator; staff attorney for special interest group; general counsel to federal agencies; military judge advocate; mediator; and attorney in private and corporate practice. In addition, they represent collective membership in the following bars: California, District of Columbia, Illinois, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, and Virginia.

### **Legal Training and Continuing Judicial Education of Administrative Judges**

The legal training of the Administrative Judges was received at the following law schools: Catholic University of America, Creighton University, The George Washington University, University of California (Boalt Hall), University of Indiana, The John Marshall Law School, University of Nebraska, University of Oklahoma, University of Pittsburgh, University of San Diego, Southwestern University, Syracuse University, University of Tulsa, Valparaiso University, and the University of Wisconsin.

Furthermore, to maintain legal and judicial knowledge and abilities on the "cutting edge" of the profession, the Administrative Judges periodically attend various short training courses with jurists from around the world offered by The National Judicial College, The American Academy of Judicial Education, and other sources. Among the courses completed during the past few years, are: advanced administrative law; judicial writing; opinion writing; logic for judges; advanced evidence; forensic, medical and scientific evidence; managing trials effectively; ethics for judges; national security law; and decision making and fact finding.

### **Conduct of Administrative Judges**

The Administrative Judge is subject to the canons of ethics of the bar to which he or she is admitted, as well as the ethical standards of the Department of Defense. In addition, he or she must observe generally acceptable standards of judicial conduct including those specifically pertaining to confidentiality, and should assiduously avoid the appearance of impropriety. Furthermore, in ISCR cases, *ex parte* communications are to be avoided.

### **Location of Administrative Judges**

There are presently fourteen Administrative Judges within DOHA, located at three locations, as set forth below:

(1) The **Washington Hearing Office**, located at 4015 Wilson Boulevard, Suite 300, **Arlington, Virginia**, is both the main office and the largest of the three. Eight Administrative Judges are permanently based in that office. The facsimile number for the Washington Hearing Office is: (703) 696-6865. The telephone number is: (703) 696-4542. The mailing address for the office is: Defense Office of Hearings and Appeals, Washington Hearing Office, Post Office Box 3627, Arlington, Virginia 22203.

(2) The **Western Hearing Office**, located at 21820 Burbank Boulevard, Suite 235, **Woodland Hills, California**, has five Administrative Judges permanently based there. The facsimile number for the Western Hearing Office is: (818) 887-9905. The telephone

number is: (818) 887-0409. The mailing address for the office is: Defense Office of Hearings and Appeals, Western Hearing Office, 21820 Burbank Boulevard, Suite 235, Woodland Hills, California 91367.

(3) The **Boston Hearing Office**, located at Development Building #4, Room D-017A, Kansas Street, **Natick, Massachusetts**, has one Administrative Judge permanently based there. The facsimile number for the Boston Hearing Office is: (508) 233-4772. The telephone number is (508) 233-4591. The mailing address for the office is: Defense Office of Hearings and Appeals, Boston Hearing Office, Development Building #4, Room D-017A, Natick, Massachusetts 01760-5055.

### Location of ISCR Hearings

It is DOHA general practice to schedule ISCR hearings within 150 miles of an applicant's place of employment or residence to facilitate the attendance of witnesses for both parties. ISCR hearings are generally conducted within the United States, including Alaska and Hawaii. However, in certain instances, upon a petition, filed by the applicant, to the Director, DOHA, or for NATO security clearance cases, a hearing may be conducted outside the United States. In the past, DOHA has also conducted ISCR hearings in Puerto Rico, Korea, the former Canal Zone, located in Panama, the Netherlands, and Germany.

Because the geographical distribution of government contractors is so varied, DOHA is required to borrow comfortable and functional courtroom facilities from other federal, state, or local court systems or agencies. Examples of courtrooms used are: federal circuit courts, district courts, customs courts, tax courts, and bankruptcy courts, military courtrooms, federal agency hearing rooms, state superior courts, circuit courts, and district courts, university moot-courtrooms, municipal courts, probate courts, and city magistrate courts. In those instances where a courtroom is simply not available, regardless of scheduling efforts, DOHA has also used grand jury rooms, conference rooms, or other acceptable substitutes.

Because of the quantity of requested DOHA ISCR hearings and the limited available manpower, DOHA has been divided into separate hearing circuits, much like the federal circuits, each with a circuit-riding Administrative Judge, to facilitate the clustering of cases for hearing within certain busier locations. The boundaries of these circuits are fluid in nature, and individual circuits may vary in size and number with the caseload and available manpower. Commencing January 1, 1998, the eight current circuits are:

**AREA A:** Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

**AREA B:** Metropolitan Washington, D.C.

**AREA C:** Maryland (except metropolitan Washington, D.C.), North Carolina, Virginia (except metropolitan Washington, D.C.), West Virginia

**AREA D:** Alabama, Florida, Georgia, Louisiana, Mississippi, Puerto Rico, South Carolina, Tennessee

**AREA E:** Delaware, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Nebraska, New Jersey, New York, North Dakota, Ohio, Pennsylvania, South Dakota, Wisconsin

**AREA F:** Arkansas, Colorado, Kansas, Missouri, New Mexico, Oklahoma, Texas

**AREA G:** Alaska, Idaho, Metropolitan Los Angeles (50%), Montana, Nevada, Northern California, Oregon, Washington, Wyoming

**AREA H:** Arizona, Hawaii, Metropolitan Los Angeles (50%), Southern California (except metropolitan Los Angeles), Utah

### **Location of Personal Appearances**

Unlike the 150 mile practice for ISCR hearings, personal appearances for appellants at duty stations within the lower 48 states are

required to be conducted at the appellant's duty station or a nearby suitable location. For appellants at duty stations elsewhere, the personal appearance is required to be conducted at the appellant's duty station or a nearby suitable location, or at DOHA's facilities located in the Washington Hearing Office or the Western Hearing Office, in the discretion of the Director, DOHA, or designee.<sup>85</sup>

To date, with the exception of one personal appearance conducted by DOHA in Germany, all other personal appearances have been conducted within the United States.

### **Initial Processing of ISCR Cases**

ISCR cases are assigned to Administrative Judges to render a final decision in one of two ways. In those instances where the applicant has answered a Statement of Reasons (hereinafter referred to as "SOR"), which is a document similar to a complaint or statement of charges, and has not specifically requested a hearing, the decision is based solely "on the record" without a hearing, based upon a review of the file of all relevant material which could be adduced at a hearing. The government attorney, called Department Counsel, and functioning in a position somewhat similar to that of a prosecutor, prepares the file and submits it to the applicant who, in turn, has a reasonable opportunity to submit documentary information in rebuttal, explanation, or mitigation. It is the consolidated *File of Relevant Material* ("FORM") which is then submitted to the Administrative Judge for his or her consideration and ultimate decision.

In those instances where an applicant has answered the SOR and has specifically requested a hearing, the applicant may appear in person with or without an attorney or a personal representative. In those instances, the Administrative Judge has the added responsibility of scheduling the ISCR case for hearing, consistent with guidelines and practices pertaining to time and location.

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<sup>85</sup>Travel costs from the duty station to the personal appearance are the responsibility of the employing organization. See, the Regulation (Change 3), app. N, at N-1.

## Initial Processing of Personal Appearance Cases

Personal appearance cases are assigned to Administrative Judges to render a recommended decision in only one way. There are no decisions issued by the Administrative Judge based solely "on the record." Under current procedures, the component CAF initially issues a letter of intent to deny/revoke access to classified information or assignment in sensitive duties, accompanied by an SOR. After the individual responds to the letter, if there are continuing concerns about the individual's trustworthiness, reliability, or judgment, the CAF renders a final decision, and issues a letter of denial/revocation. At that point, the individual has an opportunity to appeal the decision.<sup>86</sup> To do so, the individual, now known as an appellant, generally signs a Notice of Intent to Appeal ("NOIA") and either returns it to the CAF, mails it directly to DOHA, or forwards it by facsimile to DOHA. The case is immediately assigned to an Administrative Judge, who has the responsibility of scheduling the case for a personal appearance, consistent with guidelines and practices pertaining to time and location. At the same time, DOHA requests the case file from the appropriate CAF, which has 10 days to furnish it.

