

RECONSIDERATION AFTER THE DENIAL OF A SECURITY CLEARANCE

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Being denied a security clearance is not always the last chance of having one. Employees of contractors to the Department of Defense may request reconsideration of the denial or revocation of a clearance by filing a request with the Defense Office of Hearings and Appeals (DOHA) any time after one year from the date the clearance was initially denied or revoked. DOHA's rules of procedure describe the process.²

For employees of Defense Department contractors, DOHA's procedures are clearly described,³ but for government employees, military personnel or persons seeking review of SCI (Sensitive Compartmented Information) access decisions, the process for requesting reconsideration is not well defined. Agencies adjudicating those persons' clearances or access determinations have, unlike DOHA, not published procedures or guidelines on how to request reconsideration.

With respect to DoD contractor employees, the outcome in each reconsideration request depends on many factors. After an employee's security clearance has been denied or revoked, the employee may reapply to DOHA no sooner than one year after the date of an unfavorable initial decision.⁴ In the event that this initial unfavorable decision is an administrative judge's unfavorable decision, the time to reapply is calculated from the date on that decision, regardless of whether the administrative judge's decision is later appealed to the DOHA Appeal Board. Conversely, if the initial unfavorable decision is an Appeal Board decision reversing an administrative judge's favorable decision, the time to reapply is calculated from

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² The procedures for reconsideration are found at Enclosure 3 to DoD Directive 5220.6, (hereinafter referred to as the "Directive") which is the regulation controlling the operations of the Defense Office of Hearings and Appeals.

³ The DOHA Directive refers to the employee as the "applicant."

⁴ Directive, Enclosure 3, (Additional Procedural Guidance) ¶ E3.1.37

the date on the Appeal Board decision.

A request for reconsideration is begun by the employee's employer submitting a new Standard Form 86, Questionnaire for National Security Positions, to the Defense Industrial Security Clearance Office (DISCO) with a request for reconsideration.⁵ The employee's security office must submit the request through JPAS (the Joint Personnel Adjudication System). Within about sixty days, the employee will receive a letter from DISCO advising that the employee (i.e., the "applicant") is responsible for providing to the Director of DOHA a copy of the adverse clearance decision, together with any evidence the employee wishes to submit which would warrant reconsideration, such as any change in, or mitigation of, the circumstances or conditions which caused the applicant to have been previously denied.⁶

At this point, the employee should make as comprehensive and detailed a showing as possible of why the clearance should be reconsidered. If there has been a change of circumstances, the change should be fully described and documented. The evidence submitted of any changed circumstances should be completely documented, and should be prepared with the same care and thoroughness as if the employee were presenting his case initially to an administrative judge. For example, if the clearance was denied because of excessive debt, the employee should show that the debts have been paid, and that the employee is in good financial condition. If the denial was alcohol abuse, the employee should show that a sufficient period of sobriety has elapsed, and that there has been regular attendance at counseling or AA meetings.

Whether to even allow reconsideration of a denied clearance is within the complete discretion of the DOHA Director. Reconsideration is not automatically granted. The Director of DOHA must first determine from the information submitted that reconsideration is even warranted. Some requests simply will not indicate a sufficient change of circumstances to warrant reconsideration. If the Director does determine that reconsideration is warranted, the case will then be referred for a new

⁵ Directive, Enclosure 3, ¶ E3.1.38. The Joint Personnel Adjudication System (JPAS) is managed by the Defense Security Service. Information on its purpose, use and operation may be found at www.dss.mil

⁶ Directive, ¶ E3.1.38.

investigation and a new review of the changed facts.⁷

There are situations where reconsideration would probably not be granted, and the process would end there. For example, if the clearance was originally denied because the employee had a family member residing in a foreign country, and the family member was still there, the application would not be reconsidered. Similarly, if the employee had been denied a clearance because of failure to file tax returns, and the employee still had not filed his tax returns, reconsideration would surely be denied.

