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MEMORANDUM FOR ALL APPELLANTS AND THEIR RESPECTIVE ATTORNEYS OR
PERSONAL REPRESENTATIVES IN PERSONAL APPEARANCES

SUBJECT: Prehearing Guidance for Your Personal Appearance

This set of questions and answers is provided to help Appellants and their Attorneys or Personal Representatives to prepare for the Personal Appearance which was requested before a Defense Office of Hearings and Appeals (DOHA) Administrative Judge. The guidance is not exhaustive, and merely implements Department of Defense Regulation 5200.2-R, *Personnel Security Program Regulation*, as amended by Change 3, dated November 1, 1995. Appendix 8 of the Regulation was replaced by the *Revised Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, effective for all Statements of Reasons issued on or after September 1, 2006.

For those individuals whose eligibility for access to Sensitive Compartmented Information (SCI) is in issue, the following Intelligence Community Directive (ICD) and Intelligence Community Policy Guidance (ICPG) apply: ICD 704, *Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information and Other Controlled Access Program Information*, effective October 1, 2008; ICPG 704.2, *Personnel Security Adjudicative Guidelines for Determining Eligibility for Access to Sensitive Compartmented Information and Other Controlled Access Program Information*, effective October 2, 2008; and ICPG 704.3, *Denial or Revocation of Access to Sensitive Compartmented Information, Other Controlled Access Program Information and Appeals Processes*, effective October 2, 2008.

1. **What are the steps of the proceeding?** An Administrative Judge will preside at your personal appearance and will follow the standard order of procedure described below. The proceeding will be conducted so that it can be understood by a person with no legal training. It will begin with the Administrative Judge introducing him or herself and then asking the person who asked for the personal appearance, referred to as the Appellant, to identify himself or herself. The Government's attorney, who is called a Department Counsel, will be asked to introduce him or herself; if one is present. The Administrative Judge will then ask if there are any procedural questions that need to be answered.

The Administrative Judge has already been provided with the case file containing the documents that the Central Adjudication Facility (CAF) considered in making its adverse decision. You will then be asked to submit documents one at a time for the Administrative Judge to identify and consider which were not already provided to the CAF.

You or your representative will be asked to question any witness whom you asked to come to the proceeding on your behalf who may then be questioned by Department Counsel, if one is present, or the Administrative Judge. You will be asked to give your own oral testimony relevant

to resolution of the case or have your representative ask you questions to get this information on the record. The Administrative Judge and a Department Counsel, if one is present, may also ask you questions.

At the appropriate point in the proceeding, as determined by the Administrative Judge, the Administrative Judge will ask the Department Counsel, if one is present, to question any witness for the Government. The Department Counsel may have asked a witness to be present to provide testimony as to why you should be denied eligibility for access to classified information, SCI, or performance of sensitive duties. If such a witness testifies, you will then have an opportunity for you or your representative to question the witness.

At the end of the proceeding you or your representative will have an opportunity to sum up why it is clearly consistent with the national security for you to be eligible for access to classified information, SCI, or the performance of sensitive duties, and finally the Department Counsel, if one is present, will have the opportunity to summarize the opposite point of view.

2. **Where will the proceeding be conducted?** The personal appearance may be conducted in a hearing room, conference room, court room, or video teleconference center, depending on the availability of suitable facilities. Appellants can expect the personal appearance to be held at a facility at or near their duty station, the nearest metropolitan area, or at DOHA facilities in the Washington D.C. or Los Angeles, California metropolitan areas. An effort has been made to find a location that provides an appropriate degree of privacy and that is consistent with the seriousness of the proceeding.

3. **Will the Government be represented by an attorney at the proceeding?** Aside from the person you may invite to assist or represent you during your personal appearance, the Administrative Judge assigned to your case generally will be the only other Government employee present. He or she will be impartial and objective in evaluating the facts set forth in the record of the case supplied to him or her by your CAF as supplemented by what you say at the proceeding, what other witnesses, if any, have to say, and whatever additional documentation is presented by you or other witnesses, if any.

However, the Government may elect to have a Department Counsel participate in the proceeding on its behalf. If a Department Counsel attends, it will be his or her responsibility to present the testimony of any witness asked by the Department Counsel to attend the proceeding in order to support any reasons set forth by the CAF supporting denial or revocation of your security clearance. It is also the Department Counsel's responsibility, if he or she elects to attend, to ask questions of you and any witness whom you may elect to bring to the proceeding.