## Scheduling the ISCR Case

The Administrative Judge normally schedules a hearing date within 30 days after receipt of a particular case. Since the clustering of cases is a major consideration in selecting the earliest practicable date, clusters of ISCR cases are generally scheduled for a time and location within 90 days from receipt of a particular case. Situations may arise from time to time, however, and there is no guarantee that the time targets will necessarily be met. Travel and case backlog continue to take their toll on total compliance.

Unlike some civil jurisdictions, numerous cases are not scheduled for the same day with the expectation that there will be

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<sup>86</sup>There are two types of appeal. One is a written appeal, based solely "on the record," directly to the PSAB, with the final decision on the appeal made without a personal appearance; and the other is an appeal to DOHA, for a personal appearance before an Administrative Judge. See the Regulation (Change 3), ch. VIII, § 8-201d., at VIII-4.

massive fall-out or continuances. Because scheduling is specifically clustered for time and location, only one or two cases, depending on the particular Administrative Judge, or the particular case, are scheduled for any given day.

Upon receipt of the Response to the SOR, in which an ISCR hearing has been requested, a notification is immediately sent to the applicant that the case has been assigned to an Administrative Judge, and the applicant is advised that the hearing will be scheduled by the Administrative Judge to commence generally within 30 days of the letter. This is to convey a sense of urgency to the applicant in the event he or she is considering hiring an attorney. Thereafter, an applicant is normally notified in writing, at least 15 days in advance of the time and location of the scheduled hearing.

### **Scheduling the Personal Appearance**

Immediately upon receipt of a particular personal appearance case assignment, every effort is made by the Administrative Judge to call the Appellant at his or her place of duty or residence, as reflected on the NOIA, to determine availability and feasibility for a particular period. If the Appellant is overseas, arrangements have to be made, either to have the personal appearance overseas, or to have the Appellant brought back to a location in Hawaii, California, or Virginia, at a date to be determined.

Since the Regulation mandates that the Administrative Judge schedule the personal appearance generally within 30 calendar days from receipt of the NOIA,<sup>87</sup> and despite the desire to cluster several cases in the same location during the same time period, there is little opportunity to do so, and the personal appearances are generally scheduled, by telephone, to commence sometime between two or three weeks after receipt of the NOIA. Thereafter, an appellant is promptly notified, in writing, to confirm the time and location of the scheduled personal appearance.

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<sup>87</sup> See the Regulation, app. L, § C., at L-15; and app. N, § 3., at N-1.



## Prehearing Guidance

The Administrative Judges presently use a *Prehearing Guidance* which is sent to the applicant or to the applicant's attorney along with the Notice of Hearing. It is merely guidance for the parties which supplements and explains provisions in the Directive. (see **Appendix A**).

## Personal Appearance Guidance

The Administrative Judges presently use a *Guidance for Your Personal Appearance*, in a question and answer format, which is sent to the appellant or to the appellant's attorney along with the Notice of Personal Appearance. It is merely guidance for the appellant which supplements and explains provisions of the Regulation. The *Guidance for Your Personal Appearance* is attached. (see **Appendix B**).

## Representation

The applicant in ISCR hearings, and the appellant in personal appearances, is entitled to be represented by an attorney of his or her own choosing, at his or her own expense, or by a personal representative, also of his or her own choosing, and at his or her own expense. An applicant or appellant may also appear without the assistance of anyone else, and in such case is treated as a *pro se* applicant or appellant. Examples of personal representatives who have appeared in DOHA ISCR hearings are: friend, co-worker, union representative or shop steward, supervisor, professional personal representative, minister, and family member. Unlike the rules of practice in other jurisdictions, an attorney for an applicant or appellant requires no special admission to the "DOHA bar" to appear before it.

The personal appearance "process is designed so that individuals can represent themselves."<sup>88</sup> While general familiarity with administrative law hearing procedures and the rules of evidence are useful, detailed knowledge of same is not mandatory. In order to

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<sup>88</sup>See the Regulation (Change 3), app. L, at L-7.

present an effective case, one needs only reasonable strengths and abilities in organization and conversation. Extensive legal credentials, eloquent oratory, or public speaking ability -- "stage presence" -- are not necessarily impressive or important; an honest, organized, candid presentation of facts in explanation or extenuation of the SOR allegations, is.

### **Entry of Appearance**

To facilitate the exchange of correspondence, proposed evidence, the handling of preliminary matters, and the scheduling of ISCR hearings, any person representing an applicant should file an Entry or Notice of Appearance, containing name, address, telephone number, and facsimile number, with both Department Counsel and the appropriate Hearing Office Docket Clerk. No particular form or format is required. Department Counsel's identity, address, and telephone number will have already been furnished by a letter to the applicant alerting him or her to the referral of the case to an Administrative Judge for hearing.

Likewise, to facilitate the exchange of correspondence, the handling of preliminary matters, and the scheduling of the personal appearance, any person representing an appellant should file an Entry or Notice of Appearance, containing name, address, telephone number, and facsimile number, with DOHA as soon as possible after the NOIA is submitted. No particular form or format is required.

### **Request for Continuance**

Once the case has been assigned to the Administrative Judge, a request for a continuance shall be granted by the Administrative Judge, in his or her discretion, only upon a showing of "good cause." Some factors to be considered in arriving at a decision on such a request, are:

- (1) The extent of the requester's diligence in readying his or her case prior to the date set for hearing or personal appearance, or if the delay is purposeful;
- (2) Length of requested continuance;

- (3) Previous continuances;
- (4) Inconvenience to the Administrative Judge, and court reporter, and in ISCR cases only, opposing party, and witnesses;
- (5) Complexity of case;
- (6) Availability of other counsel to represent requester;
- (7) Whether denial of continuance will result in identifiable prejudice.

On a periodic basis, Administrative Judges receive requests for a continuance based upon novel or unusual reasons, including the following, to enable the applicant or appellant to:

- (1) Complete a current substance abuse rehabilitation treatment program;
- (2) Enter such a program;
- (3) Complete court-directed probation;
- (4) Complete psychotherapy;
- (5) Obtain materials requested from various agencies under the Freedom of Information or Privacy Acts; or, in personal appearances, complete the process of unfulfilled timely requests to the CAF for discovery; or
- (6) Enter into the so-called mitigation "safety zone."<sup>89</sup>

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<sup>89</sup>The mitigation "safety zone" is not a legal concept or description, but merely a practical concept made in light of experience under the Adjudication Policy which contained specific time frames (i.e., 6, 12, or 18 months, or 2, 3, 4, or 5 years of drug abstinence; 1 year of stable finances; 1, 2, or 3 years of alcohol abstinence, 3 years for past sexual misconduct; 5 years for past criminal conduct; and 10 years for past personality disorder). The stated periods have been largely eliminated in the Adjudicative Guidelines, but they too contain time-sensitive mitigating conditions or factors such as recency, currency, or 12 months of abstinence. Experience has shown that some applicants may request or maneuver delays simply to accrue as much

With the possible exception of number 5 -- dealing with requests under the Freedom of Information Act or Privacy Act; or unfulfilled timely requests to the CAF for discovery, none of the above reasons provides sufficient justification for granting a continuance.<sup>90</sup> Of course, each request is evaluated by the Administrative Judge on an individual case-by-case basis.

