

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION.....	1
I. CASE CITATION FORMATS	5
CHAPTER TWO: HISTORY	7
I. PRIVATE SECTOR EMPLOYEES (EMPLOYEES OF GOVERNMENT CONTRACTORS)	7
II. FEDERAL EMPLOYEES AND UNIFORMED SERVICES	8
III. FEDERAL EMPLOYEE SUITABILITY DETERMINATIONS.....	9
IV. EMPLOYEES NOT COVERED BY DOHA.....	10
A. HIGHER LEVEL CLEARANCES AND ACCESS	10
B. DEPARTMENT OF ENERGY AND NUCLEAR REGULATORY COMMISSION	10
V. COMPARISON BETWEEN CONTRACTOR AND FEDERAL EMPLOYEE PROCEDURES	10
VI. MAKING IMPROVEMENTS OVER THE YEARS.....	11
A. EMPLOYEE ASSISTANCE PROGRAMS	11
B. THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT	11
CHAPTER THREE: ADMINISTRATIVE PROCEDURES	13
I. GOVERNMENT CONTRACTOR EMPLOYEES	13
A. INVESTIGATION	13
B. INTERIM CLEARANCE	15
C. JOINT PERSONNEL ADJUDICATION SYSTEM.....	15
D. REFERRAL TO DOHA	16
E. STATEMENT OF REASONS	17
F. REQUEST FOR HEARING	17
G. ROLE OF DEPARTMENT COUNSEL	18
H. ASSIGNMENT TO ADMINISTRATIVE JUDGE	18
I. HEARING PROCEDURES	19
1. Right to Counsel	19
2. Right to Hearing	22
3. Location of Hearing	22
4. Discovery	22
5. Presentation of Case	24
6. Exhibits	25
7. Witnesses	25
8. Closing Statements	25
9. <i>Ex parte</i> Communications	25
10. Written Determination	26
11. Remedies	26
12. Appeals	26
13. Reapplication	26
14. Reimbursement	27
II. FEDERAL EMPLOYEES	28
A. CENTRAL ADJUDICATIONS	31
B. INVESTIGATION.....	31
C. STATEMENT OF REASONS.....	31
D. RESPONSE TO THE STATEMENT OF REASONS.....	32
E. FINAL CAF DECISION.....	32
F. APPEAL OF LETTER OF DENIAL.....	32
G. PERSONAL APPEARANCE PROCEDURE	34
1. Assignment to Administrative Judge	34
2. Personal Appearance Guide.....	34
3. Right to Counsel.....	34

4.	Location.....	34
5.	Representatives of Parties	34
6.	Witnesses	34
7.	Order of Proceedings.....	35
8.	Recommended Decision.....	35
9.	Final Decision	35
10.	Conditional or Probationary Clearance	35
11.	Remedies	36
III.	PROCESSING TIME.....	36
IV.	STATISTICS	36
V.	PROCEDURES FOR HIGHER LEVEL CLEARANCES AND ACCESS.....	38
A.	CENTRAL INTELLIGENCE AGENCY	38
B.	NATIONAL SECURITY AGENCY	39
VI.	CONDUCTING RESEARCH	39
A.	PRIVATE SECTOR CONTRACTOR CASES	39
B.	FEDERAL EMPLOYEE DECISIONS	40
C.	COURSES	40

