



TULLY RINCKEY PLLC
ATTORNEYS & COUNSELORS AT LAW

Security Clearances:

Your Rights When Your Clearance and
Career is on the Line

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Presentation Highlights

- Levels of Security Clearances
- Clearance Guidelines
- Application and Reinvestigation Process
- Denial or Revocation of a Clearance
- Appeals Process for Federal Employees and Contractors
- MSPB Appeal Rights



Levels of Security Clearances

- **CONFIDENTIAL:** applied to information or material the unauthorized disclosure of which can reasonably be expected to cause damage to the national security.
- **SECRET:** applied to information or material the unauthorized disclosure of which can reasonably be expected to cause serious damage to the national security.



Levels of Security Clearances

- **TOP SECRET:** applied to information or material the unauthorized disclosure of which can reasonably be expected to cause exceptionally grave damage to the national security.
 - Classifications applied to more sensitive classified information:
 - Sensitive Compartmented Information (SCI)
 - Special Access Programs (SAP)



“Whole Person” Concept

- No matter the security clearance level (Confidential, Secret, Top Secret & Top Secret/SCI), the government utilizes the “Whole Person” concept in granting or denying a security clearance:
 - The balanced assessment of both positive and negative attributes to conclude whether one’s strengths outweigh their weaknesses



Clearance Guidelines

- A security clearance is required by anyone who requires access to classified information to perform their duties
- Security clearances in the military are determined by an individual's MOS/AFSC Rating (job) and duty assignment
 - Many military jobs require access to classified information regardless of the assignment
 - Some positions may not require a clearance, but a person's duty assignment might require a clearance
- Only United States citizens can be granted a security clearance



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Application and Reinvestigation Process



Initiation of Application Process

- The initiation of an application for a security clearance is done through the completion of an SF86 (Security Clearance Questionnaire)
- Usually done through E-QIP (Electronic Questionnaire for Investigations Processing)
- The form will require information on your education, places of residence, past employment, countries visited, names of family members, mental health, debts, alcohol and drug abuse, financial affairs, and more



Timeline Expectations

- There are no time limits imposed on the issuers of a security clearance
- Confidential or Secret clearances generally take several months to complete
- Top Secret clearances can take as long as a year to complete
- Your investigation will take longer if:
 - you have lived or worked in several locations within the United States or overseas,
 - you have traveled extensively outside of the United States,
 - you have relatives who live outside of the United States,
 - information is developed during the investigation process that requires further fact-finding.



Continuing Evaluation

- All clearance holders will be continually monitored for compliance
- All employees have a duty to report adverse information to your Facility Security Officer (FSO) at any time
 - Examples include obtaining a ticket for a DUI or having your mortgage foreclosed by a financial institution
- The FSO will report them to the Defense Security Service (DSS) so a determination can be made whether or not to suspend or revoke your clearance



Continuing Evaluation

- Factors used in determining what type of action to take include:
 - Who is aware of the incident,
 - The seriousness of the incident,
 - Whether previous incidents were a matter of concern in the past, and
 - Whether the incident relates to the areas considered to be of concern for persons holding clearances



Periodic Re-investigations

- Required every five years for a Top Secret clearance
- Required every ten years for a Secret clearance
- Required every fifteen years for a Confidential clearance
- Civilian and military personnel may be randomly investigated at any time
- A separated employee's clearance can be reactivated within two years as long as your investigation falls within the required timeframe



Polygraph Examinations

- Certain employers require polygraph exams, including:
 - _ Defense Security Service (DSS)
 - National Security Agency (NSA)
 - Central Intelligence Agency (CIA)
 - National Reconnaissance Office
- Occasionally used in personal security investigations to resolve serious adverse information about a person only with his or her consent



Cost of a Security Clearance

- The federal government covers the cost of a security clearance for military personnel and govt. civilian employees.
- Contractors must pay for their employees
- A contractor can expect to pay several thousand dollars for an individual's security clearance
- Some investigations, especially for a Top Secret clearance, can cost up to \$15-20,000