### **Effect of Failure to Appear at ISCR Hearing**

There are instances in which neither the applicant nor his or her attorney appear at the hearing prepared to proceed in a timely and orderly fashion. Normal practice is for the Department Counsel to attempt to locate the applicant or the attorney to ascertain the reasons for the delay or failure to appear. After it is determined that proper Notice of Hearing was sent to the applicant or to his or her attorney, and was received by same, and it appears unlikely that a timely appearance will be made, the Administrative Judge may discontinue the proceeding, and the case will be referred to the Director, DOHA, for appropriate action to discontinue all further case processing, to revoke any security clearance currently held by the applicant, and to deny any pending request for a security clearance.<sup>91</sup>

In some rare instances, notwithstanding the applicant's earlier request for a hearing, the applicant fails to appear at the hearing and, instead, sends his or her attorney or personal representative to represent the applicant in the applicant's absence. If the Department Counsel has no objection, and indicates no desire to examine the applicant, the hearing may proceed in the applicant's absence.

### **Effect of Failure to Appear at Personal Appearance**

In some instances, notwithstanding the appellant's earlier request for a personal appearance, the appellant, for some reason, fails

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"mitigating time" as possible before the closing of a record so that the evidence will show that certain negative actions are no longer "recent" or "current." Likewise, if a substance abuser can show a longer period of abstinence, the stronger his or her case may be.

<sup>90</sup>Pertaining to ISCR hearings, *see* the Directive, Enclosure 3, para. 8; *see* also, e.g., DISCR OSD No. 94-0084 (December 13, 1994) at pp. 3 - 4; DISCR OSD No. 91-0036 (January 27, 1993) at pp. 3 - 4.

<sup>91</sup>*See* the Directive, § F.2, at 6-7.

to appear at the personal appearance and fails to send anyone to represent the appellant in his or her absence. After it is determined that proper Notice of Personal Appearance was sent to the appellant or to his or her attorney, and was received by same, and it appears unlikely that a timely appearance will be made, the Administrative Judge may reschedule the proceeding; discontinue the proceeding, and issue a recommended decision based upon the record; or refer the entire case file to the appropriate component personnel security appeal board with a recommendation that it summarily affirm the initial decision of the CAF to deny or revoke appellant's eligibility for access to classified information or performance of sensitive duties.

### **Prehearing Conference**

The Administrative Judge may, in his or her sole discretion, order a prehearing conference to resolve unusual procedural problems anticipated prior to the scheduled ISCR hearing or to expedite the proceedings. Such conferences may be accomplished by conference call or in person, as appropriate. Both parties are required to participate in any such conference, except in those instances where an applicant is represented by an attorney or personal representative. The participation of such attorney or personal representative, in the absence of the applicant, shall be deemed sufficient.<sup>92</sup>

### **Discovery**

Discovery by an applicant is limited to non-privileged documents and material in DOHA files subject to control by DOHA. In other words, if the DOHA files contain reports of other agencies such as the Federal Bureau of Investigation ("FBI"), those documents must be obtained from the FBI and may not be obtained directly from DOHA. As a matter of practice, contemporaneously with the issuance of a Notice of Hearing, the Department Counsel normally furnishes the applicant with copies of the documentary evidence the government intends to use as evidence at the hearing, thus minimizing the requirement for further discovery. Both parties are required to serve

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<sup>92</sup>See the Directive, Enclosure 3, para. 9, at 3-2.

one another with a copy of any proposed documentary evidence, as far in advance of the scheduled hearing date as practical. Continuing unresolved prehearing problems encountered by either party, caused by the refusal or inability of the other party to provide discovery, should be brought to the immediate attention of the Administrative Judge, normally by way of a motion to compel, with a copy of the motion served on the opposing party.

Change 3 to the Regulation<sup>93</sup> incorporates provisions for an appellant to request discovery from the component CAF after the SOR is issued, and before it is answered.<sup>94</sup> Notice of discovery rights is clearly provided to the appellant at the SOR stage in the proceedings, and the appellant is informed that “releasable investigative records” concerning the appellant’s personal history can be obtained under the provisions of the Privacy Act, and that the security officer or point of contact with the CAF can assist in obtaining copies of the records. However, in instances where there has been an appeal to DOHA of a CAF revocation decision, and the appellant or attorney waits until the case has been referred to DOHA before requesting the CAF file, no delay for discovery will be permitted, and the appellant will be deemed to have waived the right to discovery. If the CAF file contains a discovery request and the waiver block<sup>95</sup> has been marked, a waiver of the exercise of the right of discovery will be found to have taken place, and no continuance request will be entertained. If the CAF file does not contain such a form, but there is other reliable evidence to reflect a waiver, once again, a waiver will be found to have taken place, and no continuance request will be entertained. No records can be released by DOHA.

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<sup>93</sup>Consistent with the intent of the Regulation, DOHA does not retain a copy of the CAF file, and all documents generated by the personal appearance process including the transcript, newly received exhibits, and associated correspondence, are routinely forwarded to the PSAB upon the issuance of the recommended decision.

<sup>94</sup>See the Regulation, app. L, § A.(2), at L-6, and part III, form at L-9.

<sup>95</sup>*Id.* Part III of the “SOR Receipt and Statement of Intention” form contains two options, one of which must be checked.

- a. ( ) I request relevant copies of documents and records upon which the SOR is based;
- b. ( ) I do not desire relevant copies of documents and records upon which the SOR is based.

## Motions

While motions pertaining to evidentiary matters and some procedural matters in ISCR cases may be entertained, the Administrative Judge is not empowered to entertain any of the following or similar motions: motion for judgment on the pleadings; motion to dismiss or for nonsuit; or motion for directed verdict.<sup>96</sup>

The discretion of the Administrative Judge has been enhanced to permit him or her to amend the ISCR SOR on his or her own motion at the hearing. Normally the motion is made prior to closing arguments, but in some instances, it may also be made as a preliminary procedural matter. When such a motion is granted, the Administrative Judge is empowered to grant the applicant's request for such additional time as the Administrative Judge may deem appropriate to answer the amendment and to present evidence relevant thereto.

Other than motions for continuance or discovery, Administrative Judges are not empowered to entertain motions in personal appearances.

## Subpoena Power

The Administrative Judge is not empowered by law to issue either a *subpoena ad testificandum*, ordering a person to appear at the hearing to testify as a witness, or a *subpoena duces tecum*, ordering a person to produce certain designated documents or evidence at the hearing. Thus, appearance or production, as appropriate, is one of a voluntary nature.

## Open/Closed Hearing

Hearings will remain open to spectators except when the applicant requests otherwise, or if there is a need to protect classified information, or for other good cause. An open hearing permits anyone

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<sup>96</sup>See DOHA No. 94-0569 (March 30, 1995) at 4; DISCR No. 90-1054 (July 20, 1992) at 4 n. 6; DISCR No. 89-1167 (June 14, 1991) at 3.

passing in the hallway, other than a witness or a prospective witness, to enter the hearing room and sit as a spectator during the proceedings. The closed hearing is simply that -- closed to anyone but the applicant, attorney or personal representative, Department Counsel, Administrative Judge, court reporter, witness on the stand, interpreter, court security officer, and other persons identified and approved by the Administrative Judge.

### **Open/Closed Personal Appearance**

Personal Appearances will remain closed to spectators except when the appellant requests otherwise. The closed personal appearance is closed to anyone but the appellant, attorney or personal representative, Administrative Judge, court reporter, interpreter, court security officer, and other persons identified and approved by the Administrative Judge.

### **Sequestration of Witnesses**

Each party in an ISCR hearing is responsible for identifying its own witnesses and prospective witnesses and insuring that they remain outside the hearing room until such time as they are called to testify. After the witness has finished testifying, and upon the representation that the witness will not be recalled, the witness may remain in the hearing room. This sequestration rule does not apply to witnesses called to testify under Rule 702 of the Federal Rules of Evidence, referring to those with scientific, technical, or other specialized knowledge or expertise, who are called to assist the Administrative Judge to understand the evidence or to determine a fact in issue.

