

SECURITY CLEARANCES: KNOW YOUR RIGHTS

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YOU ARE ENTITLED TO HAVE AN AFSA REPRESENTATIVE AND ATTORNEY PRESENT DURING QUESTIONING.

By J. MICHAEL HANNON

In a quiet Friday morning, you receive a telephone call from your supervisor instructing you to report to the small embassy conference room downstairs. Your post doesn't get many visitors, so you're surprised to find two serious-looking people in business attire already in the room when you arrive. Placing their credentials on the table, they explain that they're special agents with the State Department's Bureau of Diplomatic Security who have come all the way from Washington, D.C., to talk with you.

At first they are rather vague about the purpose of their visit, saying they just want to ask you a few things. The questions are indirect, even friendly, at first, but it soon becomes clear that the interview has been scripted ahead of time — and you are the only participant who does not know what is going on. When you press the agents, they eventually tell you that the department has received “derogatory information” that raises doubts as to your suitability for a security clearance. But they refuse to describe the specific allegations, much less their source.

You protest that the charges are absurd, but they press you to answer their questions anyway, suggesting

that cooperation will clear the matter up quickly. The agents are then supposed to present you with one of two written “warnings”: either a Garrity Warning or a Kalkines Warning, both named after court cases. The Garrity Warning is intended to preserve the government's ability to use your answers against you in any criminal proceeding. You are told that the interview is completely voluntary, and if you choose not to answer you cannot be disciplined for that refusal. This does not necessarily mean that there is an interest in prosecuting you.

The Kalkines Warning is given when the government has chosen to forgo any criminal prosecution against you ahead of time. In that case, you will be compelled to answer questions at the risk of losing your job, but your answers may not be used against you in any criminal prosecution. This does not mean, however, that there will not be a criminal prosecution. The use of that warning simply means that the government is not planning a criminal prosecution *at that moment*.

Whichever warning the agents give you, be aware that they may attempt to minimize its seriousness to induce you to volunteer information.

If you are already confused at this point, you are not

alone. In fact, many State Department investigators apparently share your confusion, particularly those in the Inspector General's Office. In our legal practice representing Foreign Service personnel in such situations, we have found that agents sometimes give either no warning or the wrong warnings. (Complicating matters further, there are a multiplicity of warning forms floating around among different government agencies.) But even if the agents follow the proper procedures in all respects, there is one key piece of information they are not required to volunteer: the fact that you have the right to have an AFSA representative and/or attorney present during the questioning.

Even if the agents do choose to advise you of that right in this particular scenario, they may also note that it will take time and effort to arrange that, delaying a resolution of your case.

You want to believe the agents; after all, you have nothing to hide, and you are sure the "derogatory information" is silly on its face. So you go ahead and answer their questions, watching as they take copious notes about what you tell them.

If you're lucky, the agents thank you, file a report indicating that there is no truth to the allegations, and that's the end of the matter. But it may also happen that they tell you your clearance has already been suspended pending a full investigation, and you are being recalled to the department. The agents will then give you a written notice of suspension, but typically that is as cryptic as the verbal information they had provided.

The Bureau of Diplomatic Security is also authorized to refer your case to the Department of Justice or to a United States Attorney's Office for consideration of criminal prosecution. The criminal jurisdiction of United States courts reaches overseas, as the United States may prosecute in this country any conduct which has an effect on commerce between the United States and any foreign country, a standard which is broadly construed.

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Once DS refers a case for criminal prosecution, the department takes the position that the matter is out of its hands, leaving you to await the exercise of discretion by the prosecutor's office and/or a grand jury. And the only time restriction imposed on these bodies is the statute of limitations for the particular crimes you are being indicted for. But for purposes of this article, let's assume they do not refer your case.

Minimal Due Process Only

Upon arrival in Washington, you surrender your badge and diplomatic passport and are given a new badge. You can get around the building, but you cannot access classified information or escort guests, and you must leave the premises by 7 p.m. Ideally, you are reassigned to a temporary position in which you can earn your pay doing something that does not require a security clearance. But that does not always happen, so you might spend weeks or months sitting at home with nothing to do, receiving your salary and wondering what will happen next.

The answer to that may surprise you.

Under State Department regulations and established law, the Bureau of Diplomatic Security has the sole authority to determine whether your security clearance should be suspended on the basis of "all facts available upon receipt of the initial derogatory information." The standard to be applied is to determine whether it is "in the interests of national security" to continue your security status or to suspend it.

