

April 1990

# DUE PROCESS

## Procedures for Unfavorable Suitability and Security Clearance Actions



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**National Security and  
International Affairs Division**

B-236496

April 23, 1990

The Honorable William D. Ford  
Chairman, Committee on Post Office  
and Civil Service  
House of Representatives

The Honorable Gerry Sikorski  
Chairman, Subcommittee on the  
Civil Service  
Committee on Post Office  
and Civil Service  
House of Representatives

The Honorable Don Edwards  
Chairman, Subcommittee on Civil  
and Constitutional Rights  
Committee on the Judiciary  
House of Representatives

In July 1989, you asked us for information on the procedures available to individuals who have been or may be determined to be unsuitable for federal employment or denied a security clearance. The procedures are known as administrative due process procedures, and they generally provide an individual the right to receive notice of any proposed unfavorable determination, the opportunity to respond to the proposed action, and the right to appeal any final decision. Appendix I contains the details of our review of applicable statutes, executive orders, and governmentwide regulations, as well as current administrative due process regulations at six agencies: the Departments of Commerce, Defense, Energy, Justice, State, and Treasury.

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**Results in Brief**

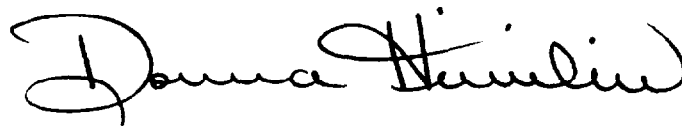
The Office of Personnel Management (OPM) is generally responsible for carrying out the civilian personnel suitability and security programs. Of the six departments, only Energy has departmental regulations which specifically contain administrative due process procedures for cases where an employee has been determined to be unsuitable for federal employment. However, adverse employee suitability determinations by the agencies are governed by OPM's regulations dealing with adverse actions, which contain administrative due process procedures.

The Departments of Defense, Energy, State, and Treasury have regulations that contain administrative due process procedures for employees who are denied security clearances. Regulations of the Departments of Commerce and Justice do not contain specific procedures. In cases where existing security clearances are revoked, the regulations of all of the departments except Commerce and Justice contain administrative due process procedures. Nevertheless, OPM's Federal Personnel Manual instructs agencies to comply with applicable administrative due process requirements. Justice's regulations state that the provisions of the manual, which contain administrative due process procedures, apply to situations not expressly covered in the regulations.

The Department of Energy's regulation contains administrative due process procedures for contractor employees. The other five departments participate in the Defense Industrial Security Program, which has regulations containing due process procedures.

As requested, we did not obtain agency comments on this fact sheet. Unless you publicly announce its contents earlier, we plan no further distribution until 30 days from the date of this letter. At that time, we will send copies to the Secretaries of Commerce, Defense, Energy, State, and Treasury; the Attorney General; and other interested parties. We will also make copies available to others upon request.

Please contact me at (202) 275-8412 if you or your staffs have any questions concerning this fact sheet. The major contributors are listed in appendix II.



Donna M. Heivilin  
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Major Contributors to This Fact Sheet		

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## Abbreviations

DOD	Department of Defense
OPM	Office of Personnel Management



# Administrative Due Process Procedures for Suitability and Security Clearance Determinations

## Background

Various statutes, executive orders, regulations, and other guidance set forth the procedures that agencies must follow in making suitability or security clearance determinations regarding federal employees and contractor employees. These procedures are designed in part to protect individuals when any unfavorable information could result in an adverse determination. These administrative due process procedures generally provide for an individual to receive notice of any proposed unfavorable determination, the opportunity to respond to the proposed action, and the right to appeal any final decision.

The Office of Personnel Management (OPM) is generally responsible, by statute and executive order, for carrying out the civilian personnel suitability and security programs.<sup>1</sup> Agencies are generally required to follow OPM's regulations. The Federal Personnel Manual, issued by OPM, defines suitability and security as follows:

- Suitability is a requirement or requirements for government employment, referring to an individual's character, reputation, trustworthiness, and fitness, as related to the efficiency of the service.
- Security refers to the employment and retention of an individual with duties relating to the protection and preservation of classified information. A favorable determination that an individual's handling of classified information is clearly consistent with the interests of national security is called a security clearance.

