

## **STATEMENT OF HAROLD J. KWALWASSER**

I am the Deputy General Counsel for Legal Counsel of the Department of Defense (DoD). I thank the Committee for the opportunity to appear before you to discuss various issues you have raised regarding the personnel security process at DoD.

In requesting my attendance, you asked that I address the following questions:

- The consistency of application of adjudication guidelines by DoD's adjudication facilities, particularly at the Defense Office of Hearings and Appeals (DOHA); and
- The implementation of peer review to assure consistent application of the guidelines throughout the DoD adjudication facilities.

In order to do so, I believe it would be helpful if I begin by providing some background about my own role in the personnel security process, a general overview of the applicable Executive Orders and Directives, and a description of the procedural process that an applicant for a security clearance must follow. I will then discuss my review of DOHA's decisions since 1996, which will address concerns the Committee has raised in response to press reports that DOHA's decision-making has not been following the guidelines or operating in a consistent manner. Finally, I will briefly address the issue of improvements in the personnel security process, which is also the subject of a longer statement by Mr. J. William Leonard, the Acting Deputy Secretary of Defense for Command, Communication, Control and Intelligence (C3I) for Security and Information Operations (S&IO), that is being provided to the Committee along with this statement.

**The Role of the Deputy General Counsel for Legal Counsel**

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The Defense Office of Hearings and Appeals is one of eight organizations in the Department of Defense that reviews personnel security cases. The other seven, which are all referred to as "central adjudication facilities" (CAF), handle cases involving DoD civilian and military personnel. DOHA generally handles employees of DoD contractors, although, as noted below, it does play a limited role in the adjudication of cases handled by the CAFs.

DOHA is part of the Defense Legal Services Agency, which is directed by DoD's General Counsel. As the Deputy General Counsel for Legal Counsel, I have been delegated oversight responsibilities for DOHA's operation. I have no equivalent responsibility for the CAFs, although I am familiar with their operations because my office provides legal advice to Mr. Leonard, who is responsible for overall personnel security policy on behalf of the ASD(C3I) throughout the Department.

#### **Applicable Executive Orders and Directives**

Although the adjudication guidelines about which the Committee is concerned are the same for DOHA and the CAFs, the history of the organizations is different - as are the applicable Executive Orders and DoD Directives.

The organization currently called DOHA is the outgrowth of the Supreme Court decision in *Greene v. McElroy*, 360 US 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959), which involved a contractor employee who had been denied a security clearance without a hearing. *Greene* stressed the importance of a security clearance applicant's need to have the traditional due process elements of confrontation and cross-examination when facts are disputed and noted the importance of access to the evidence the Government used as a basis to deny or revoke the security clearance. *Id.* p. 496. In response, then

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President Dwight Eisenhower issued Executive Order 10865 mandating hearings in security clearance cases for contractor employees.

EO 10865, as amended by EO 10909, 11382 and 12829, [Attachment to TAB A] has been implemented at the Department of Defense by DoD Directive 5220.6 [TAB A], also found at 32 CFR 155. The CAFs are not governed by either these Executive Orders or DoD Directive. They currently operate pursuant to EO 12968, issued in 1995, [TAB B] and DoD Regulation 5200.2-R [TAB C]. The procedural differences between the two systems will be explained below.

The adjudication guidelines [TAB D] in which the Committee is interested are the same for all the organizations. They were issued by the National Security Council in 1997 as part of the implementation of EO 12968, and are incorporated in the applicable DoD Directives, such as 5220.6.

The guidelines represent an effort to create one set of adjudicative standards for the entire Government. Prior to their issuance, each federal agency had its own standards. (DoD, as one agency, had one set of standards.) While they were similar, they were not the same, thereby creating a great deal of inefficiency as agencies would resist recognizing other agencies' clearances since they had not been adjudicated under the first agency's standard.

According to the policy:

[t]he ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration of [thirteen specific guidelines], each of which is to be evaluated in the context of the whole person....

