



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
WASHINGTON HEARING OFFICE
POST OFFICE BOX 3627
ARLINGTON, VIRGINIA 22203-1995
FAX (703) 696-1831



MEMORANDUM FOR ALL APPLICANTS AND THEIR RESPECTIVE ATTORNEYS OR
PERSONAL REPRESENTATIVES, AND DEPARTMENT COUNSEL

SUBJECT: Prehearing Guidance for DOHA Industrial Security Clearance (ISCR) Hearings and
Trustworthiness (ADP) Hearings

In an effort to expedite the hearing in DOHA industrial security clearance cases and trustworthiness cases, the following guidance is provided to Applicants and their respective attorneys or Personal Representatives, and Department Counsel (the parties) to assist them in preparing for the hearing. This guidance is not exhaustive, and the parties should also refer to Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, for guidance on hearing matters. In the event of any conflict between this guidance and the provisions of DoD Directive 5220.6, the provisions of the Directive control. For your information, the January 2, 1992 edition of the Directive has been officially changed on four occasions: Change 1 became effective on November 22, 1993; Change 2 became effective on May 20, 1994; Change 3 became effective on February 16, 1996; and Change 4 became effective on April 20, 1999. Enclosure 2 of the Directive was amended on September 1, 2006, with the implementation of *Revised Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*.

1. The hearing is an adversarial proceeding in which the parties have the responsibility to present their respective cases. The Government is normally represented by an attorney known as a Department Counsel. The Applicant has the option of appearing by himself or herself without an attorney, or being represented by an attorney selected and paid for by the Applicant, or by being represented by a Personal Representative such as a friend, family member, or union representative.

2. Your hearing may be conducted in a federal, state, county, or local hearing room, conference room, court room, or video tele-conference center, depending on the availability of suitable facilities. **Applicants employed within the United States can expect the hearing to be held at a facility within 150 miles of their residence or place of employment, or at DOHA facilities in the Washington D.C.; Los Angeles, California; Chicago, Illinois; or Boston, Massachusetts, 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. Each party is expected to be prepared to present at the hearing whatever evidence (testimonial or documentary, or both) that party intends to offer. In this regard, it should be noted that the Administrative Judge is not empowered by law to issue a subpoena. Thus, the appearance of witnesses or production of documents is purely voluntary, and is the sole responsibility of the person intending to offer that evidence. The costs associated with the attendance of witnesses is also the sole responsibility of the party calling that witness.

intending to offer that evidence. The costs associated with the attendance of witnesses is also the sole responsibility of the party calling that witness.

4. To facilitate the exchange of correspondence, proposed evidence, the handling of preliminary matters, and the scheduling of hearings, any person representing an Applicant should file a written Entry or Notice of Appearance with both Department Counsel and the Hearing Office Docket Clerk. The facsimile number and mailing address for the particular office handling the matter appears at the top of this memorandum. No special form or format is required.

5. A party requesting a continuance of a scheduled hearing date must make a ***timely showing of good cause, in writing***, to the Administrative Judge assigned the case, for any such continuance. Among the factors to be considered are the requester's diligence in readying his or her case prior to the date set for the hearing, and inconvenience to the opposing party, witnesses, and the Administrative Judge. Failure of an Applicant to appear for the scheduled hearing or to comply with an order of the Administrative Judge may result in the case being returned to the Director, DOHA for discontinuance of processing and revocation of any security clearance or assignment to sensitive duties or position the Applicant currently possesses.

6. Neither party should attempt to furnish the Administrative Judge any information relating to the case without giving the other party the opportunity to be present. Such actions constitute what are known as prohibited *ex parte* communications. Also, copies of any proposed exhibits must not be submitted to the Administrative Judge prior to any hearing, except those conducted by video teleconference. For all other hearings, any documents to be offered as evidence should be presented at the hearing itself during the presentation of that party's case. In some instances, when an Applicant has appended documents to the response to the Statement of Reasons, the documents have been returned with an explanation that such materials are inappropriate to a pleading and that they should be resubmitted as proposed exhibits during the hearing. If such action has occurred, an Applicant should inform the Administrative Judge during the hearing, and be prepared to again offer the material previously rejected.

