

FEDS IN COURT

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Security Clearances

by Attorney Josh Bowers

Attorney Joshua F. Bowers has represented federal employees for nearly 20 years, including seven as an attorney in the national office of the National Federation of Federal Employees. Named Lawyer of the Year in 2002 by the Metropolitan Washington Employment Lawyers Association, Bowers has testified before Congress on federal employee issues, and represented his clients before the numerous administrative forums available to federal employees.

In this issue, Bowers answers a few key questions about security clearances.

Having a security clearance can make or break a fed's career. Has there been an increase in clearances being suspended or revoked?

Two key events in the past 20 years brought heightened scrutiny to the federal government's decision-making process for granting a federal employee security clearance. The first was the collapse of the Soviet Union and the resulting release of information identifying a few federal employees who were acting as Soviet agents. The government subsequently tightened the standards for granting and maintaining a clearance.

The next event was the attack on 9/11, which was followed by a more restricted application of the federal government's security clearance standards. As a result, misconduct that may have been overlooked 20 years ago now results in the revocation of a security clearance—and potential employment termination for failure to maintain the clearance.

What are the most common reasons for security clearance denial?

Historically, the motive for betraying any government *is* less likely to be ideology and more likely to be a desire for financial gain, or to be the result of a troubled personality as indicated by substance abuse or other antisocial behavior. These are two primary concerns when an agency reviews whether to grant or maintain a security clearance.

The greatest challenge when representing an employee with a history of either financial problems or substance abuse is to demonstrate that the employee is remorseful for that prior conduct, and that the problem is sufficiently in the past to justify retention of a clearance.

The Department of Defense (DoD) has provided guidance on what may constitute mitigating factors for past misconduct. These factors are not hard and fast. For example, if an employee has a history of severe problems with credit card debt, or has filed for personal bankruptcy, it will be adversely considered. If the financial crisis was brief and the result of an isolated incident such as a family medical crisis, the maintenance of a clearance can be defended by demonstrating the medical condition and financial difficulties are clearly resolved.

With any real or perceived misconduct, it is important for the employee to demonstrate remorse. With substance abuse or mental health issues, the best approach is to demonstrate the problem is in the distant past. If the problem is more recent, an employee should provide evidence of successful completion of a treatment program and a favorable diagnosis by a credentialed medical professional.

Where can an employee appeal the denial or revocation of a security clearance?

A security clearance is a privilege and not a right, and it may be denied or revoked with limited appeal rights. Most clearances are held by DoD civilian employees. DoD has a well-established appeal process, and decisions are posted on the Internet to provide insight. Other federal agencies have their own procedures.

The best chance to address security clearance concerns *is* during the opportunity to reply to a notice of intention to terminate a security clearance. At this stage, there *is* far more flexibility on the timing of the decision and the ability to marshal persuasive evidence. Once the agency's decision is made, however, the appeal process is expedited and the burden of proof difficult.

The Supreme Court in *Department of the Navy v. Egan*, (484 US 518 (1988)) effectively denied any review of the merits of a security clearance decision by a federal agency by either the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB). To date, the EEOC and MSPB retain limited jurisdiction to review only whether an agency provided a federal employee procedural rights when a clearance was denied or revoked. Security clearance law and procedures are complex. Representation by an experienced advocate may be a fed's best defense.

Josh Bowers is a graduate of Antioch College, in Ohio, and holds a master's in legal studies and a

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