The regulations further provide that DS investigations must be "reported in a timely manner" and issues requiring temporary suspension of clearance must be resolved "as quickly as possible (normally within 90 days)." The department is, however, permitted to continue suspension of an individual's clearance "until the relevant issues have been fully resolved."

If that seems open-ended, it is. Today, given the security issues facing the department, the resources available to pursue these investigations are sorely taxed. Our law firm has Foreign Service clients who have been drawing their salaries while on suspension for well over 180 days. And AFSA has clients who have

had their clearances suspended for more than two years.

In the absence of a criminal referral or a decision by the prosecutor's office not to accept the case, DS completes the investigation in its own time. If it determines an employee's continued security clearance is "not clearly consistent with the interest of the national security," DS prepares and submits a recommendation for revocation or suspension of clearance eligibility to the Director of the Diplomatic Security Bureau for approval.

At this point, the employee is allowed to ask for documents in order to prepare a rebuttal to the proposal to revoke the security clearance. He or she is also informed of the right to representation, and provided with the entire investigatory file "as permitted by national security and other applicable law."

More likely than not, these documents will not include the identity of the source of the "derogatory information." It is also unlikely that the witnesses relied upon by DS will even be identified in the investigatory file. There are no rules of evidence that pertain to a DS investigation or restrain its conclusions.

The government has the initial burden of proving — "based on substantial evidence" (as opposed to the familiar "beyond a reasonable doubt" standard) — that it is not in the national interest to continue the employee's security clearance. This is often a minimal standard, because there need only be a "rational basis" for State Department action, due to the level of trust required for access to classified information. Once the government meets its burden, it is then the responsibility of the employee to refute or rebut the government's case.

The limited nature of this process is deemed by the courts to satisfy due process concerns because a security clearance is not a species of property that the Constitution protects with full-blown trial procedures. In other words, because an employee does not "own" a security clearance, it can be revoked without a trial. The employee is only entitled to "minimal due process," which includes notice and an opportunity to respond.

Pursuant to Executive Order 12968 (issued Aug. 4, 1995), once the head of DS approves the revocation of a

Once DS moves to revoke a security clearance, the employee is only entitled to "minimal due process," which includes notice and an opportunity to respond.

security clearance, the employee must be provided with a written explanation of the grounds for the revocation. However, that document need only be as detailed as national security interests permit. State Department regulations also require that the letter advise the affected employee of any recourse available and the procedure for requesting access to his or her investigative file.

The Appeals Process

The employee is provided a reasonable opportunity (normally 30 days) to reply in writing and to appeal to a three-person management-level panel known as the Security Appeal Panel for review of the security determination. The Under Secretary for Management chairs the panel; the other two members are the Director General of the Foreign Service and the Assistant Secretary for Administration. Personal appearance is permitted before the panel, but direct and cross-examination of witnesses is not permitted. The appeal panel renders the final departmental decision concerning the employee's security clearance with a recommendation to reinstate or revoke clearance, which ultimately determines the individual's employability by State.

If the panel upholds the bureau's decision to revoke the security clearance, the employee will likely be proposed for separation for cause, because the department's position is that all Foreign Service employees must maintain a security clearance as a condition of employment. The employee is entitled to a hearing before the Foreign Service Grievance Board, but the board may not review the merits of the underlying security revocation. The board's review is limited to whether the procedural requirements for revocation of a clearance have been met and whether separation of the employee serves the "efficiency" of the Service.

Federal courts do not have the subject matter jurisdiction to review an agency's national security clearance decision. This restriction is rarely overcome. Employees have attempted to sue the State Department, arguing that the security clearance revocation was retaliatory. Even then, however, courts are often reluctant to inter-

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vene, out of concern that such a review is an impermissible intrusion by the judicial branch into the authority of the executive branch.

On occasion, a court might find that the interest being pursued by the employee — for example, a discrimination claim — is sufficiently important to permit a trial with appropriate limitations on the disclosure of classified information. But even in these circumstances, the court might choose not to review the basis for the security clearance revocation.

Know Your Rights

Given the tremendous amount of discretion given to DS and the Security Appeal Panel, and the extremely limited due process and appeal rights afforded to the employ-

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ee, it is vital for all employees to know their rights and to call upon their advocates early in the process to interact with investigators and clearance adjudicators. Employees are guaranteed the right to have an AFSA attorney and/or private attorney represent them during a DS investigation and throughout the security revocation process. (If the employee remains overseas during the initial phase of the investigation, as in the hypothetical situation described at the beginning of this article, AFSA attorneys will gladly arrange to participate in meetings with the agents via speaker phone.)

Again, note that DS is not required to inform employees of those rights: they must request such representation. ■

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