

ADJUDICATIVE GUIDELINES IN DEPARTMENT OF DEFENSE SECURITY CLEARANCE CASES: AN OVERVIEW OF THE 2006 REVISIONS

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I. INTRODUCTION:

Military personnel, civilian employees of the Department of Defense (DoD), and employees of DoD contractors are all covered by the DoD security clearance process. Employees whose positions require that they have a security clearance must submit a form known as Standard Form 86: Questionnaire for National Security Positions (SF-86) and undergo an investigation before they can be granted a security clearance. Although the due process requirements for military personnel and DoD civilian employees differ from those of contractor employees (see Table I), the standards governing whether a clearance will be issued are the same across the board.

TABLE I: Due Process Rights for Personal Appearance and Industrial Security Cases Following Issuance of Statement of Reasons

Personal Appearance Cases	Industrial Security Cases
U.S. military personnel and DoD civilian employees	DoD contractor employees
Covered by Executive Order (EO) 12968 and DoD Regulation 5200.2-R	Covered by EO 10865 and DoD Directive 5220.6
Consolidated Adjudication Facility (CAF) denies or revokes security clearance if no response provided to Statement of Reasons (SOR), and issues decision if applicant responds to SOR	No CAF processing; Defense Office of Hearings and Appeals (DOHA) denies or revokes security clearance if no response provided to SOR
Opportunity to appear personally before DOHA Administrative Judge	Opportunity to appear personally before DOHA Administrative Judge
	Can confront and cross-examine witnesses
	Can call third-party witnesses
	Use of Federal Rules of Evidence as a guide
Administrative Judge decisions only considered recommended decisions	Administrative Judge decisions become final decisions if not appealed
ALL decisions by DOHA Administrative Judges are appealed automatically to Personnel Security Appeal Boards	DOHA Appeal Board only receives appeals if the government or individual appeals the decision – which only occurs approximately 25% of the time
Broad review at Personnel Security Appeal Boards: <ul style="list-style-type: none"> • De novo review of Administrative Judge decisions • New evidence allowed 	Limited scope of review at DOHA Appeal Board: <ul style="list-style-type: none"> • Deference to credibility decisions by Administrative Judge • No new evidence allowed on appeal • Use of rebuttable presumptions

The ultimate standard that DoD uses in evaluating whether an individual is eligible to receive or maintain a security clearance is whether it is “clearly consistent with the interests of national security” for that individual to be granted or to continue to maintain a clearance. That standard was approved by the U.S. Supreme Court in a case entitled *Department of Navy v. Egan*, 484 U.S. 518 (1988).

In order for DoD to determine whether granting a security clearance to an individual applicant will be clearly consistent with the interests of national security, the DoD uses what is known as the “Adjudicative Guidelines,” which is a set of 13 separate but related Guidelines dealing with behaviors and circumstances which the DoD has determined may impact an individual’s ability to be granted a security clearance.

After an individual submits his or her SF-86, if the DoD component responsible for making a determination about the clearance is unable to grant a security clearance based on the individual’s security clearance application, a Statement of Reasons (SOR) will be issued. Using the criteria established in the Adjudicative Guidelines, the SOR details the reasons why the individual cannot be granted or cannot maintain a security clearance.

The Adjudicative Guidelines were recently revised, effective September 1, 2006. This article discusses the recent changes and compares some of the provisions in the new standards with the old standards. It is important to keep in mind that the revised Adjudicative Guidelines only apply to individuals who received a SOR issued on or after September 1, 2006. For older cases in which the SOR was issued prior to that date, the old Guidelines will still apply.

Moreover, this article is not a completely comprehensive examination of the Adjudicative Guidelines. It is not a complete review of all provisions of the Guidelines, but rather just those provisions which are new or which have been significantly revised.

II. ADJUDICATIVE GUIDELINES:

Both the old and new Guidelines refer to what is known as the “whole person concept.” In essence, that concept stands for the principle that a number of variables – “[a]vailable, reliable information about the person, past and present, favorable and unfavorable” – should be considered in reaching a security clearance determination. Nine specific factors, including the nature and seriousness of the conduct, the frequency and recency of the conduct, and the individual’s motivation for engaging in the conduct, are evaluated as part of the whole person concept.

