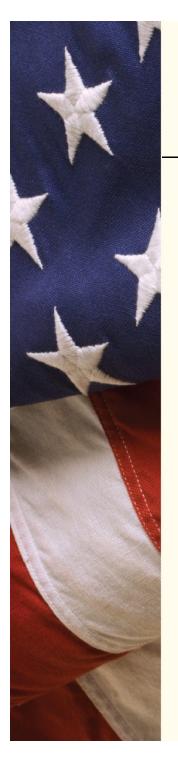


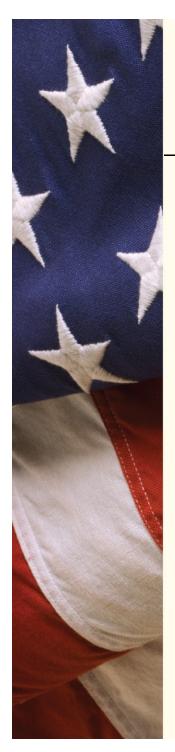


# Taking Adverse Actions Based on Suitability or Security Issues



### **Objectives**

- Discuss the various purposes for personnel investigations
  - HSPD-12 (PIV access)
  - Suitability/Fitness (character and conduct)
  - National Security/Access to classified information
- Outline agency authorities and options for adjudication and the procedural requirements for action when issues arise
- Discuss reciprocity policies and guidance

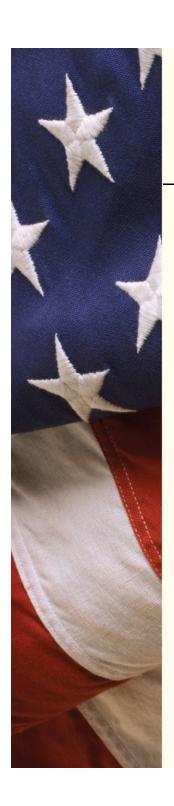


## **Purposes of Personnel Investigations**

Requirement for access to Federal facilities and logical systems

Eligibility for a Personal Identification Verification (PIV) card as mandated by HSPD-12

- Need to evaluate character and conduct of Government workers
  - Suitability determinations for positions covered by 5 CFR 731
  - Continuous evaluation through reinvestigation of individuals in positions of public trust as required by E.O. 13488



#### **Purposes of Personnel Investigations**

## Need to evaluate character and conduct of Government workers

- Eligibility and qualifications for excepted service or other positions not covered by 5 CFR 731 or National Security requirements
- Fitness determinations for contractor employment per contractual requirements



#### **Purposes of Personnel Investigations**

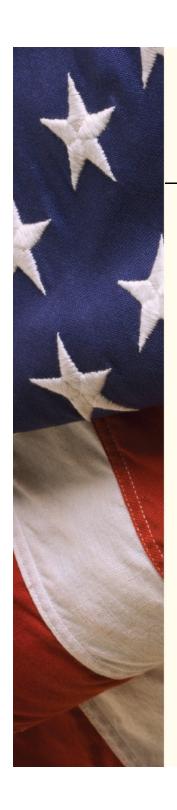
#### **Protection of National Security**

- Eligibility for a National Security position under E.O. 10450
- Eligibility for a clearance to access classified information under E.O. 12968
- Continuous evaluation through reinvestigation of individuals holding clearances under E.O. 12968



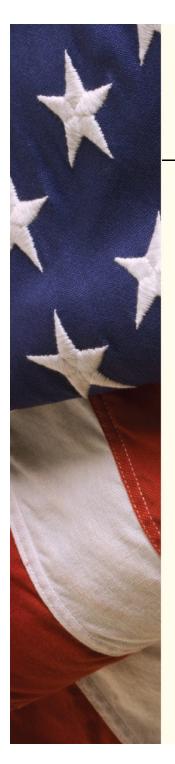
# PIV Card Requirements (Resulting from HSPD-12)

- Mandatory, Governmentwide standard for a secure and reliable form of identification issued by the Federal Government for employees and contract employees
  - Physical access to Federally controlled facilities
  - Logical access to Federally controlled information systems
- Requirements established in Federal Information Processing Standards (FIPS) publication 201-1 Completion and successful adjudication of National Agency Check with Written Inquiries investigation or other investigation as required for Federal employment



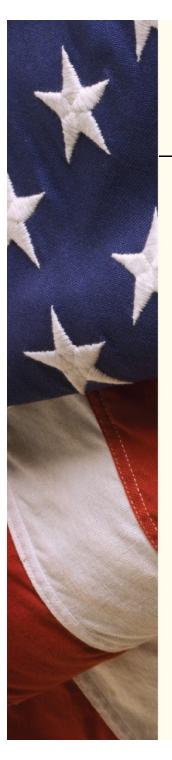
## What is Suitability?

