



DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

MANAGEMENT ADVISORY MEMORANDUM

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Notification of Concerns Regarding the
Department of Justice's Compliance with
Whistleblower Protections for Employees with
a Security Clearance

OVERSIGHT AND REVIEW DIVISION



May 9, 2024

Management Advisory Memorandum

To: Lisa Monaco
Deputy Attorney General

From: Michael E. Horowitz
Inspector General

A handwritten signature in blue ink that reads "Michael E. Horowitz".

Subject: The Department of Justice's Compliance with Whistleblower Protections for Employees with a Security Clearance

The purpose of this memorandum is to advise you of concerns that the Department of Justice (Department or DOJ) Office of the Inspector General (OIG) has identified regarding the Department's compliance with 50 U.S.C. § 3341 and the Director of National Intelligence's (DNI) Security Executive Agent Directive 9 (SEAD 9), which provide protections for federal employees who allege their security clearance has been suspended, revoked, or denied in retaliation for making a protected disclosure. This concern came to our attention in connection with the OIG's assessment of complaints the OIG received from employees of a DOJ component, alleging that their security clearances were suspended in retaliation for protected whistleblowing activity.

Specifically, 50 U.S.C. § 3341(j) prohibits agencies from taking or threatening to take "any action with respect to any employee's security clearance" in retaliation for protected whistleblowing activity.¹ To ensure compliance with this provision, Section 3341(b) requires the DNI (as the result of a Presidential designation) to establish "uniform and consistent" policies and procedures for Executive Branch agencies that allow whistleblowers to appeal the suspension, denial, or revocation of their security clearance for alleged retaliation; however, if the security clearance has been suspended, but not yet denied or revoked, the appeal may only occur if the security clearance has been suspended more than 1 year.² The statute further provides that the agency security clearance review process must, to the extent practicable, permit individuals with a retaliation claim "to retain their government employment status while [the security clearance review] is pending."³ In May 2022, the DNI issued SEAD 9, which requires agencies to have an appeal process for employees alleging reprisal due to a suspension, revocation, or denial of their security

¹ These protections were first signed into law on July 7, 2014, as part of the "Intelligence Authorization Act for Fiscal Year 2014," P.L. 113-126.

² The statute provides that this 1-year time limitation can be extended if the head of the agency (or designee) "certifies that a longer suspension is needed before a final decision on denial or revocation to prevent imminent harm to the national security."

³ For the purposes of this memorandum, the term "security clearance review" includes the various stages of a security clearance determination, from the security investigation and suspension of a clearance through the final appeal of a revoked or denied clearance.

clearance and that the “appeal process must provide for...the [Inspector General] of the employing agency to conduct fact-finding.”

The Department’s existing appeals policy for employees whose security clearances have been suspended, revoked, or denied, DOJ Instruction 1700.00.01 (March 2018), while providing for an OIG appeal in alleged retaliation cases where a security clearance has been revoked or denied, does not include an OIG appeal process for employees whose security clearance has been suspended for more than 1 year and who allege retaliation, as required by SEAD 9. It also does not have a process in place that enables employees claiming retaliation, to the extent practicable, to retain employment status pending a security clearance review, as required by Section 3341. We have reviewed security clearance appeal policies for multiple DOJ law enforcement components and they also do not appear to include these requirements of SEAD 9 and Section 3341.

The Issue

In general, under DOJ Instruction 1700.00.01, if a security concern is raised about a Department employee, the allegation is referred to the relevant component’s security division, which has the authority to immediately suspend the employee’s clearance and initiate a security investigation to determine whether the employee’s clearance should be revoked or reinstated. Under the DOJ Instruction, if the component’s security division revokes or denies the employee’s clearance upon completion of the security investigation, the employee may request the information supporting that decision. The DOJ Instruction provides further that the employee may then submit a formal request to the component’s security division to reconsider its revocation or denial determination. Pursuant to DOJ Instruction 1700.00.01, if a revocation or denial decision is sustained, the employee must be notified of their opportunity to appeal the decision to the Department’s Access Review Committee (ARC), and if there is a claim of retaliation the employee must be notified of their rights under Presidential Policy Directive 19 (PPD-19) to file a retaliation claim with the OIG. In practice, the process from suspension, to subsequent security investigation, to a decision to revoke or deny, to a request for reconsideration, and to a final decision on the request for reconsideration can take several years to complete.

The DNI is responsible, by delegation from the President, for implementing the provisions of Section 3341. In May 2022, the DNI updated SEAD 9, “Whistleblower Protection: Appellate Review of Retaliation Regarding Security Clearances and Access Determinations.” SEAD 9 reiterates the terms of Section 3341(b)(7), notes that the Directive applies to all Executive Branch agencies, and informs agencies that the policies and procedures for appealing a denial, suspension, or revocation of a clearance “must provide for...the [Inspector General] of the employing agency to conduct fact-finding [on the retaliation allegation].”