Access to Records

- An employee can request a copy of their investigation file by sending the following information to the Defense Security Service:
 - Current full name
 - Any other names used in the past
 - Date of birth
 - Social Security Number
 - Official Notarized Signature
 - Brief description of the records you are seeking
 - Any other information you believe to be useful
 - Whether you want someone else to receive the records on your behalf



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Denial and Revocation Appeals



Conditions that Raise Security Concerns

- Allegiance to the United States
- Foreign Influence
- Foreign Preference
- Sexual Behavior
- Personal Conduct
- Financial Considerations
- Alcohol Consumption
- Drug Involvement
- Psychological Conditions
- Misuse of Information Technology Systems
- Criminal Conduct



Allegiance to the United States

- Conditions that cause concern:
 - Involvement in, support of, training to commit, or advocacy of any act of sabotage, espionage, treason, terrorism, or sedition against the United States of America;
 - Association or sympathy with persons who are attempting to commit, or who are committing, any of the above acts;
 - Association or sympathy with persons or organizations that advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means, in an effort to:
 - overthrow or influence the government of the United States or any state or local government;
 - prevent Federal, state, or local government personnel from performing their official duties;
 - gain retribution for perceived wrongs caused by the Federal, state, or local government;
 - prevent others from exercising their rights under the Constitution or laws of the United States or of any state.



Mitigating Factors: Allegiance to the U.S.

- The individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these
- The individual's involvement was only with the lawful or humanitarian aspects of such an organization
- Involvement in the above activities occurred for only a short period of time and was attributable to curiosity or academic interest
- The involvement or association with such activities occurred under such unusual circumstances, or so much time has elapsed, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or loyalty



Foreign Influence

- Conditions that cause concern:
 - Maintains contact with foreign friends, family members, or professional associates
 - Provides or receives material support to/from contacts outside the U.S.
 - Returns to native country
 - Maintains property or financial interests (including inheritance rights) outside the U.S.
 - Fails to report association with foreigners when required.



Mitigating Factors: Foreign Influence

- Applying for U.S. citizenship as soon as they are eligible
- Expressing their intention to live permanently in the U.S. even after retirement
- Observing American holidays
- Participating in local non-ethnic social, community, political, or charitable groups
- Socializing with people outside their ethnic group



Sexual Behavior

- Conditions that cause concern:
 - Sexual behavior of a criminal nature, whether or not the individual has been prosecuted
 - A pattern of compulsive, self-destructive, or high-risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder
 - Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress
 - Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.



Mitigating Factors: Sexual Behavior

- The behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature
- The sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment
- The behavior no longer serves as a basis for coercion, exploitation, or duress
- The sexual behavior is strictly private, consensual, and discreet



Personal Conduct

- Conditions that cause concern:
 - Providing false or misleading answers
 - Omitting information either consciously or unconsciously on forms or in an interview
 - Pattern of dishonesty or misrepresentation
 - Any action that when applied to the “whole person concept” questions candidate’s reliability, trustworthiness or soundness of judgement



Mitigating Factors: Personal Conduct

- Honesty
 - Be honest about past issues, current issues and how action will not be repeated
- Transparency
 - Reduce chance of coercion by telling friends and family
- Taking corrective action
 - Highlight specific actions taken to reduce issues and future problems



Financial Considerations

- Conditions that cause concern:
 - History of financial troubles or not meeting financial obligations
 - Inability or unwillingness to satisfy debts
 - Consistent spending beyond one's means
 - Embezzlement, tax evasion or fraudulent tax filing
 - Debts linked to drugs or alcohol abuse or gambling
 - Unexplained wealth
 - False expense accounts



Mitigating Factors: Financial Considerations

- Structured payment plans
 - Payment plans established and diligently followed
- Debt based on unforeseen circumstances and is being rectified
 - Example: Medical debts, divorce, death
- Credit counseling
- Predatory lending
- Treatment for gambling problems
- Affluence resulted from legal source of income
- Good faith effort to resolve or reduce debts
 - Requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and an adherence to duty or obligation