4. **Do I need to hire an attorney?** You can prepare for, and appear at, the personal appearance by yourself. The proceeding is designed so that it can be understood and used by all Department of Defense civilian employees and members of the Military Departments. Many appear personally and are successful without any assistance. However, any adult of your choosing such as a co-worker, supervisor, friend, spouse, colleague, union representative or member of the clergy may assist you if you arrange for it, or you may hire an attorney at your own expense. If you want to be represented by an attorney or anyone else, you must arrange for it immediately. Postponement of the personal appearance can be granted by the Administrative Judge only for

good cause, and delay in finding an attorney or other representative is generally *not* a good reason to delay a scheduled personal appearance.

5. **What should I do to prepare for my personal appearance?** The personal appearance is your opportunity to provide oral comments and documents demonstrating that your eligibility for access to classified information, SCI, or performance of sensitive duties should be granted or reinstated. The Administrative Judge presiding at your personal appearance will have already reviewed your case file which was provided to him or her by the CAF that made the decision to deny or revoke your eligibility for access to classified information or performance of sensitive duties. Therefore, your goal should be to explain your reasons for having the CAF's decision reversed by providing additional information and documentation rather than only repeating information which you had previously submitted. You may also elect to bring a person or persons to the proceeding to provide testimony as to why you should be granted a security clearance but are not required to do so and may choose to submit a letter or affidavit from them as explained in paragraph 6 below.

Make sure that your documents are organized in the order that you want to present them and bring an extra copy of the documents so that you can refer to them if needed to answer questions that may be directed to you by your representative, the Department Counsel, if one elects to be present, or the Administrative Judge. If your personal appearance is conducted by video teleconference, copies of your new documents should be forwarded to the Administrative Judge at least 24 hours in advance of your personal appearance. The facsimile number and mailing address for the particular office handling the matter appears at the top of this memorandum.

6. **Must I or the Government bring people to the proceeding so they can testify?** If you want the Administrative Judge to consider what other people, such as supervisors, co-workers, family, friends, neighbors, doctors or other experts, have to say about your eligibility for access to classified information, SCI, or performance of sensitive duties, you *may* bring them to the personal appearance so they can testify in person in response to questions you ask them and questions asked them by a Department counsel, if one is present, and the Administrative Judge; **or** you may obtain their comments in writing for submission to the Administrative Judge at the proceeding. Usually a signed and dated letter is sufficient, but more weight can be given to statements that are in the form of a notarized affidavit or otherwise attested to as being true.

If you elect to bring witnesses to the proceeding, it is your responsibility to have them there at the outset of the proceeding as generally it will not be delayed because of the absence of a witness. You should also expect that the Administrative Judge will limit testimony to comments that are relevant and material to resolution of your case and limit the number of people allowed to testify so that information presented is not cumulative or redundant. If you experience difficulty obtaining the timely presence of witnesses that you would like to be present, you may contact the Administrative Judge and ask for assistance. He or she may, in turn, ask a Department Counsel to assist you to obtain the witness. But the Government has no subpoena power in these proceedings and Department Counsel has no obligation to provide the requested assistance in obtaining witnesses. Any election by Department Counsel to assist with facilitating the appearance of a witness does not create a right to a witness or a right to any delay.

7. **Will the proceeding be delayed or postponed if a witness cannot be present at the scheduled place, date and time for the proceeding?** If you have elected to have anyone appear on your behalf as a witness, it is your obligation to have that person present and ready to testify at the proceeding on the day and time it has been scheduled. The proceeding will generally not be delayed because of a missing witness, regardless of the reason. You will instead generally be given an opportunity to supplement the record with a written statement from the absent witness.

8. **Will I be questioned at the personal appearance?** You may be questioned by your representative. You also may be questioned by the Administrative Judge if he or she wants clarification of information that is part of the record. You may also be cross-examined by a Department counsel, if one is present. It is Department Counsel's job to ask questions that test the truthfulness of your testimony and he or she may do this in part by asking you questions based on information in the records that you submit or that are part of the case record that the CAF considered which has already been provided to the Administrative Judge. You should be prepared to answer any question clearly, completely, and honestly. You will be advised by the Administrative Judge that Section 1001 of Title 18 of the United States Code is applicable which makes it a criminal offense, punishable by a substantial fine and period of imprisonment, to knowingly and willfully make a false or misleading statement or representation to any department or agency of the United States.