There is no comparable sequestration policy for personal appearances, as witnesses, other than the appellant, are not authorized in such proceedings.

### **Classified Information**

Because of the absence of a secured hearing facility, no classified information may be introduced, discussed, or otherwise revealed during a normal ISCR hearing or personal appearance. In



highly unusual instances, on a case-by-case basis, the Director, DOHA, may approve arrangements for a secured facility, cleared court reporter, and cleared attorney for the applicant or appellant, and the introduction of classified matter.

### **Exhibits**

Proposed exhibits are not to be marked before the ISCR hearing. The Administrative Judge initially marks each offered exhibit for identification purposes only, and if the item is admitted into evidence, it will be so marked. It is current practice to mark the government's exhibits by number and the applicant's exhibits by letter. Furthermore, proposed exhibits should not be highlighted or otherwise marked, except when such marking is fully explained on the record.

Those exhibits admitted into evidence will remain with the Administrative Judge as part of the case file, and additional photocopies thereof will not be furnished to either party. Those materials which were rejected and, thus, not admitted into evidence, were previously returned to the party who unsuccessfully offered them, but now are retained with the file, in the event of an appeal.

Proposed exhibits should not be marked before the personal appearance.

### **Pleadings**

At the commencement of the ISCR hearing, the only documents normally before the Administrative Judge are the government's SOR and the applicant's answer thereto. These documents constitute the pleadings in the case and frame the issues. There is no reason for either party to have additional copies of the pleadings marked for identification or offered as evidence, for both pleadings are already "in evidence." The pleadings represent the extent of the Administrative Judge's knowledge of the admitted and contested facts at issue. No other documents material to the case are before the Administrative Judge prior to the hearing.

Prior to the commencement of the personal appearance, the Administrative Judge normally has the entire CAF file, including reports of investigation and supporting documents, and correspondence by and between the component CAF and the appellant, including the SOR and responses thereto, and any subsequent submissions made by the appellant. Prior to responding to the SOR, the appellant was advised to submit, to the CAF, useful documents which will "refute, correct, explain, extenuate, mitigate, or update the adverse information presented" by the CAF in the SOR.<sup>97</sup> After the final decision was issued by the CAF, the appellant was further advised of his or her appeal rights, and those instructions<sup>98</sup> included gathering supporting documentation to submit to either the PSAB or the Administrative Judge, depending on the method of appeal chosen.

### **Swearing of Witnesses**

The Administrative Judge does not administer oaths to, or swear in, witnesses who testify. Instead, the witness' attention is directed to 18 U.S.C. 1001, and the witness is advised that it is a criminal offense punishable by a maximum of five years in prison and a \$10,000 fine or both to knowingly and willfully make a false statement or representation to any department or agency of the United States as to any matter within the jurisdiction of such department or agency.

### **Privilege Against Self-Incrimination**

An applicant or appellant is required to give full, frank, and truthful answers to relevant questions needed by DOHA, at any stage in the proceeding, to reach a determination on security eligibility and suitability. The applicant or appellant may exercise his or her right on constitutional or other grounds to refuse to answer relevant questions posed to him or her during a hearing or personal appearance. However, the impact of such failure or refusal may preclude the Administrative Judge from reaching a finding as required by the Directive or the

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<sup>97</sup>See the Regulation, app. L, *Instructions for Responding to a Statement of Reasons*, § A.(3), at L-6.

<sup>98</sup>See the Regulation, app. L, *Instructions for Appealing a Letter of Denial/Revocation*, at L-15-16.

Regulation. An applicant's or appellant's interest in withholding factual information is outweighed by the government's legitimate interest in preventing classified information from falling into the hands of persons whose reliability and allegiance have not been clearly established. If the Administrative Judge is unable to rule on security eligibility and suitability because of an applicant's failure or refusal to testify in an ISCR case, further processing may be discontinued, the case file is returned to the Director, DOHA, and any security clearance in effect is immediately revoked.<sup>99</sup>

Personal appearances are different. In the ISCR situation, a tentative decision has been made to deny or revoke a security clearance, based on the allegations in the SOR, and the applicant has the opportunity to challenge that tentative decision. If the applicant fails or refuses to do so, the evidence in the record may be sufficient to support the tentative decision, or there may be insufficient evidence in the record to make a decision. In either instance, the applicant cannot prevail.

In the personal appearance situation, a decision has already been made, and the appellant is appealing that decision. If the appellant fails or refuses to present evidence, or seemingly abandons the appeal, the file is returned to the CAF, whose earlier decision becomes final.

### **Burden of Proof**

In the ISCR determination process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue the applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate that it is *clearly consistent with the national interest to grant or continue* the applicant's clearance. This dual burden

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<sup>99</sup>See the Directive, § F.2., at 6-7.

creates a difficulty for some attorneys who, for tactical reasons, put on no evidence and simply rest their case upon the completion of the government's case.

In the personal appearance determination process, as the appellant is pursuing an appeal of a final decision, the appellant has the burden of presenting evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the CAF file, and to ultimately demonstrate that it is *clearly consistent with the interests of national security* to grant access to classified information or employment in sensitive duties.

### Quantum of Proof

The quantum of proof necessary in an ISCR hearing is something less than a preponderance of the evidence.<sup>100</sup> The standard in personal appearance cases appears to be the same, although the Regulation is silent in this regard.<sup>101</sup>

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<sup>100</sup>The Appeal Board, in DISCR OSD Case No. 90-1054 (July 20, 1992), has provided an interesting discussion of the issue.

<sup>101</sup>In *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), a case involving a civilian employee of the Navy, well before the implementation of Change 3 to the Regulation, the Supreme Court commented:

[S]ecurity clearance normally will be granted only if it is "clearly consistent with the interests of the national security." The [Merit Systems Protection] Board, however, reviews adverse actions under a preponderance of the evidence standard. . . . These two standards seem inconsistent. It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the "clearly consistent with the interests of the national security" test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations. We consider it extremely unlikely that Congress intended such a result.

## Allegiance, Loyalty, and Patriotism

Except in those cases brought under Criteria A through D and F, of the old Adjudication Policy, and Criteria A through C of the Change 3 Adjudicative Guidelines, the applicant's allegiance and patriotism are not at issue in DOHA proceedings.

Section 7 of Executive Order No. 10,865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as the loyalty of the applicant concerned."<sup>102</sup> Security clearance determinations cover many characteristics of an applicant other than his allegiance to the United States, loyalty, and patriotism. Nothing in an Administrative Judge's ISCR decision should be construed to suggest that it has been based, in whole or in part, on any express or implied determination as to an applicant's loyalty or patriotism, except to the extent that the applicant's allegiance to the United States may be questioned because of allegations under the criteria referred to in the preceding paragraph.

On the other hand, Executive Order No. 12,968 specifically provides that, with the exception of access by non-United States citizens, and in certain special circumstances:

[E]ligibility for access to classified information shall be granted only to employees who are United States citizens for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates *loyalty* to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances. . . .<sup>103</sup>

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<sup>102</sup>Exec. Order No. 10,865, § 7 (1960).

<sup>103</sup>See Exec. Order No. 12,968, § 3.1.(b) (emphasis added).

## Conditional, Deferred, or Probationary Security Clearances

There is no specific authority for the Administrative Judge to grant conditional, deferred, or probationary security clearances.<sup>104</sup> Applicants occasionally request that they be permitted to retain a security clearance on a conditional or probationary basis, or that the Administrative Judge's final ISCR decision be deferred, to enable them to:

- (1) Complete a current substance abuse rehabilitation treatment program;
- (2) Enter such a program;
- (3) Undergo random drug urinalysis at the direction of the employer or the government;
- (4) Complete court-directed probation;
- (5) Participate in psychotherapy;
- (6) Undergo some other form of activity while retaining a security clearance; or,
- (7) Enter into the so-called mitigation "safety zone."

None of the above options are available or authorized.

