



## Security Clearance Appeals and Adjudications

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### **Introduction**

The Law Office of Henault & Sysko, Chartered was founded by former intelligence career employees of the National Security Agency. Our Attorneys have experience at every step of the process from administrative hearings to Federal Court. We have given presentations at national conferences, and been consulted and quoted by major media outlets on the topics of Security Clearances and Procedures. Our unique experience has played a significant role in the successful representation of our clients for more than three decades.

### **Security Clearance**

The term *security clearance* has been commonly used to refer to three categories of trustworthiness and reliability adjudications involving *Public Trust Positions*, *National Security Positions*, and *Special Access Programs*.

*Public Trust Positions* involve those position which could have the potential for adverse impact to the integrity and efficiency of the particular agency's mission. These positions are sensitive in nature, require a background investigation and "suitability" determination.

*National Security Positions* are the traditional security clearance position requiring a Personnel Security Clearance (PCL). These are positions that have the potential to cause damage to the national security and require access to classified information. The levels of classified access are Confidential, Secret, and Top Secret and are frequently referred to as *collateral clearances*.

*Special Access Programs* (SAP) involve a "need-to-know" and access controls beyond those normally provided for access to confidential, secret, or top secret information. One of the SAP known as *Sensitive Compartmented Information* (SCI) involves intelligence community information. SAP and SCI access can be thought of as special access which rides on top of the collateral clearance. The applicable **DoD Directive 5220.6** provides guidelines for collateral clearances and is specifically stated to be not applicable to SAP determinations. SCI determinations are made in accordance the guidelines issued by Director of National Intelligence, in **Intelligence Community**

**Policy Guidance (ICPG)704.2.** The 13 guidelines provided for in each regulations are substantially similar.

Decisions regarding eligibility for access to classified information take into account factors that could cause a conflict of interest and place a person in the position of having to choose between his or her commitments to the United States, including the commitment to protect classified information, and any other compelling loyalty. Access decisions also take into account a person's reliability, trustworthiness and ability to protect classified information. No coercive policing could replace the self-discipline and integrity of the person entrusted with the nation's secrets as the most effective means of protecting them. When a person's life history shows evidence of unreliability or untrustworthiness, questions arise whether the person can be relied on and trusted to exercise the responsibility necessary for working in a secure environment where protecting classified information is paramount.

### **Adjudicative Guidelines**

Whether **DoD Directive 5220.6, ICPG 704.2,** or an Agency specific regulation, generally all involve very similar guidelines covering thirteen generalized suitability categories:

#### ***Guideline 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.

#### ***Guideline B - Foreign Influence***

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target U.S. citizens to obtain protected information and/or is associated with a risk of terrorism.

#### ***Guideline C - Foreign Preference***

When an individual acts in such a way as to establish a preference for a foreign country over the United States, he or she may provide information or make decisions that are harmful to the interests of the United States. The principal goal of the Foreign Preference assessment is to determine the risk based on foreign associations that information may be compromised if access is approved; it is not a measurement of how loyal a subject is to the United States. Therefore, a finding that there is a preference must be established by adequate evidence of heightened risks related to national security. Furthermore, the fact that a U.S. citizen is or has become a citizen of another country does not establish a preference for a foreign country. Being a U.S. citizen and a citizen of another country is not prohibited or disqualifying absent a showing of heightened risks related to national security. The same is true for the exercise of any right, privilege or obligation of foreign citizenship or action to acquire or obtain recognition of a foreign citizenship by a U.S. citizen.

#### ***Guideline D - Sexual Behavior***

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

#### ***Guideline E - Personal Conduct***

Conduct involving questionable judgment lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of 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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility.

a. Refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation:

b. Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

#### ***Guideline F - Financial Considerations***

Failure or inability to live within ones means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information, An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds, Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

#### ***Guideline - G Alcohol Consumption***

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

#### ***Guideline H - Drug Involvement***

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

#### ***Guideline I - Psychological Conditions***

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when

evaluating potentially disqualifying and mitigating information under this guideline. No negative inference concerning the standards in this Guideline may be raised solely- on the basis of seeking mental health counseling.