"Suitability" refers to a person's identifiable character traits and conduct sufficient to decide whether employment or continued employment would or would not protect the integrity or promote the efficiency of the service



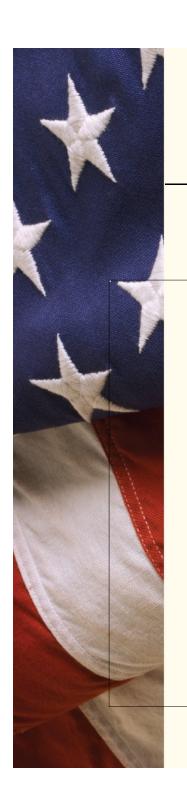
## **Suitability Requirements**

- Code of Federal Regulations (5 CFR 731)
  establishes criteria and procedures for suitability
  investigations, determinations, and actions
- Covered positions include only:
  - Competitive service positions
  - Career appointments in the Senior Executive Service
  - Excepted service positions that can be non-competitively converted to competitive service
- Suitability investigations are conducted under this authority for all covered positions. Agency suitability actions under 5 CFR 731 are limited to applicants and appointees



## **Suitability Investigations**

- All covered positions require background investigations unless:
  - The person has already undergone an investigation; and
  - Is being appointed, converted, or transferred with one year of continuous service; and
  - Has been previously determined suitable or fit under criteria equivalent to 5 CFR 731 (adequate assurance of suitability for covered positions, as determined by OPM)
- When the above conditions apply, investigation is still permitted when:
  - Position requires higher level of investigation
  - New information raises suitability questions

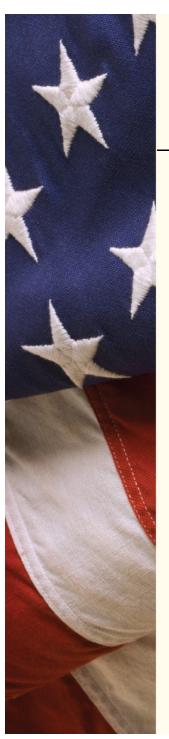


## **Suitability Risk Levels**

**Public Trust** 

- High Risk (HR)
- Moderate Risk (MR)
- Low Risk (LR)

Level of investigation depends on risk level of position



## **Suitability Reinvestigations**

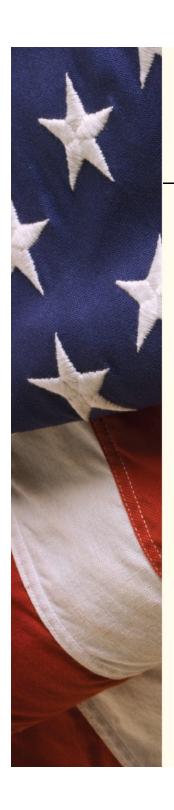
- E.O. 13488 established authority to reinvestigate persons in positions of public trust
- Issues developed in reinvestigations must be evaluated to determine whether or not the person's continued employment promotes the efficiency of the service
- However, agencies have no jurisdiction to take actions on employees (continuous service for more than a year) under 5 CFR 731. Any necessary action, must be taken under other agency authority (e.g., 5 CFR 752)



#### What is Fitness?

"Fitness" refers to the level of character and conduct determined necessary for an individual to perform work for, or on behalf of, a Federal agency as an employee in the excepted service (other than in a position subject to suitability) or as a contractor employee

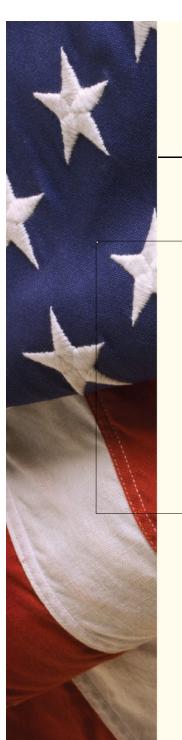
- Excepted service positions are covered by 5 CFR 302
- Contracts should specify investigative and adjudicative requirements for contract employees



## What is Security?

"Security" refers to a reasonable expectation that the employment or continued employment of an individual would or would not be clearly consistent with the interests of National Security