Furthermore, in ISCR cases, there is no authority to deny a security clearance at a higher level while permitting retention of a security clearance at the current or lower level. Thus, for example, in an ISCR case where it is found that it is not clearly consistent with the national interest to grant or continue a security clearance for an applicant with a TOP SECRET clearance, the applicant may not retain

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<sup>104</sup>See ISCR No. 97-0630 (May 28, 1998) at 3; DOHA No. 96-0228 (April 3, 1997) at 3; ISCR No. 96-0311 (December 12, 1996) at 3; ISCR No. 95-0838 (June 24, 1996) at 2; ISCR No. 94-0343 (February 7, 1996) at 3.

that clearance or any other one, such as a SECRET or CONFIDENTIAL clearance.<sup>105</sup>

In personal appearance cases, however, the issue is not quite as clear cut. Change 3 to the Regulation mandates that the Administrative Judge issue a written recommendation to “sustain or overturn” the CAF’s earlier decision, and seems to permit an “adjudicator” to grant conditional, deferred, or probationary security clearances, with the following language:

If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access.<sup>106</sup>

In certain limited instances, this authority has been recommended by Administrative Judges, and, on occasion, has been exercised by a component PSAB, in rendering a final decision.

### **Equitable Estoppel**

The previous granting of a security clearance to an applicant or appellant does not preclude the government from proceeding with a subsequent revocation action under the Directive or the Regulation. The government's compelling interest in safeguarding its secrets requires that adjudicators of security clearances decide each case on all available information -- the “whole person concept” -- and in light of current standards of security suitability. This is a continuing process, and the prior granting of a security clearance, in light of changing conduct and activities as well as new information, while possibly relevant, does not dominate a new assessment of current security eligibility and suitability.

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<sup>105</sup>See the Directive, § C.2., at 3; *see also*, e.g., DOHA No. 96-0049 (November 25, 1996) at 4; ISCR No. 95-0523 (May 15, 1996) at 2; ISCR No. 94-0947 (October 12, 1995) at 5.

<sup>106</sup>See the Regulation, app. I, at I-3.

## Rules of Evidence in ISCR Hearings

The Federal Rules of Evidence serve only as a guide in ISCR hearings, and when a particular federal rule conflicts with one of the few rules of evidence set forth in the Directive, the rule in the Directive takes precedence. Relevant and material evidence, both oral and documentary, as well as physical evidence, may be received into evidence, and technical rules of evidence are relaxed in order to permit the development of a full record. The probative value of the proffered evidence is what is important, and evidence which is misleading, prejudicial, repetitious, cumulative, or confusing, may be rejected as being of insufficient probative value, in light of the unfair prejudice its admission may permit.

Records or other physical evidence compiled or created in the regular course of business, other than DoD personnel background reports of investigation ("ROI"), may be received and considered by the Administrative Judge, subject to rebuttal, without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the agency head concerned, to safeguard classified information within industry pursuant to Executive Order 10865. Investigative reports other than ROI may be received without an authenticating witness to the extent permitted by the Federal Rules of Evidence.<sup>107</sup>

Records compiled in the regular course of business or other physical evidence, other than ROI, relating to a controverted issue, which, because they are classified, may not be inspected by an applicant, may be received and considered by the Administrative Judge, provided the DoD General Counsel has:<sup>108</sup>

(a) Made a preliminary determination that such evidence appears to be relevant and material; and,

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<sup>107</sup> See the Directive, Enclosure 3, para. 20, at 3-4.

<sup>108</sup> *Id.*, para. 21, at 3-4.



(b) Determined that failure to receive and consider such evidence would be substantially harmful to the national security.

There is also a special, rarely invoked, rule pertaining to a written or oral statement adverse to an applicant on a controverted issue, which permits it to be received and considered by the Administrative Judge without affording an opportunity to cross-examine the person making the statement. Application of the rule is limited, however, to the following circumstances:<sup>109</sup>

(a) When there is a certification that the person who furnished the statement is a confidential informant who has been engaged in obtaining intelligence information for the government and that disclosure of the person's identity would be substantially harmful to the national interest; or

(b) If the DoD General Counsel has determined that the statement appears to be relevant, material, and reliable; that failure to receive and consider it would be substantially harmful to the national security; and that the person cannot appear to testify because of the following:

(1) Death, severe illness, or similar cause, in which case the identity of the person and the information to be considered is to be made available to the applicant; or

(2) Some other cause determined by the Secretary of Defense, or when appropriate, by the agency head, to be good and sufficient.

### **Rules of Evidence in Personal Appearances**

Unlike normal ISCR proceedings where the Federal Rules of Evidence serve as a guide, in personal appearance proceedings, the only requirement with respect to admissibility of evidence is that it should

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<sup>109</sup>*Id.*, para. 22, at 3-4-5.

be relevant and material to the concerns as to why eligibility for a security clearance or performance of sensitive duties should be denied or revoked. Executive Order 12,968 simply states: "The appellant may submit documents relative to whether the [Letter of Denial] should be overturned."<sup>110</sup> Of course, unduly repetitive or cumulative information should be avoided. No other formal rules of evidence are applicable to these proceedings.

### **Order of Proceeding in ISCR Hearings**

An ISCR hearing is similar to a civil court proceeding. While the specific order of activity may differ with each Administrative Judge, certain overall activities are generally performed. The Administrative Judge introduces himself or herself, identifies the applicant and the case, and briefly explains his or her role in the hearing. Appearances are entered by both parties. If the applicant is *pro se*, some preliminary questions may be asked of him or her to enable the Administrative Judge to determine if he or she is aware of his or her rights and responsibilities, and to explain what they are if he or she is not. Guidance pertaining to such topics as the sequestration of witnesses, the swearing of witnesses, the prohibition of classified information during the hearing, the rules of evidence, etc., is given. Opening statements are made, reserved, or waived. The parties each present their respective cases with witnesses and documents. Closing arguments are made or waived. The hearing is adjourned.

### **Order of Proceeding in Personal Appearances**

A personal appearance is more or less informal. Executive Order No. 12,968 simply states:

The [Administrative Judge] will conduct the personal appearance proceeding in a fair and orderly manner: . . . The appellant may make an oral presentation and respond to questions posed by his counsel or personal representative, and shall respond to questions asked by

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<sup>110</sup>See the Regulation (Change 3), app. N, § 5.b., at N-1.

the [Administrative Judge]; . . . The appellant may submit documents. . . .*The appellant will not have the opportunity to present or cross-examine witnesses.*<sup>111</sup>

While the specific order of activity may differ with each Administrative Judge, certain overall activities are generally performed. The Administrative Judge introduces himself or herself, identifies the appellant and the case, and briefly explains his or her role in the personal appearance. If the appellant is represented by an attorney or personal representative, an appearance will be entered. If the appellant is *pro se*, some preliminary questions may be asked of him or her to enable the Administrative Judge to determine if he or she is aware of his or her rights and responsibilities, and to explain what they are if he or she is not. Guidance pertaining to the prohibition of classified information during the personal appearance is given. The appellant presents his or her case by testifying and submitting documents. The personal appearance is adjourned.

### Opening Statements

The parties in ISCR hearings each have the opportunity to make opening statements. While the theory of the case is usually apparent from a review of the pleadings, this is the opportunity for the parties to explain the thrust of their respective positions and to alert the Administrative Judge as to the nature and relative importance of the proposed evidence. The Department Counsel goes first. The applicant is given the option of making the opening statement at that time, or reserving it until after the government has presented its case. Opening statements are optional, and may be waived.

While there is no specific provision for an opening statement in personal appearances, they have been permitted upon request.

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<sup>111</sup>*Id.*, § 5.b. through d., at N-1 (emphasis added).

