Westlaw Journal
GOVERNMENT CONTRACT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 27, ISSUE 16 / DECEMBER 9, 2013

EXPERT ANALYSIS

The Perfect Storm for Increased Scrutiny Of the Cleared Workforce: What Contractors Need to Know

By Dismas N. Locaria, Esq., and James Y. Boland, Esq.,
Venable LLP

After the damning security leaks by Edward Snowden and the Washington Navy Yard shooting, many people in Washington are turning their sights to additional regulation to protect national security and military installations. This renewed focus is probably further supported by the increasing awareness of our nation's vulnerability to cyber attacks. Indeed, both the executive and legislative branches of government are examining this very issue.

In the wake of the Navy Yard shooting, the Department of Defense launched at least three separate reviews related to the procedures and controls surrounding security clearances. The findings of these reviews — one headed by the Office of the Secretary of Defense, the second by a group of independent outsiders and the third by the Navy — will be reported to the White House, which is conducting its own government-wide review of the security clearance process through the Office of Personnel Management.

More recently, in an October committee hearing, the Senate began voicing its concern regarding the steps or missteps that OPM took concerning the security clearance of the Navy Yard gunman, Aaron Alexis. Sen. Claire McCaskill, D-Mo., pointed out that some of the issues stem from incomplete police work — "The criminal justice system does a very bad job adjudicating the mentally ill. ... Most of the time, the police department won't event try to file charges." However, Kelly Ayotte, R-N.H.; Heidi Heitkamp, D-N.D.; and Tom Coburn, R-Okla.; expressed their desire to see federal investigators use online information. Heitkamp remarked:

> When you apply for this clearance, you waive your right to privacy. Every parent on this committee knows if you want to know what your kids are doing, go on social media.

In conjunction with this hearing, McCaskill and Ayotte introduced a bill Oct. 30, called the Enhanced Security Clearance Act of 2013 (S. 1618), seeking to require OPM to conduct periodic searches of publicly available information on every individual with a clearance at least twice every five years. This proposed legislation, which is already receiving positive reviews from industry, comes on the heels of the proposed Security Clearance Oversight and Reform Enforcement (SCORE) Act, a bill introduced in July to hold contractors who are engaged in background investigations more accountable.

Of course, the renewed focus on the clearance process has been exacerbated by new information that paints contractors and individuals who are eligible for security clearances in a negative light. In particular, the Government Accountability Office recently released a report showing that more than 8,000 individuals and government contractors who are eligible for security clearances owed more than $85 million in unpaid federal taxes. GAO-13-733 (Sept. 10, 2013). This is to say nothing of the fact that the primary contractor responsible for assisting OPM in performing background investigations is embroiled in a False Claims Act lawsuit in which the Department of Justice recently intervened.

The process of clearing contractor personnel is an issue that is coalescing into a perfect storm.

Taken together, even in a time of partisan gridlock, the process of clearing contractor personnel is an issue that is coalescing into a perfect storm and is garnering bipartisan support for new legislation or regulation, or, at a minimum, tighter enforcement and stricter scrutiny under the existing system. Whether change is imminent or not, given the intensity of the current environment, you and your cleared employees should understand the current legal standard for clearance decisions so you are prepared to successfully challenge an adverse decision, proactively avoid an adverse decision in the first place and fully appreciate the impact of various legislative proposals.

THE CURRENT SYSTEM

The principal question when deciding to grant, deny or revoke a clearance is "whether it is clearly consistent with the national interest" to grant or continue a security clearance for the applicant. DOD Directive 5220.6, Jan. 2, 1992 ¶ 3.2 (as amended). This is the standard that the Defense Office of Hearings and Appeals, or DOHA, a component of the Defense Legal Services Agency, will apply when adjudicating a contested clearance. Determining what is "clearly consistent" with the nation's interests is, of course, the challenge. Tolerance for certain behaviors or risks in a contractor's background, as well as mitigating factors, may evolve over time. In fact, what may have been sufficient to qualify as "clearly consistent" with the national interest several years ago may no longer be the case in light of the recent high-profile crimes committed by cleared personnel.

To guide DOD adjudicators and decision makers, the DOD directive provides that a clearance decision must be a "fair and impartial common sense determination" that takes into consideration a number of factors, including the nature and seriousness of the conduct surrounding the circumstances at issue, the frequency and recency of the conduct, the age and motivation of the applicant, the absence or presence of rehabilitation and the probability that circumstances or conduct will continue or recur. DOD Directive 5220.6 ¶ 6.3.