- Government workers in sensitive positions and/or requiring access or eligibility for access to classified material
- National Security authorities include: Executive Order 10450; Executive Order 12968; Executive Order 13467; 5 CFR Part 732; and 5 U.S.C § 7532
- The security determination is a discretionary agency responsibility made <u>in addition to and subsequent to</u> the suitability or fitness determination



### **National Security Sensitivity Levels**

- Special Sensitive
- Critical Sensitive
- Non-Critical Sensitive
- Non-sensitive

National Security Positions

## Level of investigation depends on sensitivity level of position



## **Security Reinvestigations**

- E. O. 12968 establishes authority for reinvestigations of positions requiring eligibility for access to classified information
- Issues developed in reinvestigations must be evaluated to determine whether or not continued access is in the best interest of National Security



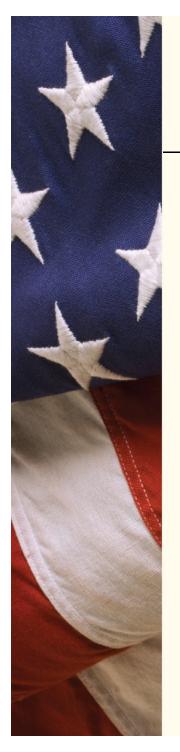
### **Adjudications**

- HSPD 12 adjudication
- Suitability adjudication under 5 CFR 731
- Fitness determinations that are equivalent to criteria in 5 CFR 731
- Security adjudication under E.O. 12968
- Other agency authorities



## **HSPD-12 Adjudication**

- 7/31/08 Final Credentialing Standards for Issuing PIV Cards under HSPD-12 issued by OPM
- No PIV card may be granted if:
  - Known or reasonable suspicion of terrorism
  - Unable to verify identity
  - Fraudulent identity information submitted
  - Reasonable belief attempt will be made to gain unauthorized access to sensitive or protected information
  - Reasonable belief credential will be used unlawfully or inappropriately
  - Reasonable belief individual will use Federally-controlled information systems unlawfully, make unauthorized modifications, corrupt or destroy, or inappropriately use such systems



## **HSPD-12 Adjudication**

- Agencies may use Supplemental Credentialing Standards when position is not covered by other adjudicative criteria. These include reasonable basis to believe there is an unacceptable risk due to:
  - Misconduct or negligence in employment
  - Criminal or dishonest conduct
  - Material, intentional false statement, deception or fraud
  - Alcohol abuse without substantial rehabilitation
  - Illegal use of narcotics, drugs, or other controlled substances without substantial rehabilitation
  - Statutory or regulatory bar
  - Willful engagement in acts or activities designed to overthrow the U.S. Government by force
- Equivalent to suitability factors in 5 CFR 731



## Suitability Adjudication Under 5 CFR 731

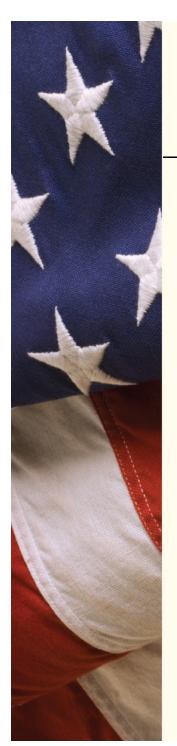
## OPM retains authority to adjudicate:

Covered applicants, appointees and employees with evidence of material, intentional falsification, refusal to furnish testimony, or cases in which Governmentwide debarment is warranted

## Agencies have delegated authority to adjudicate:

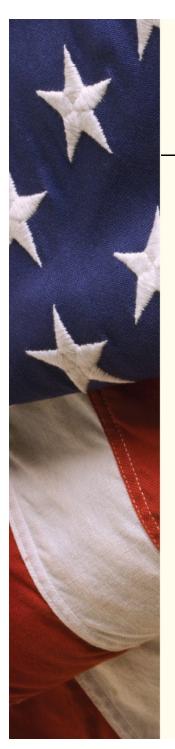
Covered applicants and appointees, <u>unless</u> there is evidence of material, intentional falsification or refusal to furnish testimony

Note: No prior approval is needed, but notification to OPM is required, for actions taken by agencies under other authority (5 CFR 315, 5 CFR 359, or 5 CFR 752)



# Agency Delegated Adjudicative Authority

- Agencies may begin to determine an applicant's suitability at any time during the hiring process
- Agencies must refer cases warranting Governmentwide debarment to OPM
- Agency authority is subject to revocation by OPM