***Guideline J - Criminal Conduct***

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

***Guideline K - Handling Protected Information***

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

***Guideline L - Outside Activities***

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

***Guideline M - Use of Information Technology Systems***

Noncompliance with rule& procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness. calling into question the willingness or ability to properly protect sensitive systems, networks, and information\_ information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

The individual circumstances of each incident, including the length of time since its occurrence, will be taken into account by investigators when determining if an individual qualifies for a security clearance. It is possible to obtain a security clearance even though an individual would not have been suitable in the past if investigators now believe the individual is reformed and is suitable. A candidate who is denied a security clearance will be notified of the reason for that decision and will have an opportunity to file an appeal. Each agency has its own appeal process.

Each case is judged on its own merits, and final determination remains the responsibility of the specific department or agency. The evidentiary standard is high - **Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.**

**Appeal Process**

It is important to understand that the denial or revocation of a security clearance may be a career altering experience which must be taken seriously. The critical decision whether to appeal should be made promptly to provide adequate time to engage professional assistance to prepare a comprehensive response to the government's Statement of Reasons or Letter of Intent. The

government has taken months to prepare its case against you. Once notified of the government's intention to deny or revoke your security clearance, you must comply with the procedural timetable which in some cases may be as short as 45 days. Time is operating against you.

The government has created extensive investigatory, procedural and security clearance adjudication processes to screen applicants to determine if access to government classified information is appropriate. The government evaluates a wide range of criteria including allegiance to the United States, foreign influence, foreign preference, sexual behavior, personal conduct, financial considerations, alcohol consumption, drug involvement, emotional, mental, and personality disorders, criminal conduct, security violations, outside activities and misuse of information technology systems to determine if granting access to the applicant is clearly consistent with the national security.

Sometimes adverse information concerning a single criteria may not be sufficient for an unfavorable determination but the applicant may be disqualified if available information establishes a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. Each security clearance decision is an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable. In evaluation of the relevance of an individual's conduct, the adjudicator considers factors as to the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of participation; the presence or absence of rehabilitation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and the likelihood of continuation or recurrence.

During the course of an investigation, the applicant may be asked to submit to a polygraph examination which in some circumstances is voluntary. Certain very sensitive activities involving intelligence sources and methods are under authority of the **ICPG 704.2**, which governs *Sensitive Compartmented Information* (SCI). Some Special Assess Programs (SAP) and Sensitive Compartmented Information accesses may have other additional security processing requirements such as Counter Intelligence and/or a full Life Style polygraphs. In these cases, the results of the polygraph examination, which generally are the applicant's admission during the examination frequently form part of the basis for denial or revocation. In this circumstance, the applicant becomes the government's primary witness against himself or herself.

Generally, each Department, Agency or Military Service has its own implementing regulations which are reasonably consistent but can provide variations in some procedures. In the case of government employees, each government entity usually has a Central Adjudication Facilities which is the decision authority for security clearances. In the case of Department of Defense contractors, the adjudication authority resides at the Defense Office of Hearings and Appeals (DOHA). There are generally two levels of appeal. The first level appeal for DOHA is an adversary hearing before an Administrative Judge, the second level involves written briefs to the Appeal Board. The first level appeal for SCI matters varies by agency but generally involves a detailed written resolve, where the second level involves an Access Appeal Panel. A personal appearance is also available for SCI appeals although generally does not involve the taking of third party testimony.

Security clearance adjudications is strictly an federal administrative process. The administrative decision after exhausting the appeal process is final. It is not subject to judicial review in accordance with the United States Supreme Court case of *Department of the Navy v. Egan*, 484 U.S. 518 (1988). In that case the Supreme Court stated “*A clearance does not equate with passing judgment upon an individual’s character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information.*”

## **Contact Us**

We have a broad range of experience navigating the complex security clearance appeals process for our contractor and civilian employees of the Defense and Intelligence Community clients. This experience coupled with civilian intelligence community experience provides a substantial additional benefit permitting Henault & Sysko, Chartered to represent our client effectively and efficiently.