**CHAPTER FOUR: PROCEDURAL ISSUES APPLICABLE TO HEARINGS
AND PERSONAL APPEARANCES 41**

I.	BURDEN OF PROOF	42
II.	THE STATEMENT OF REASONS	43
III.	EVIDENCE	45
A.	NEXUS	46
B.	MATERIALITY	46
C.	EXCLUSIONARY RULE	47
D.	HEARSAY.....	47
E.	CIRCUMSTANTIAL EVIDENCE	48
F.	OFFICIAL NOTICE/ADMINISTRATIVE NOTICE	48
G.	BUSINESS RECORDS	54
H.	ADMISSIONS	54
I.	POST-RECORD EVENTS	55
J.	EVIDENCE OF JOB PERFORMANCE	55
K.	EVIDENCE OF APPLICANT’S VALUE TO EMPLOYER	56
L.	EVIDENCE OF APPLICANT’S NEED FOR JOB	56
M.	EVIDENCE, MEDICAL.....	56
N.	ADMISSIBILITY OF THE REPORT OF INVESTIGATION	58
O.	EVIDENCE OF NEW OR CHANGED CIRCUMSTANCES.....	58
P.	TESTIMONY AS TO FUTURE BEHAVIOR	58
Q.	SURPRISE EVIDENCE.....	59
R.	INTENT/STATE OF MIND.....	59
S.	ESTOPPEL.....	59
1.	Equitable Estoppel	59
a.	Where Government Has Previously Granted Clearance	59
b.	Effect of Prior Favorable Adjudication.....	61
2.	Collateral Estoppel and <i>Res Judicata</i>	61
IV.	WITNESSES	63
A.	CREDIBILITY DETERMINATIONS	63
1.	The General Rule.....	63
2.	Numerous Exceptions	63
3.	Credibility Determinations Based on Written Record.....	66
4.	Credibility Determination as Proof of Contested Facts.....	66
5.	Expert Opinion as to Applicant Credibility.....	67
B.	CORROBORATION	67

C.	IMPEACHMENT	68
D.	DEMEANOR	68
E.	RECATATION	68
F.	CLAIMS OF PRIVILEGE.....	68
G.	CHARACTER REFERENCES	68
V.	EXPERT WITNESSES	69
VI.	CONSTITUTIONAL ISSUES	74
A.	FIRST AMENDMENT	74
B.	FOURTH AMENDMENT	74
C.	FIFTH AMENDMENT.....	75
D.	SIXTH AMENDMENT	75
E.	EIGHTH AMENDMENT.....	75
VII.	JURISDICTIONAL ISSUES	75
A.	GENERAL ISSUES.....	75
B.	JURISDICTION WHEN APPLICANT QUILTS OR IS FIRED.....	76
VIII.	OTHER PROCEDURAL ISSUES	77
A.	ADVISORY OPINIONS	77
B.	ADP I, II, AND III CASES	77
C.	CLASSIFIED INFORMATION.....	78
D.	CONDITIONAL CLEARANCE.....	78
E.	DIRECTIVE, CHALLENGES TO.....	78
F.	FILE OF RELEVANT MATERIAL	78
G.	FOREIGN LAW	78
H.	GOOD FAITH	78
I.	INVESTIGATION.....	79
J.	LEVEL OF CLEARANCE	79
K.	OPERATING INSTRUCTIONS	79
L.	PRECEDENT	79
M.	RECIPROCITY	80
N.	TRUSTWORTHINESS DETERMINATIONS.....	81
CHAPTER FIVE: CRIMINAL PROCEDURE		83
I.	FEDERAL RULES OF CRIMINAL PROCEDURE	83
II.	ADMISSIONS.....	83
III.	ARREST	83
IV.	COLLATERAL ESTOPPEL IN LIGHT OF PLEA OR CONVICTION	83
V.	STATE COURT PROCEEDINGS.....	85
VI.	PLEA OF "NOLO CONTENDERE"	87
VII.	THE ALFORD DOCTRINE.....	88
VIII.	TO WHAT DID THE APPLICANT PLEAD GUILTY	89
IX.	BEING ON PROBATION	90
X.	CRIMINAL SENTENCE	90
XI.	JENCKS ACT	90
XII.	PRIVILEGE AGAINST SELF-INCRIMINATION	91
XIII.	EFFECT OF ACQUITTAL, DISMISSED CHARGES, AND DROPPED CHARGES	92
XIV.	FELONS AND THE SMITH AMENDMENT	94
A.	PRIOR TO 1996.....	94
B.	1996 TO 2000	94
C.	2000 TO 2004	94
D.	2004 TO 2006	97
E.	2006 TO 2008	98
F.	2008 TO DATE	100