Applicants are to be judged "in the context of the whole person" and not based on a single, isolated issue or incident in their background. DOD Directive 5220.6, Enclosure 2, Adjudicative Guidelines; 32 C.F.R. § 154, Append. H ¶ (2)(c). The current clearance system uses broad guidelines, one or more of which must be invoked in order to deny or revoke a security clearance.

The guidelines identify specific risks and vulnerabilities associated with an applicant's allegiance to the United States, foreign influence, foreign preference, sexual behavior, personal conduct, financial considerations, alcohol consumption, drug involvement, psychological conditions, criminal conduct, handling of protected information, outside activities and use of information technology systems.

Finally, if these guidelines were not broad enough, there is a catchall that allows an applicant to be disqualified if "available information reflects [a] recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior." Adjudicative Guidelines ¶ (d).

The guidelines not only address an applicant's direct propensity to violate the terms of clearance because he or she is untrustworthy, unreliable or disloyal, but also whether facts in the applicant's background would suggest that he or she may be susceptible to being influenced (*e.g.*, blackmailed) or coerced into disclosing classified information. These latter considerations are typically the perceived security concerns that surprise most government contractors because they do not directly implicate the individual's character or behavior. Instead, they exist solely on the basis of environmental factors that could place an individual in a vulnerable position, irrespective of the person's long-standing loyalty to the United States and unblemished record. Of course, they also add a good degree of subjectivity to the review process.

The "clearly consistent" standard is sufficiently general and undefined so as to afford the government with considerable discretion in deciding whether to grant, deny or revoke a clearance. Due to the increasing scrutiny of contractor clearances, with many people asking how individuals such as Snowden or Alexis could obtain a clearance in the first place, contractors should expect, at a minimum, that government adjudicators will now be less forgiving of incidents in a contractor's background, even without any legislative changes to the current legal standards governing access to classified information.

Moreover, the government will probably increase the number of proposed clearance revocations, which will shift the burden to contractor personnel to overcome the government's concerns by having to affirmatively demonstrate that continued access to classified information is clearly consistent with the national interest — a task that is always an uphill battle once a clearance has been proposed for revocation.

Many proposed legislative changes are process-oriented; these changes include expansion of the amount of information reviewed in a background investigation and increases in the frequency of reviews, with less attention to the governing legal standard. This is probably due to the fact that, as written, the current standard, which was revised in 2005, already seeks to err on the side of denying a clearance, because the burden is on the applicant to demonstrate that a clearance is clearly consistent with the national interest. The adjudicative standards provide that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." Adjudicative Guidelines ¶ (b). For this reason, in legal cases reviewing clearance disputes, the DOHA decides any "ties" or close calls in favor of the government, not the applicant.

Core gaps and vulnerabilities in the current clearance process are probably more attributable to the lack of sufficient background information available to investigators and the infrequency of reviews than to an insufficiently robust legal standard. These gaps and vulnerabilities have resulted in the ability of high-risk or dangerous individuals such as Snowden and Alexis to obtain access to classified information and secured facilities.

That is not to say, however, that the legal standard for determining eligibility provides the government with an unfettered right to deny a contractor a clearance because of any perceived risk, no matter how slight. Contractors are still entitled to a degree of due process under the existing standards. Therefore, even with an improved background investigation process, which will invariably result in more information available to adjudicators, contractors will still have an opportunity to demonstrate their eligibility for a clearance.

The government will probably increase the number of proposed clearance revocations.

OVERCOMING ADVERSE FACTORS

Knowing that increased scrutiny is coming, whether through direct legislative or executive action or simply as a result of adjudicators applying the current standards more rigorously, it is important for contractors to understand one of the keys to overcoming an adverse decision regarding a clearance. For many contractors, experienced, cleared personnel are among the company's most valuable assets, since they represent a substantial investment in training, technical development and company loyalty. The loss of a clearance for certain individuals can have serious repercussions, particularly when those individuals are considered key personnel.

A legal challenge to an adverse clearance decision is adjudicated under the adjudicative guidelines. Enclosure 2, DOD Directive 5220.6; 32 C.F.R. § 154, Append. H). Although the government is afforded substantial discretion, it must justify an adverse clearance decision based on various factors that could raise a security concern. Once the DOD identifies such a factor, it becomes the applicant's burden to demonstrate that one of several specifically enumerated mitigating factors are present so that, when examined in the "context of the whole person," granting access or continuing eligibility to the applicant is "clearly consistent with the national interest."

Under existing guidelines, the DOD adjudicator will consider such things as whether the individual voluntarily reported the adverse information, whether he or she was truthful and complete in providing responses to questions (*e.g.*, SF 86, Questionnaire for National Security Positions), whether the person took steps to resolve the security concern or is likely to favorably resolve the security concern and whether he or she has demonstrated positive changes in behavior and employment. What this means is that the mere fact that information in one's background may present a security concern is not dispositive. The applicant has an opportunity to address the concern and show that continuing to have access to classified information is still clearly consistent with the national interest.