Alcohol Consumption

- Conditions that cause concern:
 - Incidents away from work such as DUI/DWI's, disturbing the peace, fighting.
 - Individual does not need to be diagnosed as an alcohol abuser for there to be issue
 - Incidents at work such as drinking on the job or showing up late.
 - Habitual or binge drinking
 - Alcoholicism diagnosis
 - Relapse
 - Failure to follow treatment



Mitigating Factors: Alcohol Consumption

- Treatment/Counseling
 - Currently in treatment or has successfully completed treatment by a medical professional
 - Participates in Alcoholics Anonymous (AA)
- Problem is Not Recent
 - Ability to show that problem or potential problem was associated with an incident or lifestyle, i.e., college



Drug Involvement

- Conditions that cause concern:
 - ANY drug abuse of legal or illegal drugs
 - Positive illegal drug test or illegal drug possession
 - ANY illegal drug use after being granted a clearance
 - Drug Abuse/Dependence diagnosis by a licensed professional
 - Expressed intent to continue illegal drug use



Mitigating Factors: Drug Involvement

- Future Drug Use is Unlikely
 - History of use is sporadic and/or not recent
- Treatment
 - Received past or current treatment by a medical professional
- Signed Statement of Intent
 - Automatic clearance revocation for future violation



Psychological Conditions

- Conditions that cause concern:
 - Behavior that casts doubt on an individual's judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior
 - An opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness
 - The individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g. failure to take prescribed medication



Mitigating Factors: Psychological Conditions

- The identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan
- The individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional
- Recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation
- The past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability
- There is no indication of a current problem.



Misuse of Information Technology Systems

- Conditions that cause concern:
 - Downloading ANY pornographic materials while at work
 - Downloading ANY child pornography (work or home)
 - Unauthorized entry into any IT system
 - Downloading classified information to any unauthorized source such as a personal flash drive
 - Illegally downloading software or copyrighted materials including music and movies



Mitigating Factors: Misuse of I.T. Systems

- Unusual circumstances
 - Corrective action taken immediately
- Misuse was unintentional or inadvertent
 - System unawareness
 - Corrective action was taken immediately
- Good faith effort
- Major time lapse since incident



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Appeals Process



Federal Contractor Appeals Process

- Step 1: Statement of Reasons (SOR) issued by DOHA
 - Applicant has 20 days to respond with a detailed written answer, under oath, that admits or denies the allegations listed
- Step 2: Request a Hearing
 - A hearing may be requested at the time an applicant responds to his or her SOR
 - There is better than a 90% denial rate for non-hearing or form cases that are decided on just written records



Federal Contractor Appeals Process

- Step 3: Hearing before an Administrative Judge
 - Applicant can offer testimony, exhibits and witnesses
 - DOHS attempts to set the Industrial cases within 150 miles of an applicant's home
 - More and more teleconferences are taking place
 - The government has the burden of going forward with evidence and the Department Counsel presents the government's case
 - Both parties may offer exhibits into evidence
 - DOHA has no subpoena power, but witness for each side may be called to testify



Federal Contractor Appeals Process

- Step 4: DOHA Issues a Written Decision
 - The Administrative Judge will issue a written decision which is final
- Step 5: Appeal
 - Either party may appeal the Judge's decision
 - Losing party must appeal within 15 days of the Judge's decision
 - The appealing party must file an appeal brief within 45 days of the Judge's decision
 - No new evidence may be received or considered



Federal Contractor Appeals Process

- Step 6: Appeal Board Decision
 - The Appeal Board reviews the file and makes a decision sustaining, reversing, or remanding the case to the Administrative Judge for further deliberations
- Step 7: Reapplication
 - If denied a clearance, an applicant can reapply one year from the date of an unfavorable decision, the SOR, or the hearing from which the Judge's decision was final



Federal Employee Appeals Process

- Step 1: Statement of Reasons (SOR)
 - CAF gives, on average, 30 days to respond
 - Extension may be granted, but not guaranteed
- Step 2: “Discovery” Phase
 - Appellant makes request for evidence and information supporting revocation
- Step 3: Response to SOR
 - Highlight mitigating factors
 - Two Outcomes:
 - 1. CAF agrees with your reasons, clearance is reinstated
 - 2. CAF issues Letter of Denial (LOD)