9. **Will the personal appearance be transcribed?** The proceeding will be recorded by a court reporter. He or she will provide the Administrative Judge with a verbatim transcript and you will be given a copy.

10. **Will there be formal rules of evidence that I must understand and comply with?** The only requirement to admit information into the record is that it must be *relevant* and *material* to the issues affecting your eligibility for a security clearance, SCI, or performance of sensitive duties and not unduly repetitive of information that is already part of the record.

11. **What documents may I submit?** You may submit any documents that you believe should be considered by the Administrative Judge and ultimately by your component's Personnel Security Appeal Board (PSAB). The information can involve refutation, explanation, extenuation, or mitigation of the reasons provided to you in the Letter of Denial issued by your CAF as to why your security clearance or eligibility to perform sensitive duties should be denied or revoked. The only limitation is that the materials must be *relevant* and *material* to the concerns as to why your eligibility for security clearance, SCI, or performance of sensitive duties should be denied or revoked, and should not be unduly repetitive of information that is already part of the record.

12. **What is the function of the Administrative Judge who will preside at my personal appearance?** The Administrative Judge did not participate in the CAF's decision to deny or revoke your eligibility for access to classified information, SCI, or performance of sensitive duties. He or she is at the personal appearance to give you a fair opportunity to present your case as fully as possible.

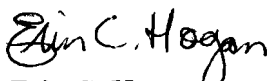
13. **Will the Administrative Judge make the final decision as to whether my eligibility for a security clearance or performance of sensitive duties should be denied or revoked?** The Administrative Judge will prepare a recommended decision and forward it along with the record of

your case to your component's PSAB. The Administrative Judge will not announce his or her recommended decision to the Appellant at the end of the personal appearance. The PSAB may adopt the recommended decision, or reverse or otherwise modify the Administrative Judge's recommendation.

14. **What is the "record" of my case?** The record in your case will consist of all of the information already considered by the CAF when it determined to deny or revoke your eligibility for access to classified information, SCI, or performance of sensitive duties, plus the verbatim transcript of the personal appearance, and any additional documentation which you submit at the personal appearance.

15. **What regulations will the Administrative Judge consider?** The Administrative Judge will consider the adjudicative guidelines, as amended, found in Department of Defense Regulation 5200.2-R, *Personnel Security Program Regulation*, as amended by Change 3, dated November 1, 1995. Appendix 8 of the Regulation was replaced by the *Revised Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, in a Memorandum dated August 30, 2006, effective for all Statements of Reasons issued on or after September 1, 2006. In other words, the Administrative Judge will use the adjudicative guidelines which were in effect when the CAF issued the Statement of Reasons giving you notice that it determined that it should deny or revoke your eligibility for access to classified information, SCI, or performance of sensitive duties. Furthermore, as indicated above, if your eligibility for access SCI is in issue, the provisions of Intelligence Community Directive (ICD) 704, *Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information and Other Controlled Access Program Information*, effective October 1, 2008; Intelligence Community Policy Guidance (ICPG) 704.2, *Personnel Security Adjudicative Guidelines for Determining Eligibility for Access to Sensitive Compartmented Information and Other Controlled Access Program Information*, effective October 2, 2008; and ICPG 704.3, *Denial or Revocation of Access to Sensitive Compartmented Information, Other Controlled Access Program Information and Appeals Processes*, effective October 2, 2008, apply. The *Revised Adjudicative Guidelines For Determining Eligibility For Access To Classified Information* can be found on the DOHA web page at www.dod.mil/dodgc/doha.

16. **What will happen if I do not come to my personal appearance?** It is your responsibility to attend the personal appearance at the agreed date and time and at the location designated in the notice sent to you with these questions and answers. It is also your responsibility to request the Administrative Judge for a postponement or change of location which may be granted by the Administrative Judge only if you present him or her with reasons sufficient to demonstrate that you have been diligent and that there are good reasons for your request. If you have not been granted a postponement and fail to appear on the day and time and at the place designated by the Administrative Judge, he or she will so advise your component's PSAB with a recommendation that it sustain the CAF's determination to deny or revoke your eligibility for access to classified information, SCI, or performance of sensitive duties



Erin C. Hogan
Chief Administrative Judge