Those guidelines are: (1) allegiance to the United States; (2) foreign influence; (3) foreign preference; (4) sexual behavior; (5) personal conduct; (6) financial considerations; (7) alcohol consumption; (8) drug

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involvement; (9) emotional, mental and personality disorders; (10) criminal conduct; (11) security violations; (12) outside activities; and (13) misuse of information technology. The adjudicators are further directed to evaluate the relevance of the conduct by considering factors such as:

- its "nature, extent and seriousness...,"
- "the circumstances surrounding the conduct...,"
- its "frequency and recency...,"
- "the potential for pressure, coercion, exploitation, or duress,"
- "the likelihood of continuation or recurrence,"

and other similar parameters. In addition, the adjudicators are to take into account mitigating information, such as:

- whether the person "voluntarily reported the information,"
- "was truthful and complete in responding to questions,"
- "sought assistance and followed professional guidance," and
- "has demonstrated positive changes in behavior and employment."

These mitigating factors reflect our deeply-held societal belief, regularly demonstrated in a variety of governmental policies, in the ability of secular rehabilitation and/or personal and spiritual renewal to change individuals' behavior. The consistent application of these relevance and mitigation factors, rather than the guidelines themselves, is the significant challenge for the adjudicative process. **The**

### **Personnel Security Clearance Process**

In security clearances cases, the process typically starts with the submission of a request for a clearance investigation, re-investigation or report of violation to the Defense Security Service (DSS). DSS

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then conducts an investigation. For secret clearances, investigations focus primarily on a review of the answers to the SF-86 questionnaire form that the applicant has provided, as well checking national and local criminal records data bases and personal financial information. For top secret clearances, applicants face more extensive background checks that include DSS agent interviews with people who know the applicant and his or her background.

For contractor employees, the DSS then reviews the file as part of its quality control process to assure that the investigation is complete. In addition, if the reviewer finds that there is no, or minimal, derogatory information in the file, he or she is authorized to grant the clearance without sending the package on to DOHA. DSS' decision-making is guided by a Decision Logic Table that has been designed to provide guidance when approving such a "clean case" is appropriate. In fact, the great majority of contractor employee cases are resolved in this fashion. CAF cases, however, are sent to the adjudication facilities prior to such clearance determinations, so that "clean cases" for DoD civilian and military employees are resolved at the CAFs themselves.

Approximately 12,000 contractor cases a year are normally sent from DSS to DOHA. In CY 1999, however, the number dropped to 5,107 because of problems at DSS. At DOHA the investigative packages are initially screened by trained security specialists (generally GS-11s - 14s), who have the assistance of DOHA counsel. They also review the files for completeness, and, if everything is in order, they assess whether it is appropriate to issue a clearance under the guidelines set out in Directive 5220.6, notwithstanding the presence of some derogatory information. If the decision is to grant a clearance, the security specialist prepares a memorandum of record (case summary) that sets out the essential facts and pertinent adjudication guidelines considered in arriving at the conclusion. After supervisory review,

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DOHA advises DSS of the clearance action, and DSS in turn advises the contractor. The security specialists granted 3,543 clearances in CY 1999. Approximately 98-99% of all contractor employee cases are thus resolved at either the DSS or DOHA security specialist level. [TAB E.] The process in the CAFs is similar.

If the security specialist concludes that granting a clearance is not clearly consistent with the national security, he or she prepares a Statement of Reasons (SOR) setting forth why DOHA is unable to grant the clearance, detailing the applicable facts and relevant guidelines. The SORs are sent to applicants, who are invited to respond. If there is no response, DOHA considers the matter a "default," and denies the clearance. In CY 1999, there were 122 defaults. If the applicant responds, he or she may elect to submit a response in writing or request a hearing. Upon receipt of a response, DOHA provides the applicant with the documents that supported the issuance of the SOR.