Notwithstanding the requirements of the Section 3341 and SEAD 9, the Department’s governing directive on security clearance appeals, DOJ Instruction 1700.00.01, does not include a process that authorizes employees to contest a suspended security clearance as retaliatory during the period of the suspension, no matter how long the clearance remains in suspended status.⁴ DOJ Instruction 1700.00.01 only permits an employee to file a retaliation complaint appeal after a final decision has been made by the component to sustain a revocation decision. Therefore, DOJ Instruction 1700.00.01 does not meet the requirements of Section 3341 and SEAD 9.

⁴ While DOJ Instruction 1700.00.01 directs components to “make every effort to resolve suspension cases as expeditiously as circumstances permit,” and requires components to report monthly on the status of any suspension that exceeds 90 days, there are no time limits on how long an employee’s security clearance can remain suspended.

This lack of a DOJ appeal process for employees who allege their suspension of more than 1 year is retaliatory, as required by Section 3341 and SEAD 9, is especially problematic at DOJ components that regularly suspend employees without pay for the duration of the security review process, which can sometimes last years. For example, employees of the Federal Bureau of Investigation (FBI) are routinely informed at the time their clearance is suspended that, "It has been a longstanding, essential condition of employment that employees of the FBI be able to obtain and maintain a Top Secret security clearance." Accordingly, pursuant to FBI practice, a suspended clearance results in the employee being notified that they will also be subject to an indefinite employment suspension without pay and the loss of access to FBI facilities until the security review process adjudicates the suspension decision. The FBI, like the Department, does not have a process that allows employees whose security clearance has been suspended for more than 1 year to file a retaliation complaint.⁵

As noted, Section 3341 also requires government agencies to establish a security clearance review process that, to the extent practicable, "permit[s]...individuals...[with a retaliation claim] to retain their government employment status while [the security clearance review] is pending." Not only does DOJ Instruction 1700.00.01 not address this Section 3341 requirement, but it also does not place any limitations, or even provide guidance, on how long an employee can be kept indefinitely suspended without pay while the component's security review process is ongoing. For example, the policy does not require DOJ components to consider any practicable alternatives to indefinite suspension without pay during a security investigation for employees, including those with a reprisal claim, such as identifying duties that do not require a security clearance. In many cases, it is financially unrealistic for an employee suspended without pay who claims retaliation "to retain their government employment status while [the security clearance review] is pending," given the length of time a security clearance inquiry often takes. As a practical matter, therefore, the ability of an employee who has been indefinitely suspended without pay to retain their employment status can be rendered meaningless when that suspension lasts for a substantial period of time. Therefore, existing DOJ practice is inconsistent with the intent of Section 3341. Moreover, it creates the risk that the security process could be misused, as part of an inappropriate effort to encourage an employee to resign, by having an employee's clearance suspended knowing the employee will be placed on leave without pay and that the suspension may not be resolved for a lengthy period of time.

Following our identification of these concerns, the OIG requested information from DOJ's Justice Management Division (JMD), which is responsible for personnel security for the Department, for any Department-wide guidance that meets the whistleblower requirements of Section 3341 and SEAD 9. JMD responded that DOJ Instruction 1700.00.01 does not explicitly permit an employee to file a retaliation claim with the OIG after their clearance has been suspended for more than 1 year, but that it would be appropriate, in light of the statutory provisions, to notify employees of their right to file a retaliation claim

⁵ In technical comments submitted after reviewing a draft of this memorandum, the FBI stated that it will be challenging to identify practicable alternatives to indefinite suspensions without pay for employees with a suspended security clearance. Separately, the DEA noted, "Employees who are indefinitely suspended without pay due to a security clearance suspension are still government employees—and therefore still have government employment status."

The OIG acknowledges the difficulty in identifying practicable alternatives to indefinite suspension without pay in some circumstances for some employees, but nevertheless, as noted below and in the recommendations section, the OIG believes that the Department, FBI, DEA, ATF, and other components should comply with the intent of this statutory provision by making reasonable efforts to identify practicable alternatives to indefinite suspension without pay in every instance and documenting the reasons when that is not practicable. Although the OIG acknowledges the DEA's statement that indefinitely suspended employees still have government employment status, maintaining this status becomes untenable, and therefore inconsistent with the intent of the statute, when indefinite suspensions without pay last for lengthy periods with no upward limit on how long the security investigation and suspension without pay can last.

with the OIG after a clearance had been suspended for over a year. JMD also stated that DOJ Instruction 1700.00.01 is currently being updated to address these issues.