## Presentation of Evidence in ISCR Hearings

Each party is responsible for producing evidence that it wants in the record. It is the government's burden to prove any contested facts. The government is relieved from any burden pertaining to admitted facts. However, to the extent that facts are admitted or proven, it remains to be seen what inferences, if any, can fairly be drawn from those facts with respect to the applicant's present security suitability.

Each party has the right and responsibility to raise objections to any evidence, including testimony and documents, proffered by the adverse party or to any procedural matter. Failure to raise a timely objection is deemed to be a waiver of that particular potential objection. One area of some misunderstanding for *pro se* applicants is that many objections properly go to the weight to be given to a particular piece of evidence, and not to its admissibility. Once the difference is explained, the proper grounds for objection are generally asserted.

Witnesses are subject to cross-examination by both parties. Cross-examination is not strictly limited to the scope of direct examination, but must be relevant and material to the matters at issue. Each party has the opportunity to conduct a redirect examination, and on occasion, may be given an additional opportunity for recross-examination. The Administrative Judge may examine any witness, generally to:

- 1) Avert reversible error;
- 2) Preclude the inclusion of obfuscating or confusing testimony;
- 3) Avoid needless presentation of cumulative and redundant testimony; or
- 4) Avoid wasting time brought about by useless, irrelevant, or immaterial examination.

The Department Counsel may elect to call the applicant as a government or adverse witness at any time during the government's case.

### **Closing Arguments in ISCR Hearings**

The parties each have the opportunity to make closing arguments. The Administrative Judge generally requests that they direct some of their respective comments to the applicability or non-applicability, as appropriate, of the Adjudication Policy or Adjudicative Guidelines factors, both "disqualifying" and "mitigating," as set forth in Enclosure 2 to the Directive. The Department Counsel goes first, followed by the applicant. The government has the opportunity to present rebuttal argument, but the applicant has no such opportunity. Closing arguments are optional, and may be waived. Closing briefs in lieu of oral arguments are generally not offered, but may be accepted or required by the Administrative Judge, especially in cases with unique or novel issues of law.

### **The Decision**

The security clearance decision, frequently called a "determination," is the document in which the Administrative Judge memorializes his or her decision-making process following his or her consideration of all the facts in evidence, an assessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors. While the individual Administrative Judge retains discretion as to the degree of detail to be included in a particular decision, general format and content uniformity have been prescribed. The decision is required to be of sufficient clarity and detail to allow a reader to ascertain what the findings and conclusions are, and whether the conclusions are rationally based on the facts.

In cases involving an employee of American industry, or a direct-hire employee or selectee for a position with NATO, or a U.S. citizen nominated by the Red Cross or the USO, the decision of the Administrative Judge is a *final decision*, unless it is appealed to the DOHA Appeal Board, and it is routinely furnished to the particular

applicant. In cases involving a federal civil servant or member of a military component, the decision of the Administrative Judge is a ***recommended decision*** to the component PSAB. Effective with the commencement of fiscal year 1998, upon issuance of the PSAB final decision, the DOHA recommended decision is being furnished to the particular appellant.

All ***final decisions*** issued by the Administrative Judge are routinely published on the Internet and appear at the DOHA World Wide Web site. The Universal Resource Locator address is:

**<http://www.defenselink.mil/dodge/doha>**

### **Transcript**

A verbatim transcript of all ISCR hearings and personal appearances is made by a certified court reporter detailed by the Hearing Office. In ISCR hearings, one copy of the transcript, less the exhibits, copies of which have already been received by both parties during, or prior to, the hearing, is furnished to the applicant, at no charge. This procedure is costly and vastly different from the usual practice followed in civil or administrative proceedings. The original transcript is retained in the case file of the Administrative Judge until such time as the written decision is issued, and the Department Counsel may have access to it and review it upon request.

In personal appearances, Change 3 to the Regulation mandates that a verbatim transcript of the proceeding be made,<sup>112</sup> but, unlike the ISCR hearing, the transcript is not furnished to the appellant. Instead, the transcript is forwarded with the entire CAF file to the component PSAB for distribution as it may deem appropriate.

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<sup>112</sup>See the Regulation (Change 3), app. N, § 3, at N-1.

### **Statistical Analysis (Grant/Denial Ratio) of ISCR Decisions Issued**

A review of ISCR statistics over the past few years reveals an approximate grant/denial ratio of 20 percent/80 percent, without a formal hearing, and 40 percent/60 percent, following a hearing. These statistics would seem to support the contention that the odds favor an applicant where the Administrative Judge has the opportunity to assess witness testimony, demeanor, and credibility, rather than merely evaluating a "cold" written record. Furthermore, they seem to validate the Supreme Court's decision in *Goldberg*, wherein it was stated:<sup>113</sup>

[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, . . . *written submissions are a wholly unsatisfactory basis for decision.*

The above ratio calculations do not include decisions issued following remand by the Appeal Board.

### **Statistical Analysis (Grant/Denial Ratio) of Personal Appearance Recommended Decisions Issued**

A statistical analysis of personal appearances since the commencement of the process reveals a recommended grant/denial ratio as follows: Of recommended decisions following a personal appearance, approximately 65 percent affirmed the CAF denial, and were unfavorable, or against the appellant, with a corresponding 35 percent, overturning the CAF decision, and were favorable, or for the appellant.

An equally significant statistic is that generated when the PSAB has issued its final decision. In those cases in which DOHA had

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<sup>113</sup> See *Goldberg*, 397 U.S. at 269 (emphasis added).

recommended affirming the CAF decision, approximately 96 percent affirmed the DOHA recommendation, and were unfavorable, or against the appellant, with a corresponding 4 percent overturning the CAF decision and DOHA recommendation, and were favorable, or for the appellant. In those cases in which DOHA had recommended overturning the CAF decision, approximately 49 percent affirmed the DOHA recommendation, and were favorable, or for the appellant, with a corresponding 51 percent overturning the DOHA recommendation and restoring the CAF decision, and were unfavorable, or against the appellant.

### **Timeliness**

In Calendar Year 1991, the average number of days between the assignment of an ISCR case -- of all combined types, including hearings, upon a review of the file of relevant material, and remand decisions -- to an Administrative Judge, to the date the decision was issued, was 201. In Calendar Year 1992, that combined average decreased to 175. In Calendar Year 1993, it plummeted to 115. In Calendar Year 1994, it dwindled to 90. In Calendar Year 1995, it again decreased to 77. In Calendar Year 1996, it bumped up to 83. In Calendar Year 1997, it declined slightly to 82. It is anticipated that the number will finally level off below 80 during this calendar year.

Since the commencement of the personal appearance process, to date, the approximate average number of days between receipt by DOHA of the NOIA in a personal appearance case to the date the recommended decision was issued by the Administrative Judge, is 50 days.

### **Summary**

In reaching individual final decisions and recommended decisions, the Administrative Judge strives to draw only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, the Administrative Judge attempts to avoid drawing inferences that are grounded on mere speculation or conjecture.



Notwithstanding the relative absence of administrative and clerical support, and the increasing diversity and complexity of the caseload, the Administrative Judges within the Trial Judiciary of DOHA are currently issuing ISCR final decisions within an approximate average of about 80 days from date of assignment. Periods of delay, brought about by scheduling difficulties, requests for continuance, or other similar reasons, have not been deducted from that cumulative average.

Likewise, even when confronted with the new, relatively unique, and constantly refined procedures created for personal appearances, those Administrative Judges are currently issuing personal appearance recommended decisions well within the average goal of 60 days from the date of receipt of the NOIA. Periods of delay, brought about by scheduling difficulties, requests for continuance, delays in obtaining the case file, and operational activities making appellants temporarily unavailable, have not been deducted from that cumulative average.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Final decisions under the Directive, and recommended decisions under Change 3 to the Regulation, include consideration of a reasonable expectation of predicted danger or behavior, or the possible risk that an applicant or appellant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible conjecture as to potential risk of compromise of classified information.<sup>114</sup>

DOHA Administrative Judges operate in a setting that involves the resolution of substantial individual interests in cases with great

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<sup>114</sup>See *Halperin v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980).

significance to individuals in which extremely important issues of personal liberty are potentially at stake. Routinely, effectively and efficiently, protecting the nation's secrets, within budgetary constraints and operational necessities, while safeguarding the rights and privileges of individuals, is the challenge which the Administrative Judge continues to meet on a daily basis.