CHAPTER SIX: THE POLYGRAPH **103**

I.	CAN A MACHINE REALLY TELL WHEN SOMEONE IS LYING.....	104
----	--	-----

II.	HOW DOES IT WORK.....	106
III.	DOHA CASES INVOLVING POLYGRAPH ISSUES.....	108
A.	USE OF A PRIVATE POLYGRAPHER.....	108
B.	INTIMIDATION BY MACHINE.....	110
C.	ADMISSIBILITY OF POLYGRAPHER’S REPORT.....	112
D.	IS A POLYGRAPH EXAM COERCIVE.....	114
E.	TOO DRUGGED FOR ACCURACY.....	115

CHAPTER SEVEN: APPEALS 117

I.	PROCEDURES.....	117
II.	REQUEST FOR STAY.....	117
III.	INTERLOCUTORY APPEALS.....	117
IV.	ORAL ARGUMENT.....	118
V.	APPEAL BRIEFS.....	118
VI.	STANDARD OF REVIEW.....	118
VII.	STATUTORY CONSTRUCTION.....	119
VIII.	ARGUMENTS THAT THE ADMINISTRATIVE JUDGE WAS BIASED.....	119
IX.	REVERSE OR REMAND.....	121
X.	APPELLATE ARGUMENTS TO SUSTAIN DECISION BELOW.....	122
A.	THE SCOPE OF REVIEW IS NARROW.....	122
B.	SUPPORTING JUDGE’S WEIGHING OF EVIDENCE.....	123
C.	SUPPORTING JUDGE’S APPLICATION OF MITIGATING FACTORS.....	124
D.	ANY ERROR WAS HARMLESS.....	124
E.	THE JUDGE CONSIDERED ALL OF THE EVIDENCE.....	124
F.	JUDGE’S PURVIEW TO DETERMINE WITNESS CREDIBILITY.....	125
G.	VIEW DECISION AS WHOLE, NOT PARTICULAR PASSAGES.....	125
XI.	ARGUMENTS FOR REVERSAL OF THE DECISION.....	126
A.	CHALLENGING THE FINDINGS OF FACT.....	126
B.	CHALLENGING THE CONCLUSIONS OF LAW.....	126
C.	CHALLENGING WHETHER GOVERNMENT MET ITS BURDEN OF PROOF.....	126
D.	CHALLENGING THE JUDGE’S CREDIBILITY DETERMINATIONS.....	126
E.	CHALLENGING WHOLE PERSON ANALYSIS.....	126
F.	FAILURE TO CONSIDER SIGNIFICANT EVIDENCE.....	126
G.	FAILURE TO PRESERVE RECORD.....	127
XII.	NO NEW ALLEGATIONS ON APPEAL.....	127
XIII.	RECONSIDERATION OF APPELLATE DECISION.....	127

CHAPTER EIGHT: CASE ANALYSES 129

I.	THE ADJUDICATIVE GUIDELINES.....	129
A.	THE GENERAL CRITERIA (“POLICY FACTORS”).....	129
1.	The “Whole Person” Analysis.....	130
2.	The “Whole Record”.....	130
3.	No “Piecemeal Analysis”.....	130
B.	THE SPECIFIC ADJUDICATIVE GUIDELINES.....	131
1.	Common Sense Determination.....	132
2.	Which Guideline is Applicable.....	132
3.	Security Violations, Lack of.....	133
4.	Rehabilitation.....	133
5.	Recency.....	133
II.	CASE ANALYSIS.....	134
A.	ADJUDICATIVE GUIDELINE A: ALLEGIANCE TO THE UNITED STATES.....	134
B.	ADJUDICATIVE GUIDELINE B: FOREIGN INFLUENCE.....	136
1.	Loyalty May Be Considered.....	138
2.	The Identity of the Country Must Be Considered.....	139
3.	The “Hostage Scenario”.....	142