Additionally, the OIG requested information from the FBI, the Drug Enforcement Administration (DEA), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) about any component-level procedures addressing the whistleblower requirements of Section 3341 and SEAD 9. In response, the FBI acknowledged that its written policy does not address SEAD 9's appeal process, including the right to file a retaliation complaint with the OIG of a suspension lasting over 1 year. The FBI stated it would add relevant language to the appropriate policy guides and directives to conform those guides and directives to SEAD 9 and Section 3341's requirements. The DEA responded that it uses DOJ Order 1700.00.01 for security clearance suspensions, denials, and revocations because "security clearances are the province of the DOJ's Security Program and that DEA's role is to steward and administer security clearances in accordance with the DOJ's program." Nevertheless, the DEA stated that it would ensure that the OIG's concerns regarding whistleblower protections for employees with a security clearance are addressed in internal DEA policy to the extent that they are not covered by any revised DOJ-wide policy or guidance. The DEA also noted that it is currently working to develop language to notify employees of their right to file a whistleblower retaliation claim with the OIG when their security clearance review or suspension lasts longer than 1 year. The ATF told us that there is nothing in its relevant Personnel Security Order, ATF O 8620.1A, that addresses the right of a suspended employee with a whistleblower claim to appeal to the OIG if the suspension lasts longer than 1 year. ATF added that its Personnel Security Division (PSD) is currently in the process of drafting an updated Personnel Security Order that will consider incorporating the right of an employee with a whistleblower claim to appeal a clearance suspension lasting longer than 1 year. According to the ATF, the PSD will also consider adding language that would implement a policy that, to the extent possible, allows an employee with a retaliation claim to retain their employment status while such a security clearance appeal is pending.

The OIG identified these concerns in connection with our work assessing retaliation complaints from DOJ employees whose security clearances had been suspended and who had been placed on leave without pay.⁶ For example, in one matter, the OIG initiated a reprisal investigation, consistent with Section 3341, after the employee had been suspended without pay for over 1 year, notwithstanding the absence of a suspension appeal policy in DOJ Order 1700.00.01 for employees claiming retaliation. In that case, the employee was suspended without pay for approximately 15 months before the FBI issued a decision revoking his security clearance and it then took another 4 months for the FBI to provide the employee with the information that the FBI used to support its revocation decision. As provided for in the Department's appeal process, the employee filed a request for reconsideration of the revocation decision, which remains pending with the FBI. The employee has been suspended without pay for more than 2 years. Had the OIG not decided to move forward with its reprisal investigation as provided for in Section 3341 and SEAD 9, the employee would still not have had the right to file a retaliation complaint with the OIG under the terms of DOJ Instruction 1700.00.01 because the revocation decision is not yet final.

We asked the FBI for data on the length of employee security clearance suspensions, regardless of whether the employee had raised a retaliation allegation. The data provided by the FBI indicated that, in the last 5 years, 106 employees have had their clearances suspended for 6 months or longer. For these 106 employees, the average time between suspension and a decision to revoke or reinstate the clearance, or for

⁶ Our identification of the procedural concern highlighted in this memorandum should not be read as a determination on the merit, or lack of merit, of any individual reprisal claim submitted to the OIG.

the employee's separation during suspension, was 527 days, which is about 17.5 months.⁷ Moreover, this time period does not account for the additional time required for the FBI to produce to the employee the documentation supporting the revocation, for the employee to file a request for reconsideration, and for the FBI to issue a decision on the reconsideration request. As this data reflects, it is unlikely that security clearance reviews, from suspension to a final decision to revoke, are being completed in 1 year. Accordingly, the DOJ Instruction that provides for a retaliation complaint to be filed with the OIG only after this process is concluded is inconsistent with the requirements of 50 U.S.C. § 3341 and SEAD 9.

Recommendation

To ensure consistency with the requirements of 50 U.S.C. § 3341 and to promote fundamental fairness in the clearance suspension and adjudication process, we recommend that the Department revise DOJ Instruction 1700.00.01 to:

1. Ensure that there is a process for employees to file a retaliation claim with the OIG when a security clearance review or suspension lasts longer than 1 year;
2. Ensure that employees are notified in writing of their right to file a retaliation claim with the OIG when a security clearance review or suspension lasts longer than 1 year;
3. Ensure that employees who have had their security clearance suspended, revoked, or denied, and have made a retaliation claim, have an opportunity, to the extent practicable, to "retain their government employment status" during a security investigation; and
4. Put in place a process to review the monthly reports that DOJ Instruction 1700.00.01 requires of components in suspension cases exceeding 90 days in order to assess whether components are complying with the DOJ Instruction's requirement that components "make every effort to resolve suspension cases as expeditiously as circumstances permit."

The OIG further recommends the Department direct that each component ensure that its internal policies, directives, and procedures comply with the revisions to DOJ Instruction 1700.00.01, Section 3341, and SEAD 9. The Department concurs with these recommendations.

cc: Bradley Weinsheimer
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Office of the Deputy Attorney General

⁷ DOJ Instruction 1700.00.01 also states, "A description of the status of any suspension cases exceeding 90 days must be reported to the [Department Security Officer] and updated on a monthly basis." The FBI informed the OIG that it has not been complying with this requirement, and that compliance with this provision appears to have stopped during the pandemic, but that moving forward the FBI will resume reporting suspension cases exceeding 90 days to the Department.

The OIG acknowledges that some security clearance investigations are delayed because of pending OIG or internal affairs misconduct investigations that may overlap with security investigations. The OIG will continue to work with the FBI and the other Department components to deconflict security and misconduct investigations, and provide the necessary information to support the notification requirement for security clearance investigations exceeding 90 days, where there is an overlapping OIG misconduct investigation.