At this point, there are differences in procedure between DOHA and the CAFs arising from their different historical and regulatory underpinnings. DoD civilian and military personnel cannot request a hearing at this point. Also, except for the Washington Headquarters Service's CAF, the applicant will not receive the documentation supporting the CAF's decision without filing a Privacy Act request.

At DOHA, the case now goes before an administrative judge. The judges are not administrative law judges. They are all experienced lawyers who are GS-15s. Most have previously been Department Counsel (the lawyers at DOHA who advocate the government's case against granting a clearance).

DOHA assigns contested cases to one of its Department Counsel. When the applicants do not ask for a hearing, Department Counsel compiles and submits all relevant documentation to an administrative

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judge. The applicant also has the opportunity to submit additional documentation to the administrative judge.

When there is a hearing, both sides have the opportunity to present live witnesses and cross-examine those offered in opposition. Both sides also present their documentary evidence. There is a verbatim transcript. Although there is not strict adherence to the Federal Rules of Evidence (for example, copies - rather than originals - are permitted), DOHA applies traditional legal concepts, such as "collateral estoppel," which prevents applicants from re-litigating the merits of felony convictions or civil judgments.

The administrative judge then prepares and issues a decision that discusses the relevant facts and each of the applicable guidelines, including mitigation factors. These decisions, in redacted form, are available in the DOHA library and are available on the Web and through Westlaw. Over the past four years, the administrative judges have denied clearances in approximately three-quarters of the cases they have heard. [TAB E.] Fewer clearances are granted for cases resolved without a hearing. For example, in FY 1999, administrative judges denied 84% of cases where there was no hearing, but only 59% of the cases where there was one. One possible explanation for this result is that applications with doubtful cases are less likely to make the effort to ask for, and participate in, a hearing.

The CAFs' adjudication process differs from DOHA's in several respects. Obviously, if there is no hearing, there is no opportunity for the adjudicator to hear live testimony or evaluate witnesses during examination or cross-examination. Also, the adjudicators may rely on the DSS' reports of investigation, which EO 10865 expressly precludes in contractor employee cases. Finally, the CAFs' written decisions

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are also generally more summary in their descriptions of the reasons for the grant or denial of the clearance, and they are not available on the Web.

The appeal process also differs between DOHA and the CAFs. For DOHA, the appeal goes to an Appeal Board composed of three administrative judges. Under Directive 5220.6, the Board must determine if:

- a. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record ... ,
- b. The Administrative Judge adhered to the procedures required by Executive Order 10865... and this Directive, or
- c. The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law.

The Board may not take new evidence.

The Appeal Board then prepares a decision affirming or reversing the administrative judge's decision, or it may remand the case for further consideration. The decision is published and available for review. Of the 38 clearance grants appealed to the Appeals Board in the last four years, 21 have been reversed (and denied), 11 affirmed and 6 remanded. Of the 133 denials appealed, 126 have been affirmed, two reversed (and granted) and five remanded. [TAB F.]

The CAF appeal process is different. If a CAF adjudicator grants a clearance, there is no appeal to the CAF's Personnel Security Appeal Board (PSAB). If the applicant has been denied a clearance, he



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or she may appeal on the written record, but he or she may also request a "personal appearance," a step in the process that was added by EO 12968.

The personal appearance takes place before a DOHA administrative judge. However, this process is unlike a hearing for a contractor employee. There are no witnesses other than the applicant, and there is no cross-examination. No equivalent to Department Counsel is present for the Government. The DOHA administrative judge issues a recommended, non-binding decision, which is forwarded to the PSAB along with a transcript of the proceeding.

Since 1996, the PSABs have concurred in the DOHA administrative judges' recommended decisions in approximately 80% of the cases. [TAB G.] During CY 99, DOHA Administrative Judges issued 142 recommended decisions used by PSABs to render final decisions. Of these, the DOHA administrative judge recommended affirmation of the CAF denial or revocation in 82 cases or 58 % of the total. Of these recommendations to affirm the CAF (and deny or revoke), the PSABs agreed with DOHA in 75 or 91 % of the cases. The PSABs disagreed with both the CAF and DOHA in only 7 cases or 9 %.