Adverse employee suitability determinations by agencies are governed by OPM's regulations on employee adverse actions in general, which contain administrative due process procedures. These regulations apply only to competitive service employees. For employees outside the competitive service,<sup>2</sup> OPM's Federal Personnel Manual states that agency heads, at their discretion, may apply all or part of its administrative due process procedures. OPM also has administrative procedures for final suitability disqualification actions against applicants and appointees.<sup>3</sup>

<sup>1</sup>For the personnel suitability program, see 5 U.S.C. 3301 and 3302 and Executive Order 10577, as amended; for the personnel security program, see Executive Order 10450.

<sup>2</sup>Excepted service employees are those outside the competitive service, such as Foreign Service and Federal Bureau of Investigation employees.

<sup>3</sup>An applicant is a person being considered for general employment eligibility or employment in a specific position. An appointee is a person who has entered on duty, but who is under the 1-year subject-to-investigation requirement that follows any appointment to a competitive service position.

Two executive orders address personnel security.<sup>4</sup> Executive Order 10450, issued in April 1953, contains factors about personal character and conduct that are used to establish whether the employment or continued employment of an individual in the federal civilian service is “clearly consistent with the interests of national security.” The order forms the basis of OPM’s civilian personnel suitability program, which includes procedures for determining security clearance eligibility.

Executive Order 10865, issued in February 1960, establishes the framework for granting security clearances to contractor employees, and identifies specific administrative due process requirements.

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## **Administrative Due Process Procedures for Suitability Determinations**

The Department of Energy’s regulations contain provisions for administrative due process procedures following unfavorable suitability determinations. According to representatives of the Departments of Commerce, Defense, Justice, State, and Treasury, these agencies use OPM’s procedures, which are contained in published regulations and the Federal Personnel Manual, for making employee suitability determinations. The regulations of the five departments do not specifically contain procedural instructions for making such determinations. According to an OPM official, there is no requirement for agencies to issue separate regulations that contain procedural requirements already contained in OPM’s regulations and Manual.

OPM’s regulations contain administrative due process procedures dealing with final suitability disqualification actions against applicants and appointees. The regulations state that the person against whom such an action is proposed shall be given notice of the proposed action, an opportunity to answer, notice of the final decision, and notice of rights of appeal.

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<sup>4</sup>A third executive order (Executive Order 12356, dated April 2, 1982), that governs the security of information also affects an individual’s access to classified information. The order requires that the agency determine the trustworthiness of persons seeking access, and that such access is essential to the accomplishment of lawful and authorized government purposes.



Adverse employee suitability determinations by agencies are governed by OPM's regulations dealing with adverse actions in general.<sup>5</sup> OPM's regulations provide that an employee who is removed or suspended for cause (e.g., on suitability grounds) is entitled to

- written notice of the proposed action, stating the specific reasons for the action;
- a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- representation by an attorney or other representative; and
- a written decision and the specific reasons for the decision at the earliest practicable date.

OPM's regulations also provide that an employee who receives an unfavorable determination is entitled to appeal to the Merit Systems Protection Board. An employee who files an appeal is entitled to a hearing and to be represented by an attorney or other representative.

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## **Administrative Due Process Procedures for Personnel Security Clearance Denials and Revocations**

The administrative due process procedures associated with denying or revoking security clearances are governed by two different authorities—one for federal civilian employees and the other for contractor employees. Executive Order 10450, "Security Requirements for Government Employment," is the basic authority for the federal government's personnel security clearance program and makes the head of each department responsible for determining if employees should be granted security clearances.

OPM, which is responsible for carrying out the civilian personnel security program, has identified in its Federal Personnel Manual minimum due process procedures that must be made available to federal employees when they are about to be denied a security clearance or have one revoked. Executive Order 10865, "Safeguarding Classified Information Within Industry," prescribes the specific due process procedures that are to be made available to contractor employees in similar circumstances.

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<sup>5</sup>OPM's regulations implement 5 U.S.C. 7503 and 7513, which entitle employees to certain procedural protections in the event of an adverse action, including unfavorable suitability determinations. Section 7503 covers employees who are suspended for 14 days or less for cause, while section 7513 applies to an employee's removal or suspension for more than 14 days.

A Department of Defense (DOD) official said that no specific executive order establishes due process procedures for military personnel. However, pursuant to general authority given in the National Security Act of 1947, the Secretary of Defense has made them subject to the same personnel security regulation that governs civilian personnel.