4.	Occupation of the Foreign Relative.....	144
5.	The Applicant's Relationship With the Foreign Relative(s).....	144
6.	The Exception to the General Rule	146
7.	Treatment of Specific Countries	148
	a. China, People's Republic of (PRC).....	148
	b. Hong Kong	151
	c. India and Nepal	151
	d. Iran.....	153
	e. Israel.....	157
	f. Lebanon.....	157
	g. Libya.....	157
	h. Morocco.....	157
	i. South Korea.....	159
	j. Russia.....	159
	k. Sudan.....	159
	l. Syria.....	159
	m. Taiwan	160
C.	ADJUDICATIVE GUIDELINE C: FOREIGN PREFERENCE	163
	1. Passport Cases	165
	2. Foreign Citizenship.....	167
	3. Violation of the Travel Ban	168
	4. Financial Interest in a Foreign Country	169
D.	ADJUDICATIVE GUIDELINE D: SEXUAL BEHAVIOR.....	169
	1. Decisions Granting Clearance	171
	a. Has Enough Time Passed.....	171
	b. Was the Applicant Vulnerable to Coercion	172
	c. Has the Applicant Dealt With His/Her Psychological Condition	176
	d. Was There Sufficient Evidence of Reform and Rehabilitation	176
	2. Decisions Denying Clearance	177
	a. Too Soon to Tell.....	177
	b. Insufficient Reform or Rehabilitation.....	178
	c. Still Vulnerable to Coercion	181
	d. Sexual Behavior Not Mitigated	182
E.	ADJUDICATIVE GUIDELINE E: PERSONAL CONDUCT	183
	1. Falsification	186
	a. Government Burden to Prove the Statement was False	187
	b. Is the Falsification Material	190
	c. Was the Falsification Intentional.....	192
	d. Attempts to Mitigate Falsification Charges	201
	i. The "Idiot Treatment"	201
	ii. Prompt Good Faith Effort to Correct	203
	iii. I am Sorry, So Sorry	205
	iv. I Really Need This Job	207
	v. Telling Some But Not All	207
	e. Honesty	208
	2. Personal Conduct Cases Not Involving Falsification	208
	a. Debts as Poor Judgment	208
	b. Poor Judgment; Vulnerability to Coercion	209
	c. Failure to Cooperate With Investigation	211
	d. Work-Related Misconduct	212
	e. Violation of Employer's Policy	213
F.	ADJUDICATIVE GUIDELINE F: FINANCIAL CONSIDERATIONS.....	214
	1. Decisions Granting Clearance	216
	2. Decisions Denying Clearance	221

G.	ADJUDICATIVE GUIDELINE G: ALCOHOL CONSUMPTION.....	230
1.	Once Dependent, Always Dependent.....	231
2.	I Have Mended My Ways	232
3.	When Do Isolated Incidents Become a Pattern.....	236
4.	How Much is Too Much.....	236
5.	Claiming Disability Discrimination	239
6.	Contesting the Diagnosis.....	239
7.	The In-Between Result: “Too Soon to Tell”	240
H.	ADJUDICATIVE GUIDELINE H: DRUG INVOLVEMENT.....	241
1.	What is “Recent”	243
2.	Marijuana Use.....	244
I.	ADJUDICATIVE GUIDELINE I: PSYCHOLOGICAL CONDITIONS.....	247
1.	Favorable Decisions Based on Evidence of Cooperation With Treatment and Medication	249
2.	Insufficient Evidence of Following Treatment and Medication Resulting in Unfavorable Determinations	251
3.	Reliance on Expert Psychiatrists	252
4.	Too Soon to Tell	254
5.	Reliance on Common Sense Yielding Mixed Results	255
J.	ADJUDICATIVE GUIDELINE J: CRIMINAL CONDUCT	259
1.	Was the Criminal Behavior Recent.....	260
2.	What is a “Pattern”	261
3.	How Much Reform and Rehabilitation is Enough.....	261
4.	Falsification	262
5.	Facts Leading to Granting of Clearance.....	262
6.	Facts Leading to Denial of Clearance	264
K.	ADJUDICATIVE GUIDELINE K: HANDLING PROTECTED INFORMATION.....	269
1.	Examples Where Clearance was Denied	275
a.	Blame Others	275
b.	Multiple Violations	276
c.	No Security Violation is “Minor”	276
d.	Stressful Job is No Excuse	277
e.	Loose Lips Sink Ships	277
f.	It is Not a Security Violation, but You Still Lose	278
2.	Examples Where Clearance was Granted.....	278
L.	ADJUDICATIVE GUIDELINE L: OUTSIDE ACTIVITIES	280
M.	ADJUDICATIVE GUIDELINE M: USE OF INFORMATION TECHNOLOGY SYSTEMS	282