# Suitability Standards and Criteria 5 CFR 731.201 and 202

- A suitability action taken against an applicant, appointee, or employee will protect the integrity or promote the efficiency of the service
- Suitability determinations must be based on the presence or absence of one or more specific factors (charges)
- Only the eight specific factors outlined on the following slides are considered a basis for finding a person unsuitable and taking a suitability action

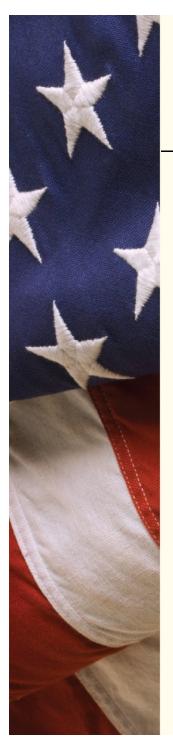


#### 1. Misconduct or negligence in employment

 Inability to perform and other qualification issues are not suitability issues

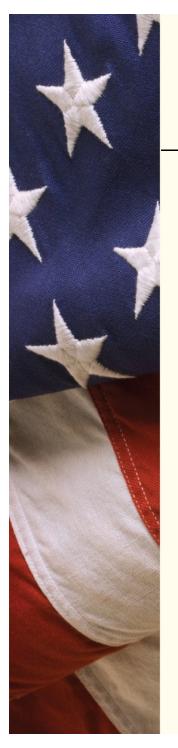
#### 2. Criminal or dishonest conduct

Financial irresponsibility is included only if dishonesty is established



- 3. Material, intentional false statement, or deception or fraud in examination or appointment\*
  - A "material" statement is one that is capable of influencing, affects, or has a natural tendency to affect an official decision, even if OPM or an agency does not rely upon it
- 4. Refusal to furnish testimony as required by 5 CFR 5.4\*
  - Limited to testimony required by the Office of Personnel Management, Office of the Special Counsel, or Merit Systems Protection Board

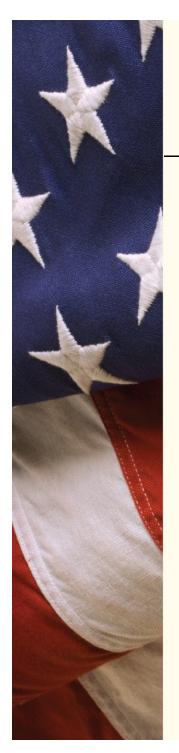
<sup>\*</sup> Only OPM can cite this factor



- 5. Alcohol abuse, without evidence of substantial rehabilitation, of a nature and duration that suggests that the applicant or appointee would be prevented from performing the duties of the position in question or would constitute a direct threat to the property or safety of the applicant or appointee or others\*
- 6. Illegal use of narcotics, drugs or other controlled substances without evidence of substantial rehabilitation\*
- \* Neither factor applies if there is clear evidence of substantial rehabilitation (measurable efforts and noticeable results)

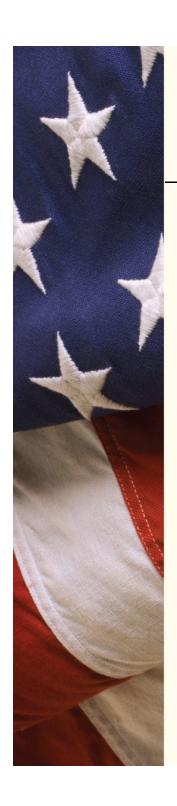


- 7. Knowing and willful engagement in acts or activities designed to overthrow the United States Government by force
  - Membership in an organization, alone, is not disqualifying
- 8. Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question
  - There must be a specific legal restriction to employment

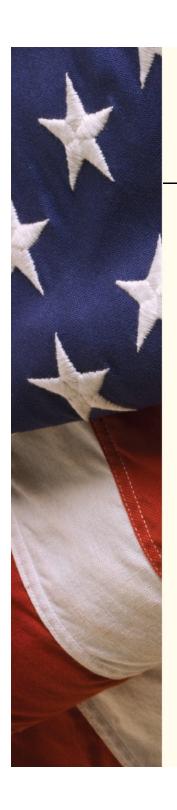


## **Origins of Suitability Issues**

- Application or appointment forms
- Interviews/examinations
- Pre-employment inquiries
- Investigative data forms
- Personal subject interview (PRSI)
- Investigation