DOHA administrative judges recommended grant of the security clearance (reversal of the CAF) in 60 cases or 42 %. Of these DOHA recommendations to grant the clearance, the PSAB agreed with the DOHA recommendation and reversed the CAF in 39 cases or 65%. In assessing the significance of these numbers, however, it is important to keep in mind that the DOHA administrative judge had the benefit of the personal appearance of the applicant, which may in some cases have significantly altered the state of the record available to the initial adjudicator.

When a PSAB considers an appeal, it is not required to give deference to the factual findings of the adjudicator or the DOHA administrative judge (although it is free to do so if it wishes). It may request

additional information. PSAB decisions, which can affirm, reverse or remand initial decisions, follow an abbreviated template format, dissimilar from DOHA's written decisions. They are also not available on the Web.

A summary of the two processes follows:

**DoD PERSONNEL SECURITY CLEARANCE DUE PROCESS<sup>1</sup>**

<b>Contractor-employee</b>	<b>DoD civilian and military member</b>
DSS grants cases with no or minimal derogatory information.	CAF adjudicates all cases
DOHA security specialists grant clearances when SOR issuance is unwarranted.	CAF security specialists grant clearances when SOR issuance is unwarranted.
DOHA security specialist issues SOR when unable to grant clearance.	CAF security specialist issues SOR when unable to grant clearance.
DOHA denies or revokes security clearance if no response to SOR.	CAF denies or revokes security clearance if no response to SOR.
DOHA refers SOR case to Administrative Judge (AJ). Department Counsel represents Government; provides documents.	WHS provides documentation supporting SOR. Military CAFs provides documentation only if requested under Privacy Act.
If no hearing requested, Department Counsel automatically provides documentation to AJ and applicant.	See box above.
If a hearing is requested; both sides can present and cross-examine witnesses, and present and challenge documentation.	No comparable CAF procedure. See box above.
AJ issues clearance decision based on entire hearing record including any transcript and all documents.	CAF issues decision based on investigative file and applicant's written SOR response.
Department Counsel and applicant may appeal decision to DOHA Appeal Board.	CAF grants are not appealed. Applicant may appeal denials or revocations to PSAB, or ask for a personal appearance before DOHA AJ.
No comparable DOHA procedure; there is no opportunity for another personal appearance on appeal.	In personal appearance, only applicant may testify. No Government witnesses. AJ submits recommendation to PSAB.

<sup>1</sup>A larger version of this chart is included at TAB H.

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DOHA Appeal Board reviews for legal or factual error, does not take new evidence.	PSAB conducts de novo review of CAF information, DOHA AJ recommendation, and may also obtain additional information.
DOHA Appeal Board decisions to affirm or reverses, or returns case to AJ for further consideration.	PSAB affirms, reverses, or returns case for further CAF consideration.

**Review of Cases 1996-2000**

In order to assess whether DOHA has been following the adjudicative guidelines in a consistent manner, I directed a review to be undertaken of all of DOHA's decisions that appear on the DOHA Website, which covers all administrative judge and Appeal Board decisions issued since November, 1996.

All of these decisions may be readily reviewed by Committee staff. This data base contains 920 cases. I first asked that a search be done for those cases where there might be fact patterns similar to the ones involved in the cases that have been previously reported in the press. A further analysis of the results of the initial search determined that 87% of the cases identified involved denials of clearances. Based on the Committee's interests, I did not further review these cases and focused instead on the 13% in which a clearance was granted.

I reviewed each of the decisions in this remaining subset. Based on that review, I am confident that there is broad, consistent application of the guidelines. I obviously did not have access to all the evidence available to the Administrative Judges, including live testimony. Nevertheless, I found fewer than one percent of the 920 cases in which I would question the result. That number represents less than .03% of all clearances granted during the 3 1/2 year period.

