

Federal Security Clearances: Fighting to Get & Keep One*

January 26, 2010

By [John P. Mahoney, Esq.](#), Partner, [TULLY RINCKEY, PLLC](#), Washington, DC†

The Federal Government is pretty good at keeping secrets. When it comes to national security, the Feds do their best to ensure that only trustworthy people have access to classified government information and operations. In order for federal employees and federal contractor company employees to have access to national security secrets, their personal backgrounds must be thoroughly investigated and they must be granted security clearances. Since September 11, 2001, most workers on federal government facilities are required to qualify for and possess a security clearance as a condition of their continued employment. For such employees, the loss or suspension of their security clearance means the loss of their jobs. There are due process rights that apply when a federal agency proposes to suspend, revoke, or deny an employee's security clearance. However, unlike most federal employment due process procedures, there is no right to court review of an adverse federal agency's security clearance decision, as the privilege to possess a federal security clearance is solely within the discretion of the Executive Branch of the Government of the United States. Given that, an employee fighting to get or hold on to a security clearance must convince the Executive Branch that he or she qualifies for that employment privilege.

Federal employees and contractors are often hired for their secured jobs before all their background checks have been completed. On occasion, the government may ultimately determine that a provisionally hired employee or contractor is not suitable to possess a security clearance. If the employee is unsuccessful in convincing the government to change its initial determination, he or she will be terminated. People who are ultimately terminated by the federal government based upon a denial or revocation of a security clearance will often find it very difficult to secure another job, either in the federal or private sectors, as getting fired by the federal government based upon national security concerns does not make one very employable thereafter.

For most federal employees, the process of deciding to revoke a security clearance is governed by Executive Order 12968, which was signed by President Clinton on August 2, 1995. Under that Executive Order, a federal employee has the right to a "personal appearance" before a federal administrative judge, which is akin to an oral reply in a federal disciplinary case. Federal contractors actually have more due process rights than do federal employees, as contractors have the right to a full contested evidentiary hearing before a judge. In the case of a federal employee, the judge's decision is merely recommended, as the employing agency has the final decision as to who receives a security clearance from that particular agency. For a contractor, the judge's decision is final, although it can be appealed to the Department of Defense's Office of Hearings and Appeals.

When an agency initially determines that an employee does not meet the standards for access to confidential information, that employee shall be:

1. Provided as comprehensive and detailed a written explanation of the reasons for the denial of the clearance as national security interests and applicable law permit, usually called the "Intent to Revoke Access Eligibility" or the "Statement of Reasons";
2. Provided documents, records and reports upon which the clearance denial is based, to the extent such documents would be provided under the Freedom of Information Act and the Privacy Act, within 30 days;

3. Informed of their right to counsel or other representative, to request documents, and to request the entire investigatory file, If requested, these materials shall be promptly provided prior to the time set for the written reply;
4. Provided a reasonable opportunity to reply in writing to the determination, and to request a review of that determination;
5. Provided written notice of and reasons for the results of the review, the identity of the deciding official, and written notice of the right to appeal;
6. Provided an opportunity to appeal in writing to a high-level panel appointed by the agency head. The panel shall be comprised of three members, two of whom shall be selected from outside the security field. Panel decisions are to be in writing and are final; and
7. Provided an opportunity to appear personally and to present relevant documents, materials, and information at some point in the process before an adjudication or other authority, other than the investigative authority, as determined by the agency head in an ex parte nonadversarial hearing. A written summary or record of such appearance shall be made part of the employee's security record, unless the appearance occurs in the presence of the panel.

The purpose of the security clearance review process is to give the employee or contractor the opportunity to convince the federal government that, when considered as a "whole person," any security concerns that the agency had against the employee are sufficiently mitigated by corrective action taken by the employee in a timely fashion so as to convince the government that it is clearly in the national security interests of the United States that the employee's clearance be granted or restored. Given the complexities and stakes of a federal security clearance decision, it is advisable that someone facing the denial or revocation of their security clearance seek representation by a qualified attorney who specializes in security clearance representation.

###

* Copyright© 2010 TULLY RINCKEY, PLLC. All rights reserved.

† John P. Mahoney, Esq. is a Partner in the Washington, DC Federal Employment Law Firm of TULLY RINCKEY, PLLC. (<http://www.fedattorney.com>). Mr. Mahoney specializes in representing federal government agencies and officials, as well as federal contractors, in all facets of federal employment law, including security clearance litigation.