## APPENDIX A

### MEMORANDUM FOR ALL APPLICANTS AND THEIR RESPECTIVE ATTORNEYS OR PERSONAL REPRESENTATIVES, AND DEPARTMENT COUNSEL

SUBJECT: Prehearing Guidance for DOHA<sup>1</sup> hearings

In an effort to expedite the hearing in DOHA industrial security clearance cases, the following guidance is being sent to Applicants and their respective attorneys or Personal Representatives, and Department Counsel (the parties) to assist them in preparing for the hearing. This guidance is not exhaustive, and the parties should also refer to Department of Defense Directive 5220.6 for guidance on hearing matters. In the event of any conflict between this guidance and the provisions of DoD Directive 5220.6,<sup>2</sup> the provisions of the Directive control.

1. The hearing is an adversarial proceeding in which the parties have the responsibility to present their respective cases. The Government is normally represented by an attorney known as a Department Counsel. The Applicant has the option of appearing by himself or herself without an attorney, or being represented by an attorney selected and paid for by the Applicant, or by being represented by a Personal Representative such as a friend, family member, or union representative.

2. Each party is expected to be prepared to present at the hearing whatever evidence (testimonial or documentary, or both) that party intends to offer. In this regard, it should be noted that the Administrative Judge is not empowered by law to issue a subpoena.

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<sup>1</sup>The Directorate for Industrial Security Clearance Review (DISCR) was redesignated as the Defense Office of Hearings and Appeals (DOHA), effective May 20, 1994.

<sup>2</sup>The January 2, 1992 edition of the Directive has been amended on three occasions: Change 1 became effective on November 22, 1993; Change 2 became effective on May 20, 1994; and Change 3 became effective on February 16, 1996.

Thus, the appearance of witnesses or production of documents is purely voluntary.

3. To facilitate the exchange of correspondence, proposed evidence, the handling of preliminary matters, and the scheduling of hearings, any person representing an Applicant should file a written Entry or Notice of Appearance with both Department Counsel and the Hearing Office Docket Clerk. No special form or format is required.

4. A party requesting a continuance of a scheduled hearing date must make a *timely showing of good cause, in writing*, for any such continuance. Among the factors to be considered are the requester's diligence in readying his or her case prior to the date set for the hearing, and inconvenience to the opposing party, witnesses, and the Administrative Judge. Failure of an Applicant to appear for the scheduled hearing or to comply with an order of the Administrative Judge may result in the case being returned to the Director, DOHA for discontinuance of processing and revocation of any security clearance the Applicant currently possesses.

5. Neither party should attempt to furnish any information relating to the case without giving the other party the opportunity to be present. Such actions constitute what are known as prohibited *ex parte* communications. Also, copies of any proposed exhibits must not be submitted to the Administrative Judge prior to the hearing. Any documents to be offered as evidence should be presented at the hearing itself during the presentation of that party's case. In some instances, when an Applicant has appended documents to the response to the Statement of Reasons, the documents have been returned with an explanation that such materials are inappropriate to a pleading and that they should be resubmitted as proposed exhibits during the hearing. If such action has occurred, an Applicant should inform the Administrative Judge during the hearing, and be prepared to again offer the material previously rejected.

6. The order of proceeding is as follows: Department Counsel may make an opening statement. Then, Applicant may make an

opening statement,<sup>3</sup> waive opening statement, or wait until the Government has concluded calling witnesses and submitting evidence before making or waiving his or her opening statement. The Government presents its case (testimony of witnesses or presentation of documents, or both) first, followed by the Applicant's case. The parties will have the opportunity to present rebuttal evidence as appropriate.

7. The parties have a wide degree of discretion in deciding what order to present the evidence in their respective cases. The Federal Rules of Evidence are used as a guide.

8. The parties should *not* mark any proposed exhibits. At the hearing, the Administrative Judge will mark the exhibits. Exhibits offered as evidence, but not admitted as such, will be retained by the Administrative Judge. As a general rule, photocopies of documents may be offered in lieu of the original, *provided* that the copies are legible. In the case of public records or business records, it is *not* required that the copies being offered be certified copies. However, nothing in this paragraph relieves a party from the responsibility of laying a proper foundation for a document when necessary. It is generally good practice to make sufficient photocopies of each proposed exhibit so that separate complete copies can be offered to the Administrative Judge and the opposing party. Preparation of such additional copies should take place before the scheduled hearing date, because there may not be any photocopying facilities available at the hearing location.

9. Witnesses will be sequestered (kept out of the hearing room while other witnesses are testifying) during the hearing, with the exception of the Applicant and any expert witnesses. The parties may have the assistance of any expert witness, selected and paid for by the party wishing to call the witness, during the course of the hearing.

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<sup>3</sup>An opening statement is not evidence. It is merely a summary of the theory of the case and a brief explanation as to the nature of the expected testimony of witnesses and the nature of documents, which serves to provide the Administrative Judge with some general idea of the case to be better able to understand the evidence.

10. The Administrative Judge does not swear in Applicants or other witnesses who testify. Instead, the Administrative Judge will direct their attention to, and advise them that Section 1001 of Title 18 of the United States Code applies to the proceedings. Section 1001 of Title 18 of the United States Code makes it a criminal offense, punishable by a maximum of 5 years in prison and a \$10,000 fine, or both, to knowingly and willfully make a false or misleading statement or representation to any department or agency of the United States.

11. All witnesses are subject to cross-examination, or questioning, by the other party. The scope of cross-examination is not limited to the scope of the witness's direct examination. However, any cross-examination must cover issues that are material and relevant to the issues in the case or the witness's credibility. As a general rule, the parties will be allowed an opportunity to conduct one redirect examination and one recross-examination of a witness. The Administrative Judge may, in his or her discretion, question any witness.

12. Each party has the right to raise appropriate objections to any evidence, or portion thereof, being offered by the other party. Objections must be made in a timely fashion. Failure to raise an objection, at the time the objectionable evidence or testimony is offered, will be construed as acquiescence. When raising an objection, the objecting party should address the objection to the Administrative Judge, stating the basis for the objection.<sup>4</sup> The non-objecting party will be given an opportunity to respond to the objection, if he or she wishes. The Administrative Judge will rule on any objection raised. In the event an objection is overruled, the objecting party has an automatic exception to the Administrative Judge's ruling.

13. After completion of the presentation of evidence by the parties, they will have an opportunity to make closing arguments.<sup>5</sup>

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<sup>4</sup>An Applicant, not represented by an attorney, need only state the objection as clearly as he or she can, in plain English. "Legalese" is not necessary.

<sup>5</sup>A closing statement is not evidence. It is merely a review of the significant evidence and commentary regarding the applicability or non-applicability, as appropriate, of adjudication policy factors, both disqualifying and mitigating, as set forth in the Directive, which serves to

Department Counsel will go first. Applicant follows, with Department Counsel having a right to rebuttal. Applicant does not have a right to respond to Department Counsel's rebuttal argument.

14. A court reporter will be present to make an official transcript of the hearing. The court reporter will send the original transcript to the Administrative Judge, and a copy of the transcript, free of charge, to the Applicant or Applicant's attorney, as appropriate.

15. The Administrative Judge will *not* announce his or her decision to the parties at the end of the hearing. A copy of the Administrative Judge's written decision will be sent to the parties by letter explaining the provisions for appeal.

16. The Administrative Judge has the discretion to vary the provisions of this guidance upon a showing of good cause, or whenever necessary to provide for the fair and efficient administration of the proceeding under the Directive.

