
A Summary of the Security Clearance Appeals Process

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Berry & Berry, PLLC practices security clearance law and represents federal employees and government contractors during the security clearance appeals process. The security clearance appeals process varies to some extent depending on the organization where the cleared individual is employed. After an individual receives a security clearance denial, there are a number of appellate options for federal employees and government contractors. The security clearance appeals process generally proceeds according to the following steps.

1. Security Concerns are First Raised

Typically, a security clearance case first arises at the investigation stage. Following the submission of the initial SF-86/e-QIP security clearance package or during the security clearance investigator's interview, security concerns could develop. There are countless examples as to how a security concern may arise. One example is where there has been an arrest that has not been previously disclosed in the SF-86/e-QIP and is then raised by the investigator. Another example may be where the investigator asks about inconsistencies in one's financial background that gives rise to security concerns. However the security concerns arise, they will be evaluated to determine whether the individual may have access or continued access to classified information.

2. Security Concerns are Evaluated by Agency Adjudicators

Once a security concern is raised through an investigation, the next step involves a security review by the agency adjudicator. For most government contractors and federal employees, these concerns are reviewed by the Department of Defense Central Clearance Facility (DoDCAF). DoDCAF has recently been consolidated and is located in Fort Meade, Maryland. DoDCAF processes security clearances for most DoD employees and related government contractors. After the investigation is submitted, DoDCAF then makes a determination to either grant the security clearance or alternatively issue a Letter of Intent (LOI) to deny the requested security clearance. Security clearances handled by other federal agencies (e.g., CIA, NSA, DIA, NGA) follow a similar path at this stage.

3. Statement of Reasons (SOR) is Issued

When a security clearance is not approved, the DoDCAF or other governmental entity (depending on the individual's place of employment) issues a Statement of Reasons (SOR) that becomes the focus of a security clearance appeal. An employee, especially a government contractor, will likely receive some information from his or her Facility Security Officer (FSO) prior to the receipt of the SOR. The allegations contained within the SOR will be the start of any legal defense to the issues raised.

When our law firm consults with potential clients who have been issued an SOR, the first step is to go over the factual basis for the security concerns in depth, find out whether any or all of the allegations are true and whether there are key mitigating factors to address the security concerns. A significant level of detail is needed at this point in order to fully respond to the issues raised by the SOR. Following the SOR, the process moves to the response and appeals stage, depending on whether the individual is employed by a federal agency or a government contractor.

4. Appeals Process for Federal Employees

For federal employees, the Letter of Intent (LOI) to Deny a Security Clearance, along with the issuance of the SOR, is the start of the security clearance process. Generally, the first step, depending on the individual federal agency involved, is for the individual to notify DoDCAF of his or her desire to respond to the SOR and whether the individual wishes to request copies of the pertinent documents and records on file relied upon by DoDCAF in order to fully respond. Subsequently, the federal employee will respond in writing to the contentions in the SOR or to the individual federal agency involved. As previously noted, other federal agencies such as the CIA, NGA, DOE, etc., have separate but similar appeals processes.

Following receipt of the federal employee's response to the SOR, the clearance adjudicator (DoDCAF in this instance) will either grant the clearance, seek more information, or deny the clearance. If the clearance adjudicator agrees with the federal employee's written response, the matter is then resolved and the individual's security clearance is approved. If not, the next stage is for the federal employee to appeal the adverse security clearance decision. A federal employee's appeal of an adverse clearance decision by DoDCAF is completed either by requesting a decision from his or her agency's personnel security appeals board (PSAB) or by requesting the appointment of an administrative judge (and a hearing date) from the Defense Office of Hearings and Appeals (DOHA).

We generally recommend that federal employees and government contractors first appeal an adverse clearance decision from DoDCAF to DOHA. If the federal employee does not fall under DoDCAF, the individual's matter can go to a more senior level adjudicator as opposed to a DOHA administrative judge. For DOHA cases, the administrative judge will then hold a hearing, permit an individual to present evidence and to examine (and cross-examine) witnesses. Following the hearing, the administrative judge will then issue a recommended decision that will then go to the agency's PSAB for consideration. The PSAB, generally consisting of three members, will then vote on whether to grant the security clearance. It is better to have a full record before the PSAB in order to provide the best chance of success on the clearance action, so a hearing is generally recommended.

For federal employees of independent federal agencies, such as those with CIA, NGA, NSA, etc. there is a similar adjudication process involving a senior level adjudicator instead of a DOHA administrative judge.

5. Appeals Process for Government Contractors

For government contractors, the process of rebutting an SOR is somewhat different than the process used for federal employees. The clearance process falls under DoD Directive 5220.6, Executive Order 10865, and Executive Order 12968. A government contractor will normally be provided a letter from DOHA, with an attached SOR, and will be asked to answer five questions. Individuals will be required to respond in 20 days with a notarized answer to the security concerns in the SOR and asked whether they wish to have a hearing or a written decision.

Following the government contractor's answer, the SOR can be withdrawn by DOHA and access can then be granted. However, most security clearance matters move to the written decision or hearing stage. Our law firm generally recommends that government contractors request a hearing before an administrative judge. We have found in many cases that live hearing testimony can make a key difference in attempting to obtain a positive result regarding the security clearance appeal.

If a written appeal (no hearing requested) is made, then DoDCAF will send the applicant a File of Relevant Material (FORM) that contains the evidence against him or her in terms of the alleged security concerns and he or she will have the opportunity to rebut these security concerns in writing. However, if a government contractor elects an administrative judge and hearing, there will be the opportunity to present all of the individual's documentary evidence in support of maintaining or obtaining one's clearance and to examine witnesses in this case in support of granting a clearance.

If a person has significant security concerns it is crucial to request a hearing because we have often found that administrative judges tend to place more weight on direct testimony in more serious clearance cases. If the hearing goes forward, the administrative judge will then review the evidence presented and issue a decision that is final on the security clearance, barring a further appeal. If no response is elected (written or in the form of a hearing request), the government contractor's security clearance will be denied.

If an adverse security clearance decision is made, either in response to the written record or by an administrative judge, then the federal employee will have the opportunity to appeal the decision to the DOHA Appeal Board. Following the ruling by DOHA or the DOHA Appeal Board, the decision is generally final and not subject to further appeal. Following a favorable DOHA decision, DOHA notifies the contractor's employer about the security clearance decision and provides the procedures for later attempting to obtain a security clearance.

Contact Us

When facing a security clearance appeal, it is important to obtain legal representation in order to provide the best opportunity to maintain an individual's security clearance. Our law firm stands ready to represent and advise individuals on appeals issues in the security clearance process. We can be contacted at www.berrylegal.com or by telephone at (703)

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Practice Areas

Security Clearance