7. The order of proceeding is as follows: Department Counsel may make an opening statement. Then, Applicant may make an opening statement, waive opening statement, or wait until the Government has concluded calling witnesses and submitting evidence before making or waiving his or her opening statement. An opening statement is not evidence. It is merely a summary of the theory of the case and a brief explanation as to the nature of the expected testimony of witnesses and the nature of documents, which serves to provide the Administrative Judge with some general idea of the case to be better able to understand the evidence. The Government presents its case (testimony of witnesses or presentation of documents, or both) first, followed by the Applicant's case. The parties will have the opportunity to present rebuttal evidence as appropriate.

8. The parties have a wide degree of discretion in deciding what order to present the evidence in their respective cases. The Federal Rules of Evidence are used as a guide.

9. The parties should *not* mark any proposed exhibits. At the hearing, the Administrative Judge will mark the exhibits. Exhibits offered as evidence, but not admitted as such, will be retained by the Administrative Judge. As a general rule, photocopies of documents may be offered in lieu of

the original, *provided* that the copies are legible. In the case of public records or business records, it is *not* required that the copies being offered be certified copies. However, nothing in this paragraph relieves a party from the responsibility of laying a proper foundation for a document when necessary. It is generally good practice to make sufficient photocopies of each proposed exhibit so that separate complete copies can be offered to the Administrative Judge and the opposing party. Preparation of such additional copies should take place before the scheduled hearing date, because there may not be any photocopying facilities available at the hearing location.

10. Witnesses will be sequestered (kept out of the hearing room while other witnesses are testifying) during the hearing, with the exception of the Applicant and any expert witnesses. The parties may have the assistance of any expert witness, selected and paid for by the party wishing to call the witness, during the course of the hearing.

11. The Administrative Judge does not swear in Applicants or other witnesses who testify. Instead the Administrative Judge will direct their attention to, and advise them that Section 1001 of Title 18 of the United States Code applies to the proceedings. Section 1001 of Title 18 of the United States Code 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.

12. All witnesses are subject to cross-examination, or questioning, by the other party. The scope of cross-examination is not limited to the scope of the witness's direct examination. However, any cross-examination must cover issues that are material and relevant to the issues in the case or the witness's credibility. As a general rule, the parties will be allowed an opportunity to conduct one redirect examination and one recross-examination of a witness. The Administrative Judge may, in his or her discretion, question any witness.

13. Each party has the right to raise appropriate objections to any evidence, or portion thereof, being offered by the other party. Objections must be made in a timely fashion. Failure to raise an objection, at the time the objectionable evidence or testimony is offered, will be construed as acquiescence. When raising an objection, the objecting party should address the objection to the Administrative Judge, stating the basis for the objection. An Applicant, not represented by an attorney, need only state the objection as clearly as he or she can, in plain English. "Legalese" is not necessary. The non-objecting party will be given an opportunity to respond to the objection, if he or she wishes. The Administrative Judge will rule on any objection raised. In the event an objection is overruled, the objecting party has an automatic exception to the Administrative Judge's ruling.

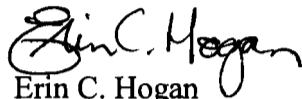
14. After completion of the presentation of evidence by the parties, they will have an opportunity to make closing arguments. A closing statement is not evidence. It is merely a review of the significant evidence and commentary regarding the applicability or non-applicability, as appropriate, of adjudication policy factors, both disqualifying and mitigating, as set forth in the Directive, which serves to provide the Administrative Judge with a better or "guided" understanding of the evidence. Department Counsel will go first. Applicant follows, with Department Counsel

having a right to rebuttal. Applicant does not have a right to respond to Department Counsel's rebuttal argument.

15. A court reporter will be present to make an official transcript of the hearing. The court reporter will send the original transcript to the Administrative Judge, and a copy of the transcript, free of charge, to the Applicant or Applicant's attorney, as appropriate.

16. The Administrative Judge will *not* announce his or her decision to the parties at the end of the hearing. A copy of the Administrative Judge's written decision will be sent to the parties by letter explaining the provisions for appeal.

17. The Administrative Judge has the discretion to vary the provisions of this guidance upon a showing of good cause, or whenever necessary to provide for the fair and efficient administration of the proceeding under the Directive.



Erin C. Hogan

Chief Administrative Judge