CHAPTER NINE: NOTEWORTHY COURT CASES.....285

APPENDICES: TABLE OF CONTENTS.....293

APPENDIX 1:	DOD DIRECTIVE 5200.2—DOD Personnel Security Program.....	295
APPENDIX 2:	DOD DIRECTIVE 5220.6—Defense Industrial Personnel Security Clearance Review Program.....	301
APPENDIX 3:	EXECUTIVE ORDER 12968—Access to Classified Information.....	355
APPENDIX 4:	DOD REGULATION 5200.2-R—Personnel Security Program.....	373
APPENDIX 5:	DOD REGULATION 5200.1-R—Information Security Program.....	567
APPENDIX 6:	APPLICANT’S RESPONSE TO STATEMENT OF REASONS—MODEL ANSWER	747
APPENDIX 7:	APPLICANT’S ANSWER TO STATEMENT OF REASONS—MODEL ANSWER.....	749
APPENDIX 8:	APPLICANT’S ANSWER TO STATEMENT OF REASONS—MODEL ANSWER.....	753
APPENDIX 9:	MODEL DISCOVERY LETTER.....	755
APPENDIX 10:	DOHA PREHEARING GUIDANCE.....	757
APPENDIX 11:	WHS ADMINISTRATIVE INSTRUCTION NUMBER 23—Personnel Security Program and Civilian Personnel Suitability Investigation Program.....	761
APPENDIX 12:	DOHA PERSONAL APPEARANCE GUIDANCE.....	773
APPENDIX 13:	UNDER SECRETARY OF DEFENSE MEMO—Amendment to DOD Regulation 5200.2-R to Delete Bar on Witnesses	777

APPENDIX 14:	DIRECTOR OF CENTRAL INTELLIGENCE DIRECTIVE NUMBER 6/4—Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information	779
APPENDIX 15:	INTELLIGENCE COMMUNITY POLICY MEMORANDUM NUMBER 2006-700-3—Intelligence Community Modifications to Annex C, “Adjudicative Guidelines for Determining Eligibility for Access to Classified Information,” to DCID 6/4, “Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information”	831
APPENDIX 16:	CIA LETTER REGARDING PERSONAL APPEARANCE.....	849
APPENDIX 17:	50 USCS § 435B—Security Clearances.....	853
APPENDIX 18:	OMB MEMORANDUM—Reciprocal Recognition of Existing Personnel Security Clearances.....	859
APPENDIX 19:	50 USCS § 435C—Security Clearances; Limitations.....	873
APPENDIX 20:	OFFICE OF THE UNDER SECRETARY OF DEFENSE—Interim Guidance for the Implementation of Public Law 110-181, Section 3002 (the Bond Amendment) Regarding Adjudication of Security Clearances	875
APPENDIX 21:	DOD DIRECTIVE 5210.48—Polygraph and Credibility Assessment Program.....	879
APPENDIX 22:	DOD DIRECTIVE 5210.48 (1984)—DOD Polygraph Program	885
APPENDIX 23:	DOHA APPEALS OF INDUSTRIAL SECURITY CLEARANCE CASES UNDER DOD DIRECTIVE 5220.6..	891
APPENDIX 24:	APPLICANT’S BRIEF IN SUPPORT OF AFFIRMANCE—MODEL BRIEF.....	897
APPENDIX 25:	<i>DEPT. OF NAVY V. EGAN</i> , 484 U.S. 518 (1988).....	905
APPENDIX 26:	<i>NELSON V. NASA</i> , 530 F.3D 865 (9TH CIR. 2008).....	915