In addition to the overarching whole person concept, there are also 13 specific Guidelines that are considered. Each Guideline covers a specific area of behavior, and includes a stated concern, several disqualifying conditions, and also several mitigating conditions. The revised Guidelines are as follows:

- Guideline A: Allegiance to the United States
- Guideline B: Foreign Influence

- Guideline C: Foreign Preference
- Guideline D: Sexual Behavior
- Guideline E: Personal Conduct
- Guideline F: Financial Considerations
- Guideline G: Alcohol Consumption
- Guideline H: Drug Involvement
- Guideline I: Psychological Conditions
- Guideline J: Criminal Conduct
- Guideline K: Handling Protected Information
- Guideline L: Outside Activities
- Guideline M: Use of Information Technology Systems

Some of the names of the Guidelines have changed since the revisions. In addition, many of the individual disqualifying and mitigating conditions have been revised. Below, specific Guidelines will be addressed, with general notes discussing the new disqualifying and mitigating conditions. Italics have been added for emphasis, and are not included in the original Guidelines.

GUIDELINE B: FOREIGN INFLUENCE

- **General Notes:**
 - This Guideline covers an individual's situation, and does not address an individual's intent or actions.
 - The identity of the foreign country is now officially an important consideration.
 - There is now more of a burden on the government to show that the situations in this Guideline create a heightened security risk.
- **New disqualifying conditions include:**
 - Contact with a family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country *if that conduct creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.*
 - Connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.
 - Counterintelligence information, that may be classified, indicates that the individual's access to protected information may involve unacceptable risk to national security.
 - Sharing living quarters with a person or persons, regardless of citizenship status, *if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.*
 - A substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, *which could subject the individual to heightened risk of foreign influence or exploitation.*
- **New mitigating conditions include:**
 - The nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country *are such that it is unlikely the individual will be placed in a position of having to*

choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.

- There is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, *or* the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

GUIDELINE C: FOREIGN PREFERENCE

- **General Notes:**

- This was an area where DoD policy used to be very different from other agencies. The “Money Memorandum” – a DoD policy stating that clearances were automatically denied if an individual had a foreign passport and did not surrender it or obtain official approval for its use – is no longer valid. Now, the foreign passport must be current and valid to be a problem.
- There is no requirement to formally renounce dual citizenship – it is the exercise of dual citizenship by activities, such as use of a valid passport or voting, that is problematic.

- **New disqualifying conditions include:**

- The exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen...[t]his includes but is not limited to possession of a *current* foreign passport....
- Action to acquire or obtain recognition of a foreign citizenship by an American citizen.
- Any statement or action that shows allegiance to a country other than the United States.

- **New mitigating conditions include:**

- Use of a foreign passport is approved by the cognizant security authority [a high-ranking official – not the local security officer].
- The passport has been destroyed, surrendered to the cognizant security authority [this can be the ground-level FSO], or otherwise invalidated [such as defaced, cancelled, or expired].

GUIDELINE D: SEXUAL BEHAVIOR

- **General Notes:**

- The Concern has been revised to include the following statement: “No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.”

- **New mitigating conditions include:**

- The sexual behavior is strictly private, consensual, and discreet.

GUIDELINE E: PERSONAL CONDUCT

- **General Notes:**

- The biggest change in this Guideline is the new catch-all disqualifying condition which essentially states that if an individual’s circumstances don’t represent

enough of a problem under any one Guideline, that individual could still be ineligible for a clearance if there are security clearance concerns on the whole.

- The Concern includes a new statement that “[o]f special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.” Two additional provisions in the Concern which address that issue have been revised, in addition to the disqualifying conditions that address the issue.
- Third-party information must be credible.
- **New disqualifying conditions include:**
 - *Credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.*
 - *Credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:*
 - 1) Untrustworthy or unreliable behavior...;
 - 2) Disruptive, violent, or other inappropriate behavior;
 - 3) A pattern of dishonesty or rule violations;
 - 4) Evidence of significant misuse of Government or other employer’s time or resources.
 - While in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.
- **New mitigating conditions include:**
 - The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness or good judgment.
 - The individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the [problematic] stressors, circumstances, or factors
 - The information was unsubstantiated or from a source of questionable reliability.

GUIDELINE F: FINANCIAL CONSIDERATIONS

- **General Notes:**
 - The Concern has been significantly revised and expanded, and there are several new disqualifying conditions.
 - Compulsive gambling is covered extensively.