The Federal Personnel Manual identifies the following minimum due process requirements when agencies take unfavorable action as a result of information developed during an OPM investigation:

- notify the individual of the specific reason(s) for the decision,
- give the individual an opportunity to respond, and
- notify the individual of any appeal rights.

Executive Order 10865 provides that an authorization for access to classified information by a contractor employee may not be finally denied or revoked unless the individual is given the following:

- a written statement of reasons for the denial or revocation;
- a reasonable opportunity to reply to the statement of reasons;
- an opportunity to appear personally before the head of the department or a designee and present evidence;
- a reasonable time to prepare for such appearance;
- an opportunity to be represented by counsel;
- an opportunity to cross examine persons, either orally or through written interrogations; and
- a written notice of the final decision which, if adverse, specifies whether the head of the department or a designee agrees or disagrees with each allegation in the statement of reasons.

As discussed below, the regulations of four of the six departments contain administrative due process procedures for government employees whose clearances have been or are being denied or revoked. For contractor employees, provisions are in either the departments' regulations or in the DOD regulation that the departments accept when DOD administers the personnel security program in industry for them.

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**Federal Employee  
Clearance Denials**

Regulations of the Departments of Defense, Energy, State,<sup>6</sup> and Treasury contain specific administrative due process procedures for applicants and employees who are denied security clearances. The Department of Commerce's Personnel Security Manual does not specifically mention clearance denials, or the process to be used for such situations; however, a draft revision to the Manual does contain due process procedures, and a Commerce official said that the Department adheres to it. The Department of Justice's Personnel Security Regulations refer to giving applicants an opportunity to explain or refute derogatory information before a clearance is denied. The regulations do not explain how this is to be accomplished. However, they state that the provisions of Executive Order 10450 and the Federal Personnel Manual apply to situations not expressly covered in the regulations.

On the other hand, DOD's Personnel Security Program Regulation states that no unfavorable administrative action is to be taken unless the person concerned has been given

- a written statement of the reasons why the unfavorable administrative action is being taken;
- an opportunity to reply in writing;
- a prompt written response to any submission, stating the final reasons for the administrative action; and
- an opportunity to appeal to a higher level of authority within DOD.

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**Federal Employee  
Clearance Revocations**

Regulations of the Departments of Defense, Energy, State, and Treasury contain due process procedures for employees whose clearances are revoked. According to the Department of Commerce's Personnel Security Manual, the agency should provide employees with an opportunity to refute information that could affect their clearance, but does not explain the process for accomplishing this. The previously noted draft revision to the Manual details the process. Justice's Personnel Security Regulations do not refer to clearance revocations, but the regulations state that the provisions of Executive Order 10450 and the Federal Personnel Manual apply to situations not expressly covered in the regulations.

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<sup>6</sup>According to State's regulation, individuals are to be advised of the reasons for denial and procedures for obtaining access to their investigative files. There is no provision that the individuals be advised of any appeal rights, because there does not appear to be any provision for individuals to appeal a denial of a clearance.

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## **Contractor Employee Clearance Denials and Revocations**

The Department of Energy's Personnel Security Program Order states that contractor employees should receive the same due process as Energy's employees.

The Departments of Commerce, Defense, Justice, State, and Treasury participate in the Defense Industrial Security Program. Under the program, those agencies can assign the security administration of their contracts to DOD. Part of that administration includes investigating contractor employees; adjudicating investigative results; and granting, denying, and revoking personnel security clearances. DOD has established due process procedures for its contractor employees and those of agencies participating in the program. These procedures reflect the administrative due process requirements set forth in Executive Order 10865, which the industrial security program implements.

The program does not mandate that participating agencies assign security administration for all of their contracts to the Defense Investigative Service, the DOD unit that handles most of the security administration work for the program. Agencies may retain such responsibility for some contracts, as do some DOD military services and units.

As requested by the Subcommittees, we asked the Departments of Defense, Justice, and State to provide (1) any established criteria that is used to decide which contracts will not be assigned to the Defense Investigative Service for security administration, (2) information on the existence of due process available under these contracts, (3) the number of contracts in which the agencies conduct their own personnel security investigations and determinations, and (4) the number of contractor employees granted clearances on the basis of investigations not conducted by the Defense Investigative Service.