/s/

Robert R. Gales  
Chief Administrative Judge

## APPENDIX B

### MEMORANDUM FOR ALL APPELLANTS AND THEIR RESPECTIVE ATTORNEYS OR PERSONAL REPRESENTATIVES IN PERSONAL APPEARANCES

SUBJECT: Guidance for Your Personal Appearance

This set of questions and answers is provided to help Appellants and their Attorneys or Personal Representatives to prepare for the Personal Appearance which was requested before a Defense Office of Hearings and Appeals (DOHA) Administrative Judge. The guidance is not exhaustive, and merely implements Department of Defense Regulation 5200.2-R, *Personnel Security Program Regulation*, as amended by Change 3, dated November 1, 1995.

#### 1. Will the proceeding be formal?

An Administrative Judge will preside at your personal appearance and will follow a standard order of procedure. The course of the personal appearance is designed so that the proceeding can be understood by a lay person with no legal training. It will begin with the Administrative Judge introducing himself or herself and then asking the person who asked for the personal appearance, referred to as the Appellant, to identify himself or herself. The Administrative Judge will then ask the Appellant to submit documents one at a time for the Administrative Judge to identify and consider, and to make oral remarks that are relative to resolution of the case. The Administrative Judge may then ask the Appellant questions, and end the proceeding with an opportunity for the Appellant to summarize why it is clearly consistent with the national security for the Appellant to be eligible for access to classified information or the performance of sensitive duties.

#### 2. Where will the proceeding be conducted?

Your personal appearance may be conducted in a hearing, conference or court room depending on the availability of suitable



facilities. Appellants with a duty station in the lower 48 states can expect the personal appearance to be held at a facility at or near their duty station. Appellants stationed elsewhere may have their personal appearance scheduled at or near their duty station or at DOHA facilities in the Washington D.C., Los Angeles, California or Boston, Massachusetts metropolitan areas. An effort has been made to find a location that provides an appropriate degree of privacy and that is consistent with the seriousness of the proceeding.

**3. Will the Government be represented by an attorney at the proceeding who will have the job of presenting evidence supporting reasons for denial or revocation of my eligibility for a security clearance or performance of sensitive duties?**

The Administrative Judge assigned to your case will be the only other Government employee at your personal appearance. He or she will be impartial and objective in evaluating the facts set forth in the record of the case supplied to him or her by your Central Adjudication Facility (CAF) as supplemented by what you say at your personal appearance and whatever additional documentation is presented by you at that appearance.

**4. Do I need to hire an attorney?**

You can prepare for, and appear at, the personal appearance by yourself. The proceeding is designed so that it can be understood and used by all DoD civilian employees and members of the military. However, you can choose to hire an attorney at your own expense. You also may be represented by any adult of your choosing such as a co-worker, supervisor, friend, spouse, colleague, union representative or member of the clergy. If you want to be represented by an attorney or someone else, you must arrange for it immediately. Postponement of the personal appearance can be granted by the Administrative Judge only for *good cause*, and delay in finding an attorney or other representative is generally *not* a good reason to delay a scheduled personal appearance.

**5. What should I do to prepare for my personal appearance?**

The personal appearance is your opportunity to provide oral comments and documents demonstrating that your eligibility for access to classified information or performance of sensitive duties should be granted or reinstated. The Administrative Judge presiding at your personal appearance will have already reviewed your case file which was provided to him or her by the CAF that made the decision to deny or revoke your eligibility for access to classified information or performance of sensitive duties. Therefore, your goal should be to explain your reasons for having the CAF's decision reversed by providing additional information and documentation rather than only repeating information which you had previously submitted.

You should organize your thoughts in a logical manner. Make sure that your documents are organized in the order that you want to present them and bring an extra copy of the documents so that you can refer to them if needed to answer questions that may be directed to you by your representative or the Administrative Judge.

You will be given an opportunity at the end of the personal appearance to make a closing statement. You should stress the highlights rather than review your entire case.

**6. Can I or the Government bring people to the personal appearance so they can testify?**

You are the only person who will be allowed to testify at your personal appearance. You will be advised by the Administrative Judge that Section 1001 of Title 18 of the United States Code is applicable which makes it a criminal offense, punishable by a maximum of five years in prison and a \$10,000.00 fine, to knowingly and willfully make a false or misleading statement or representation to any department or agency of the United States.

If you want the Administrative Judge to consider what other people such as supervisors, co-workers, family, friends, neighbors, doctors or other experts have to say about your eligibility for access to classified information or performance of sensitive duties, you must

obtain their comments in writing for submission to the Administrative Judge at your personal appearance. While a signed and dated letter is sufficient, as a general rule, more weight can be given to statements that are in a notarized affidavit or otherwise attested to as being true.

**7. Will I be questioned at the personal appearance?**

You may be questioned by your representative. You also may be questioned by the Administrative Judge if he or she wants clarification of information that is part of the record. You should be prepared to answer any question clearly, completely, and honestly.

**8. Will the personal appearance be transcribed?**

The proceeding will be recorded by a court reporter who will provide the Administrative Judge with a verbatim transcript.

**9. Will there be formal rules of evidence that I must understand and comply with?**

The only requirement with respect to admissibility of information into the record is that it must be *relevant* and *material* to the concerns as to why your eligibility for a security clearance or performance of sensitive duties should be denied or revoked and not unduly repetitive of information that is already part of the record.

**10. What documents can I submit?**

You may submit any documents that you believe should be considered by the Administrative Judge and ultimately the Appeal Board. The information can involve refutation, explanation, extenuation, or mitigation of the reasons provided to you in the Letter of Denial issued by your CAF as to why your security clearance or eligibility to perform sensitive duties should be denied or revoked. The only limitation is that the materials must be *relevant* and *material* to the concerns as to why your eligibility for security clearance or performance of sensitive duties should be denied or revoked, and not be unduly repetitive of information that is already part of the record.

**11. What is the function of the Administrative Judge who will preside at my personal appearance?**

The Administrative Judge did not participate in the CAF's decision to deny or revoke your eligibility for access to classified information or performance of sensitive duties. He or she is at the personal appearance to give you an opportunity to present your case as fully as possible.

**12. Will the Administrative Judge make the final decision as to whether my eligibility for a security clearance or performance of sensitive duties should be denied or revoked?**

The Administrative Judge will prepare a recommended decision and forward it along with the record of your case to your component's Personnel Security Appeal Board (PSAB). The Administrative Judge will not announce his or her recommended decision to the Appellant at the end of the personal appearance. The PSAB may adopt the recommended decision, or reverse or otherwise modify the Administrative Judge's recommendation.

**13. What is the "record" of my case?**

The record in your case will consist of all of the information already considered by the CAF when it determined to deny or revoke your eligibility for access to classified information or performance of sensitive duties plus the verbatim transcript of the personal appearance and any additional documentation which you submit at the personal appearance.

**14. What regulations will the Administrative Judge consider?**

The Administrative Judge will consider the guidelines set forth in Appendix I of DoD Regulation 5200.2-R, *Personnel Security Program* which were in effect when your CAF determined that it should deny or revoke your eligibility for access to classified information or performance of sensitive duties.

**15. What will happen if I do not come to my personal appearance?**

It is your responsibility to attend the personal appearance on the date and time and at the location designated in the notice sent to you with these questions and answers. It is also your responsibility to request the Administrative Judge for a postponement or change of location which may be granted by the Administrative Judge only if you present him with reasons sufficient to demonstrate that you have been diligent and that there are good reasons for your request. If you have not been granted a postponement and fail to appear on the day and time and at the place designated by the Administrative Judge, he or she will so advise your component's PSAB with a recommendation that it summarily sustain the CAF's determination to deny or revoke your eligibility for access to classified information or performance of sensitive duties.

/s/

Robert R. Gales  
Chief Administrative Judge