- The disqualifying condition regarding unexplained affluence has been expanded.
- **New disqualifying conditions include:**
 - Indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt.
 - Consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.
 - Failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.
 - Compulsive or addictive gambling....
- **New mitigating conditions include:**
 - The behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.
 - The conditions that resulted in the financial problem were largely beyond the person’s control ... *and the individual acted responsibly under the circumstances.*
 - The individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

GUIDELINE G: ALCOHOL CONSUMPTION

- **General Notes:**
 - Several of the disqualifying conditions have been revised to include the modifier: “regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.”
 - The mitigating conditions have been almost entirely revised, with some re-wording of old conditions as well as the addition of new conditions.
- **New disqualifying conditions include:**
 - Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.
- **New mitigating conditions include:**
 - The individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).
 - The individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress.

GUIDELINE H: DRUG INVOLVEMENT

- **General Notes:**
 - The Concern was rewritten, but the definition of “drugs” included in the Concern has not changed.

- The follow statement has been removed from the disqualifying conditions: “Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination.”
- **New disqualifying conditions include:**
 - Testing positive for illegal drug use.
 - Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.
 - Expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.
- **New mitigating conditions include:**
 - A demonstrated intent not to abuse any drugs in the future, such as:
 - 1) Disassociation from drug-using associates and contacts;
 - 2) Changing or avoiding the environment where drugs were used;
 - 3) An appropriate period of abstinence;
 - 4) A signed statement of intent with automatic revocation of clearance for any violation.
 - Abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

GUIDELINE I: PSYCHOLOGICAL CONDITIONS

- **General Notes:**
 - The Guideline was re-named from “Emotional, Mental, and Personality Disorders.”
 - The Concern has been rewritten, and now includes the following statements:
 - A formal diagnosis of a disorder is not required for there to be a concern under this guideline.
 - No negative inference concerning the standards in this Guideline may be raised solely on the basis of seeking mental health counseling.
 - A catch-all disqualifying condition was added.
- **New disqualifying conditions include:**
 - 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.
- **New mitigating conditions include:**
 - 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.

GUIDELINE J: CRIMINAL CONDUCT

- **General Notes:**
 - The Concern has been somewhat revised.
 - A waiver may be granted for two of the disqualifying conditions in certain circumstances; mitigation section (e) provides further explanation.
- **New disqualifying conditions include:**
 - Discharge or dismissal from the Armed Forces under dishonorable conditions.
 - Individual is currently on parole or probation.
 - Violation of parole or probation, or failure to complete a court-mandated rehabilitation program.
 - Conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.
- **New mitigating conditions include:**
 - Evidence that the person did not commit the offense [the previous mitigating condition required acquittal].
 - There is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

GUIDELINE K: HANDLING PROTECTED INFORMATION

- **General Notes:**
 - This Guideline was previously named “Security Violations.”
 - “Protected information” is broader than only classified information.
 - Several new disqualifying conditions have been added, and the mitigating conditions have been significantly changed.
 - Given the extensive changes to this Guideline, it would be best to review the entirety of the Guideline to review the revisions in lieu of a summary here.

GUIDELINE L: OUTSIDE ACTIVITIES

- **General Notes:**
 - This Guideline has not significantly changed.
- **New disqualifying conditions include:**
 - Any employment or service, whether compensated or volunteer, with ... any foreign organization or entity.
 - Failure to report or fully disclose an outside activity when this is required.

GUIDELINE M: USE OF INFORMATION TECHNOLOGY SYSTEMS

- **General Notes:**
 - This Guideline has been expanded and renamed from “Misuse of Information Technology Systems.”
- **New disqualifying conditions include:**
 - Use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system.

- Downloading, storing, or transmitting classified information on or to any unauthorized software, hardware, or information technology system.
- Unauthorized use of a government or other information technology system.
- Negligence or lax security habits in handling information technology that persist despite counseling by management.
- Any misuse of information technology, whether deliberate or negligent, that results in damage to the national security.
- **New mitigating conditions include:**
 - The misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available.

III. CONCLUSION:

As each security clearance case is unique and involves individual circumstances that may impact the outcome, it is important to seek legal advice as soon as possible when applying for a security clearance or when facing a security clearance issue. This article is intended for only general information. You should consult an attorney for specific legal advice.

If you have additional questions and would like to schedule a consultation appointment regarding your security clearance issues, please contact the Law Firm of John Berry, P.L.L.C. at (202) 955-1100. The author of this article can be reached at svins@worklaws.com.

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