DOD officials said that most of the contracts not assigned to the Defense Investigative Service involved special access contracts,<sup>7</sup> and that the relevant policies and procedures include the criteria to be used in determining these exceptions. Security is the major consideration in that determination. Data on the number of special access contracts currently not assigned to the Service and the number of affected contractor

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<sup>7</sup>Contracts that support special access programs are designed to protect sensitive or compartmented classified information.

employees were not readily available. However, the Service had identified almost 1,100 such contracts in 1987.<sup>8</sup>

The Department of Justice does not have any formal criteria describing when contracts will not be assigned to the Service. According to a Justice official, other than the Federal Bureau of Investigation, Justice does not have many contracts that are not assigned to the Service. The Bureau is establishing its own industrial security program, patterned after DOD's program, including due process for contractor employees. A Bureau official stated that they did not have data on the number of contractor employees with clearances under contracts not assigned to the Service. At the time of our review, information regarding due process requirements for employees under these contracts was not readily available.

The Department of State's guidelines identify 13 categories of contractor personnel who must be investigated and granted clearances by State. The categories include such contractor positions as overseas warehouse guards and positions with "staff-like access."

State's Foreign Affairs Manual specifies that contractor employees, for the purpose of the regulations, will be considered as applicants or employees. The regulations contain due process procedures applicable to the denial and revocation of security clearances. State could not readily provide the number of contracts not assigned to the Defense Investigative Service for personnel security investigations. However, State said that during July and August 1989 it favorably adjudicated 131 cases involving contractor employees and rejected 13 on the basis of unsuitability.

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## **Unfavorable Determinations Involving Access to Special Access Programs**

Executive Order 12356, "National Security Information," and its implementing instructions authorize agency heads to create or continue a special access program to protect particularly sensitive classified information if (1) normal management and safeguarding procedures do not limit access sufficiently and (2) the number of persons with access is limited to the minimum necessary to meet the objective of providing extra protection for the information. Individuals who are authorized such access must already have security clearances.

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<sup>8</sup>Special Access Programs: DOD Is Strengthening Compliance With Oversight Requirements (GAO/NSIAD-89-133, May 4, 1989).

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**Appendix I  
Administrative Due Process Procedures for  
Suitability and Security  
Clearance Determinations**

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With the exception of procedures governing eligibility for access to sensitive compartmented information, there are no specific governmentwide due process procedures for denying or revoking access to information protected under special access programs. The Federal Personnel Manual makes no mention of special access programs.

Eligibility for access to sensitive compartmented information is governed by the Director of Central Intelligence Directive 1/14, "Minimum Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information."<sup>9</sup>

The Directive provides as follows:

"Persons shall be:

- a. notified of the denial or revocation of [sensitive compartmented information] access;
- b. notified that they may request to be provided the reasons for such denial or revocation; and/or
- c. afforded an opportunity to appeal,

whenever the Determination Authority of any entity, in the exercise of his or her discretion, deems such action in any given case to be clearly consistent with the interests of the national security."

Most of DOD's contracts not assigned to the Defense Investigative Service are in the special access category. The Service generally does not participate in the authorization for access to special access programs.

DOD's Personnel Security Regulation applies to military and civilian personnel and contractor employees. Its administrative due process procedures for denying or revoking access to classified information in special access programs are the same as the procedures established for security clearances.

The regulations of the Departments of Energy, Justice, State, and Treasury either do not mention access to special access programs or do not specify due process procedures for denials or revocations. The Department of Commerce's Personnel Security Manual states that an individual

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<sup>9</sup>The directive applies to all government civilian and military personnel, consultants, contractors, employees of contractors, and other individuals who require access to sensitive compartmented information.

denied access to sensitive compartmented information may appeal the decision within 45 days in accordance with appeal procedures in the Director of Central Intelligence Directive 1/14. A Commerce official said that the Central Intelligence Agency adjudicates cases involving Commerce employees who need access to sensitive compartmented information, and that Directive 1/14 is followed for those cases.

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## **Objective, Scope, and Methodology**

Our objective was to identify due process policies and procedures for individuals at the Departments of Commerce, Defense, Energy, Justice, State, and Treasury who were determined to be unsuitable for federal employment or had their security clearances denied or revoked. We interviewed officials of those departments and the Office of Personnel Management. We reviewed the applicable legislation and executive orders, Federal Personnel Manual, Code of Federal Regulations, and policies and regulations of the six departments. We conducted our review from August 1989 to January 1990 in accordance with generally accepted government auditing standards.

# Major Contributors to This Fact Sheet

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