If the Director of DOHA determines that reconsideration is not warranted, the employee will be so notified. That decision will be final and unappealable, and will bar a further request for reconsideration for another year from the date of the rejection of the request for reconsideration.⁸

A determination by the DOHA Director that reconsideration is warranted simply begins the review process. The request will then be sent to the Office of Personnel Management for reinvestigation. Upon completion of the investigation, the case will then be referred back to DOHA to be reviewed by a Personnel Security Specialist. If, after the investigation and review is completed, it is determined that the issues causing the initial denial of the clearance have been sufficiently mitigated, the clearance will be approved. If, however, there are new issues, or if the old issues have not been resolved, the case will then be referred to DOHA's litigation branch, i.e., the office of the Department Counsel. A new Statement of Reasons will be issued, and the employee will then be entitled to a new hearing before an administrative judge and, if necessary, a new appeal to the DOHA Appeal Board.

The reconsideration process is far from quick. It may take as long as two to three months from the time that a request for reconsideration is submitted until the determination is made to grant or not grant reconsideration. The necessary investigation by OPM which follows may take another six to twelve. Once OPM's investigation has been received by a DOHA adjudicator, several more months may elapse before a request for a clearance is either granted, or a new Statement of

⁷ Directive, ¶ E3.1.39.

⁸ Directive, ¶ E3.1.40.

Reasons issued. If a new Statement of Reasons is issued and a responsive answer is filed by the applicant, the case will be sent to Department Counsel for preparation for a new hearing. The ensuing process of scheduling and holding the hearing, and a new decision being made by another administrative judge may take up to another six months.

The reconsideration process is long and arduous, however, time is frequently on the side of the employee. Debts can be paid, sobriety can be maintained, and more time can pass to allow circumstances to change in the employee's favor before a new hearing.

Reviews of clearance denials at other agencies, while technically not a reconsideration, are a review after the decision is made to deny clearance or access to SCI. While the time for review at DOHA may seem discouraging, when compared to reviews at other agencies, it is almost swift. For a contractor's employee, applying to the CIA for review of an initial denial of access to classified information may take up to five years. After the employee is notified that access to SCI has been denied, the employee will be given forty-five days to file a written response.⁹ An extension of time to respond will be allowed, if requested, to permit the employee to obtain the file on which the denial was based. Thereafter, a year or more may elapse before an employee is given the opportunity to appear personally before an agency representative to present his case orally.¹⁰ From that point, another year or two may pass before the CIA provides its decision on the initial appeal. If the decision is still adverse, the employee may appeal in writing to a three person panel for a final decision that may take another year or two.¹¹

The CIA, in its review of a denial of access, will only consider new evidence concerning the events which were the basis of its initial decision. It will not consider any new or mitigating evidence concerning events occurring *after* the initial denial. If the CIA does reverse the initial denial of access, that, in itself, is not a grant of access. It is only a reversal of the first decision. Since the job the employee may have

⁹ Director of Central Intelligence Directive 6/4 (hereafter referred to as "DCID 6/4"), Annex D, § 4.a.4.

¹⁰ DCID 6/4 Annex D, § 4.a.7.

¹¹ DCID 6/4 Annex D, § 4.a.6.

applied for or been considered for will by then be long gone, the employee's only recourse is to apply for a new position with the knowledge that the agency's first overturned decision will not be held against him. It is a pyrrhic victory.

Review by the National Security Agency (NSA) of decisions to deny access follow a similar path. The personal appearance, however, is before a three to five person panel. An NSA employee or a contractor's employee (referred to by NSA as an "affiliate") may request a review of the denial or revocation of SCI access within 45 days after being notified of the decision.¹² The review will be made by the Chief of Adjudications.¹³ If the review is sustained, the employee or "affiliate" can appeal to an Access Appeal Panel consisting of three to five members. The employee or affiliate may appear personally before the panel along with a personal representative, and may testify and present any additional documentation, but may not present or question witnesses.¹⁴ The decision of the Access Appeal Panel is by majority vote and is final.¹⁵ When the Access Appeal Panel decides to overturn a denial or revocation, it will provide a written rationale to the NSA Office of Personnel Security.¹⁶

Although the reconsideration process is lengthy, the reward, if successful, is great, especially if the applicant is working in a field where a security clearance is necessary.

¹² NSA/CSS Policy 5-14, § 9.

¹³ *Id.*, § 11.

¹⁴ *Id.*, § 16.

¹⁵ *Id.*, § 19.

¹⁶ *Id.*, § 22.