Among these few exceptions, there are three issues that DoD and the rest of the security community need to consider:

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First, falsification of the security application or lying to DSS investigators goes to the heart of the process and raises fundamental questions about the aspect of a person's integrity that may be highly relevant in assessing the extent to which the individual poses a security risk. To overcome findings of falsification should require a particularly compelling showing of mitigating factors.

Second, in cases alleging tax problems, there may need to be a re-assessment of whether the belated filing of a tax return under the pressure of a DSS investigation or DOHA hearing is a sufficient "mitigating factor" to excuse the behavior. My review of the cases suggests that filing returns close to the hearing is generally accepted as mitigation; it is thus a "consistent application" of the guidelines. One may question, however, whether this result is appropriate, particularly where the individual may have other financial problems. This issue may need review and the issuance of additional guidance in training.

Third, in cases involving recidivist criminal behavior, additional guidance may be helpful on the issue of how much time should elapse after the last report of inappropriate behavior in order to demonstrate that the conduct will not occur again. Although administrative judges often note that the applicant is in some form of treatment and may in addition have adopted a change of life style that makes the re-occurrence less likely, they rely solely on the passage of time to demonstrate that these changes have firmly rooted. If the time is relatively short, the proof is open to question. Because of the uniqueness of virtually every case in this area, it is difficult to assess the issue of "consistency." Notwithstanding the humanitarian impulse behind these decisions, it may be that DoD needs to issue guidance on what constitutes a sufficient period of good behavior to permit an administrative judge to conclude that the disqualifying behavior is neither "recent" nor likely to "recur," as required under the mitigation factors.

### **Measures to Improve the Process**

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The Committee has asked about what measures the DoD has undertaken to improve the consistent application of the guidelines, and has specifically inquired about the suggestion made in a 1998 Inspector General's report that the Department institute "peer review." [TAB I.]

I defer the extensive discussion of this issue to the statement that Mr. Leonard has submitted to you. However, I do have some comments that I wish to make on behalf of DOHA.

- DOHA believes in the concept of peer review. It is already conducting informal peer review among its administrative judges, who review each other's decisions before they are issued. It is looking forward to moving to a more formal peer review process as part of a Department-wide policy initiative. However, it is important to note that DOHA's support of peer review does not reflect a belief that there has been widespread, inconsistent application of the guidelines. Rather, DOHA believes that peer review is an effective tool to assure quality control and continued peer-directed education.
- DOHA supports the work of the Security Research Center (SRC). The SRC is currently studying the question of the consistent application of the adjudication guidelines, and DOHA believes that the report's recommendations will provide helpful guidance on how to improve the Department's performance.
- DOHA has also reached out to meet with members of the CAFs and PSABs to discuss issues of mutual concern, including how to assure that everyone is addressing similar factual issues in similar ways. Last fall, for example, DOHA hosted a meeting attended by members of the CAFs and PSABs to discuss emerging issues and common problems in adjudication. DOHA is planning

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further such meetings, and it looks forward to participating in the bi-annual meetings C3I will sponsor.

- DOHA management also provides guidance to security specialists and administrative judges when new developments arise. For example, last year, I joined senior management in visiting DOHA's Columbus, Ohio office, which houses most of DOHA's security specialists, to discuss how to assess certain emerging security issues.
- DOHA administrative judges attend the Department's advanced training courses. They are valuable educational opportunities. DOHA supports the expansion and enhancement of these programs. DOHA is looking forward to receiving C3I's new training CD-ROM, which is a further advance in providing DOHA with effective educational tools.
- DOHA also values the Adjudicator Desk Reference that the Department has prepared for all adjudicators, security specialists, Department Counsel and administrative judges. It is a helpful guide to handling complex or new factual situations.

I thank you for the opportunity to appear before you.