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Coping with 'security clearance' in the workplace

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The current United States involvement in armed, military conflicts in Afghanistan and Iraq has significantly boosted business interactions with the Department of Defense (DOD) and Department of State (DOS). (The DOD seemingly cannot function without the use of acronyms. Consistent with that practice, this article will follow suit.)

Many of those contracts involve either "classified" programs or access to classified information. For business entities involved with those contracts, many if not most employees involved will be required to possess a "security clearance," i.e., a United States government decision authorizing an individual access to a specific program or information as a designated level.

All access is first based upon a demonstrable "need to know" requirement conditioned upon having the requisite level of clearance. Being eligible for and obtaining a security clearance is an individual determination — being awarded a DOD contract for example, while probably satisfying the "need to know" prong, does not entitle anyone to a security clearance.

What employers (and their counsel) need to appreciate is that as the economy becomes more problematic and volatile, there is a direct correlation to adverse impacts on individuals seeking to obtain or renew security clearances. For example, excessive credit card debt, foreclosures or bankruptcy are all matters that adversely affect security clearance determinations among other things.

Thus, more and more employees are finding themselves with security clearance complications. This article will attempt to briefly alert lawyers with clients who have (or contemplate bidding on) federal contracts involving classified programs or requiring access to classified information.

To better understand the issues and problems in this area, the following example is illustrative (all names are fictitious): SmithCo, a local, high-end durable plastic manufacturer obtains a lucrative Army contract to provide a quarter million battery holders for personalized combat radio systems, where the radio's technical specifications are classified at the Secret level. Thus, at a minimum the design engineer will be required to have a Secret clearance, because she will be required to review the classified design specifications of the radio; consult with the classified battery manufacturer; and consult with the radio's manufacturer to insure overall compliance with the contract's specifications.

SmithCo's CEO assigns his best design engineer, Sally Jones and its best mold-maker, Paul Doe, to the project. Both immediately complete the Standard Form (SF) 869 and submit it to the Defense Industrial Security Clearance Office or DISCO, seeking Secret clearances. Thirty days later, both are notified by DISCO that their "eligibility" for a clearance has been denied and SmithCo's CEO is notified that unless "corrective action" is taken within 30 days, its contract with the Army will be rescinded.

John Smith, the CEO, calls you as SmithCo's legal counsel in a panic and tells you to "fix it" as soon as possible. What do you do and where do you do it?

Being able to resolve SmithCo's security clearance problems is key to its continued financial well-being and they are a good client.

While the DOD Industrial Personal Security Clearance Program (IPSCP) operates fairly efficiently and with relative speed, final clearance decisions for Top Secret level may take up to two years for persons who have never possessed any security clearance. In SmithCo's situation, there are measures that can facilitate their objective in keeping the contract. The initial "non-eligibility" decision by DISCO, must be accompanied by a written Statement of Reasons (SOR), to the affected individual. So, counsel's first obligation is to examine the SOR's of Jones and Doe.

Reading Sally Jones' SOR reveals that DISCO determined that she was ineligible due to "foreign influence" and "financial consideration" factors. Meeting with Jones discloses that her brother lives and works in Ontario, Canada and is married to a Canadian citizen. That triggered the presumptive "concern" of "foreign influence" due to the presumed potential for such on a member of her immediate family, which by regulatory definition includes siblings.

DISCO also found her ineligible due to "financial considerations" due to a "history of not meeting financial obligations."

Talking with Jones, you learn that her brother is a West Point graduate, served in the first Gulf War, was honorably discharged, is a licensed CPA in Toronto, and maintains his U.S. passport — facts that Jones failed to provide DISCO on her SF-86 due to her unfamiliarity with the process.

Further discussion shows that her ex-husband, had gotten laid off from his job about eight months earlier and is in serious default on two joint credit cards, where the accounts pre-dated the divorce, but for which Jones has a "hold harmless" provision in her divorce decree.

While legitimate concerns for the IPSCP and properly considered by DISCO, obtaining appropriate documentation to rebut those concerns, warrants an appeal to the Defense Office of Hearings and Appeals (DOHA), with a request for approval of an interim clearance. The probability of prevailing at the DOHA level is high as Jones' explanations are specifically designated "mitigating circumstances" and there is no serious question as to her brothers allegiance to the United States.

Reviewing Doe's SOR discloses a far more problematic scenario. DISCO denied his eligibility due to "drug involvement," "personal conduct" and "financial considerations." Talking with Doe, you

Continued ...

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Continued ...

learn that he did not disclose a 30- year-old marijuana incident at age 18, which was ultimately disposed of by an Adjournment in Contemplation of Dismissal (ACD).

Notwithstanding the explicit provision in CPL § 170.55(8) which provides that "No person shall suffer any disability ... as a result. ..." and that Doe's then attorney accurately advised him that he did not have a conviction and did not ever have to disclose that, by not disclosing the "drug incident," Doe committed a serious violation. He was correct under state law, but the SF specifically mandates that one must "report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record."

Doe ran afoul of that requirement as the Court Clerk's Office had accidentally not "sealed" his record and the criminal background check disclosed it. By not declaring the "pot" incident, Doe created a "personal conduct" concern, because that is deemed by DISCO to be a deliberate non-disclosure of required information.

Finally, you learn that Doe and his wife had filed for bankruptcy two years earlier and had considerable personal debt discharged.

Doe's situation is not necessarily hopeless, but to prevail at DOHA, will require a time consuming process. While acting on the "advice of counsel" is a specific mitigating factor as is the time since the ACD for the marijuana incident, in all probability DOHA will want both a drug screen and drug abuse evaluation to ensure that there are no current substance abuse issues. The bankruptcy, while not per se disqualifying, will generally require specific investigation into the causes of the former financial issues, his current financial condition and what "rehabilitative" efforts have been made to preclude further financial difficulties. That will not be done within the thirty day window.

SmithCo's CEO can resolve its contractual predicament here by timely appealing Jones' matter to the DOHA and by selecting another mold-maker (which counsel pre-screens) to apply to DISCO for the requisite security clearance. Or, SmithCo could hire someone who has a current Secret clearance or someone who is eligible for reinstatement of a clearance, to fill the moldmaker's slot until Doe's problems are hopefully resolved.

The foregoing is a somewhat simplistic example of the basic issues of security clearances in the employment arena. But, there is a labyrinth of potential problems that generally go hand-in-hand with those matters, e.g., federal Privacy Act concerns, substance abuse treatment privacy requirements, HIPAA requirements, etc.

There are DOD directives, manuals and regulations to contend and comply with and potential criminal penalties for the applicant. As with many business decisions, a proactive legal approach probably would have avoided much of SmithCo's problems and certainly the angst suffered by its CEO.

Donald Rehkopf is a member of the law firm of Brenna, Brenna & Boyce, PLLC. His practice concentrates in all administrative and criminal aspects of military and national security law, to include security clearance issues. A former Air Force Judge Advocate, he has more than 30 years experience in dealing with this subject.