Federal Employee Appeals Process

- Step 4 : Letter of Denial
 - Two Options:
 1. Respond in Writing to LOD
 - If clearance is again denied, NO APPEAL RIGHTS
 2. Request a Hearing with Defense Office of Hearings & Appeals (DOHA)
 - Affirmative Action: If you do not request a hearing, one is not automatically given
- Step 5: DOHA Hearing
 - Administrative Judge (AJ) asks appellant questions
 - Appellant can call witnesses, present evidence
 - Government has option to participate
 - Dept. counsel may participate & call government witnesses
 - Dept. counsel may let the OPM investigation file stand on the record
 - Burden of proof is on the government to show denial/revocation is warranted



Federal Employees Appeals Process

- Step 6: AJ Issues Recommended Decision
 - CAF is not bound by decision
- Step : CAF Issues Final Decision
 - Security clearance is either reinstated or denied
 - Appellant is NOT entitled to lost wages, benefits or attorneys fees
 - No appeals rights
 - Really?????



Navy v. Egan, 484 U.S. 518 (1988)

- U.S. Supreme Court held:
 - Facts
 - Employee was denied a security clearance for failure to disclose that he had two earlier convictions for assault and a conviction as a felon in possession of a gun.
 - The employee was not issued a clearance and removed on the basis that a clearance was required for the position.
 - Issue
 - Whether the MSPB has authority to review the underlying reasons for security clearance revocation?
 - Held
 - The Board does not have authority to review the underlying merits of an agency's decision to revoke an employee's security clearance



MSPB Decisions

MSPB has applied *Egan* in a variety of contexts to deny merits review to employees who were indefinitely suspended or fired because of security clearance concerns:

- The Board upheld the Indefinite suspension of an employee whose security clearance was suspended pending the outcome of a security clearance investigation based solely on the employee's arrest for cocaine possession. *Riley v. Dep't of the Navy*, 62 M.S.P.R. 105, 108 (1994).
- The Board upheld the indefinite suspension of an employee whose access to classified information was revoked based on information that the employee had been recently convicted of discharging a firearm in a building. *Bolden v. Dep't of the Navy*, 62 M.S.P.R. 151 (1994).
- The Board upheld the indefinite suspension of an employee whose access to Control Industrial Area was suspended based on alcohol related violations on his driving record. *Kriner v. Dep't of Navy*, 61 M.S.P.R. 526 (1994).
- The Board upheld the removal of an employee whose security clearance was revoked when he was found guilty of selling anabolic steroids. *Mantos v. Dep't of the Navy*, 62 M.S.P.R. 117 (1994).



Recent MSPB Cases Addressing Egan

In two recent cases, the Board held that *Egan* did not preclude the MSPB from conducting a hearing, as in any other adverse action case, to determine the merits of an agency's denial of an employee's eligibility to occupy a sensitive position:

Conyers v. Dept. of Defense, 115 MSPR 572 (2010)

An accountant was indefinitely suspended after she was denied eligibility for access to sensitive and classified information. Like the position in *Egan*, the accountant's position was designated "non-critical sensitive." Unlike *Egan*, the position holder did not require a security clearance or access to classified information. The Board concluded that *Egan* only limited MSPB's review if the adverse action is based on a denial, revocation, or suspension of access to classified information or eligibility for such access.

Northover v. Dept. of Defense:

An employee was demoted and moved to a part time position when his eligibility to occupy a sensitive (NCS) position was revoked. The Board rejected the Agency's argument that *Egan* barred the Board from reviewing the merits of an agency's "security-clearance/eligibility determination." The Board concluded that

"nothing in Egan indicates that the Court considered the NCS designation alone as sufficient to preclude Board review of the merits of the determination underlying Mr. Egan's removal." The Board concluded that "Egan limits the Board's statutory review of an appealable adverse action only when such review would require the Board to review the substance of ...an agency's decision to deny, revoke or suspend access, or eligibility for access to classified information."

Both decisions are on appeal to the Federal Circuit Court of Appeals.



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Questions and Answers



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