As these factors show, honesty combined with prompt, voluntary corrective action goes a long way toward resolving security concerns, even if the applicant disagrees that corrective action is necessary. A contractor is far more likely to successfully mitigate an identified security concern by taking affirmative steps to neutralize it than to solely argue that the issue is not, from the contractor's perspective, a genuine security concern.

Moreover, it is far better to proactively mitigate potential security concerns before they are identified by the government. Your cleared personnel should be intimately familiar with the DOD guidelines so that they fully understand the type of factors that could give rise to a security concern, and they should be familiar with the mitigating factors so they understand what steps should be taken to neutralize a perceived concern.

For example, with an increasingly diverse workforce, the perception of "foreign influence" is a source of many potentially adverse clearance decisions. It can arise when an employee has any contacts with other countries that could make the person vulnerable to coercion, exploitation or pressure. These contacts may include continued association with family members who are residents of a foreign country, particularly if they are employed by the foreign government.

Note that the government does not need to show actual coercion or exploitation. Rather, facts that *could* result in coercion or exploitation are all that is necessary to raise a security concern. Under the guidelines, an applicant can mitigate this security concern by showing that contact with foreign citizens is casual and infrequent, the applicant has minimal financial interests in the foreign country, and he or she has promptly reported all requests or threats from persons in a foreign country. If a cleared employee currently has regular contact with family members in a foreign country, he or she should carefully consider whether such contacts ought to be significantly minimized. If applicants have financial investments in a foreign company, they ought to divest themselves of those interests immediately.

For many contractors, experienced, cleared personnel are among the company's most valuable assets.

Another commonly cited guideline concerns an applicant's "outside activities" that involve participation, including through volunteer work, with a foreign country, company or organization. Again, it is immaterial whether such activities actually result in an unauthorized disclosure of classified information, but rather whether such activities create an increased risk of unauthorized disclosure. Such a concern can be mitigated by showing that the activity itself does not pose a conflict with one's security responsibilities and by the individual terminating or discontinuing the activity upon notice of the government's concerns. To avoid a proposed revocation, contractors should proactively identify outside activities that may pose a conflict and discontinue them before the government discovers them.

With regard to mental health concerns — an issue that is likely to attract particular attention in light of the Navy Yard shooting — the guidelines warn that any emotional, mental or personality disorder may call into question an applicant's judgment, reliability or trustworthiness. Under the existing standards, these concerns can be mitigated by showing that there is no indication of a current problem, providing a recent opinion by a qualified mental health professional concluding that the prior mental health problem is under control or in remission, or stating that past emotional instability was a temporary condition.

Obtaining a qualified and convincing medical opinion after the government has already raised a security concern based on the applicant's mental health will be difficult and less persuasive. Instead, a contractor should not only proactively obtain evidence showing that any prior mental health issues are in remission and under control, but the contractor should provide evidence that the condition has been consistently monitored with regular follow-up examinations to persuasively demonstrate that the condition is, in fact, under control or no longer present.

These are just a few of the examples of how contractors can proactively address potential security concerns before they are identified by the government. The first objective is to avoid a denial or proposed revocation altogether, and you can help achieve this outcome by knowing what factors the government will consider and how you can convincingly mitigate perceived concerns. Even if your mitigation steps are not enough to avoid a proposed clearance revocation, however, you will be able to cite your record of taking proactive and voluntary steps to neutralize potential conflicts

as a basis for overcoming a clearance challenge before the DOHA. Building a "mitigation" record now can be critical to ensure that you are well equipped to challenge an adverse clearance decision.

CONCLUSION

Recent events have certainly created a unique confluence of circumstances that will probably result in increased scrutiny and potentially new legislation and regulation. Regardless of new regulation, which may require periodic searches of publicly available information, the DOD already has considerable authority under the existing system. Accordingly, contractors, whose success or livelihood depends on their receipt and retention of their security clearance, should be mindful of the factors at issue and how best to address issues of potential concern before they become an issue of actual concern.

Dismas N. Locaria, (L) a partner in the government contracts group at **Venable LLP** in Washington, assists contractors in all aspects of working with the federal government. He can be reached at dlocaria@venable.com. **James Y. Boland**, (R) an associate in the firm's Tysons Corner, Va., office, is a member of the government contracts group. He focuses his practice on a broad range of federal procurement counseling and litigation, including matters pending before the Defense Office of Hearings and Appeals. He can be reached at jyboland@venable.com.