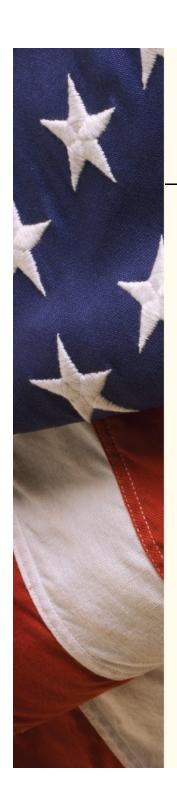


OPM and agencies must consider the listed additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case



#### 1. Nature of the position

- The more authority, responsibility, sensitivity and public trust associated with the position, the higher the risks involved and the more potential adverse impact there is
- Consider Core duties continuing responsibility of particular importance to the relevant covered position or the achievement of an agency's mission



#### **Nature of the Position**

#### **Examples of core duties**

- Law Enforcement positions sale of narcotics
- Fiduciary positions embezzlement
- Motor Vehicle Operator habitual traffic offender
- Computer Security Manager using company computer to access porn sites
- Staffing Specialist prohibited personnel practices

NOTE: LIST IS NOT ALL-INCLUSIVE



#### 2. Nature and seriousness of the conduct

 The more serious the conduct, the greater the potential for disqualification

#### 3. Circumstances surrounding the conduct

 Full facts and circumstances are essential to insure justice to the person and to protect the interests of the Government

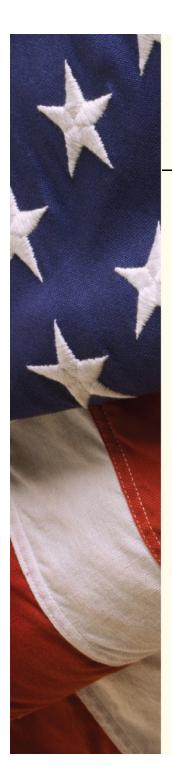


#### 4. Recency of the conduct

The more recent the conduct is, the greater the potential for disqualification

#### 5. Age of person at time of conduct

- Offenses committed as a minor may be less serious than those committed as an adult
- Not normally pertinent if conduct is very recent, part of a pattern or particularly heinous



#### 6. Contributing societal conditions

 Economic and cultural conditions might be a mitigating factor if the conditions are now removed

## 7. Absence or presence of rehabilitation or efforts toward rehabilitation

- Time elapsed since conduct last occurred (no set time frame; must be considered in tandem with other factors)
- Results of treatment/counseling; prognosis and past history of treatment
- Other aspects of the individual's life, such as stable employment record, positive changes in personal life, etc.



# Suitability Determinations and Actions

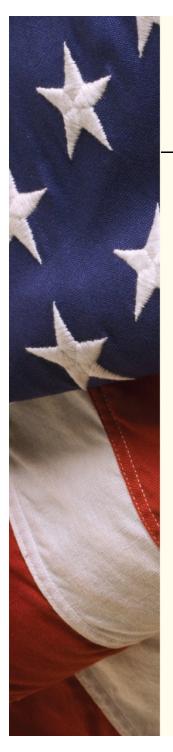
- A suitability action (defined at 5 CFR 731.203) is an outcome taken by OPM or an agency under the procedures of 5 CFR 731
  - Cancellation of eligibility
  - Removal
  - Cancellation of reinstatement eligibility
  - Debarment
- A non-selection, alone, is not a suitability action
  Objections to eligible or pass-over of preference eligible decisions are made under 5 CFR 332 and are not appealable to the Merit Systems Protection Board



## What is NOT a Suitability Action?

- Rescission of tentative offer of employment
- Non selection, including
  - the cancellation of a tentative offer for a single position
  - cancellation of eligibility for a specific position based on an objection to an eligible or pass over of a preference eligible under 5 CFR 332.406

is not a suitability action even if it is based on the criteria for making suitability determinations set forth at 5 CFR 731.202



## **Debarment by OPM and Agencies**

- OPM may deny a person examination for, or appointment to, all covered positions for up to 3 years (Governmentwide)
- Agencies may deny a person examination for, or appointment to, all or specific covered positions within the agency for up to 3 years (Agency-specific)
- An additional period of debarment may be imposed by OPM or an agency
  - Person must again be an applicant or appointee for a covered position and 5 CFR 731 procedures must be followed
  - May be based in whole or in part on the same conduct or new conduct UNITED STATES OFFICE OF PERSONNEL MANAGEMENT



### Part 731 Procedural Requirements

#### Proposed Action

- Must give reasonable notice to subject in writing, stating specific reasons
- Must notify subject of right to "materials relied upon"
- Must inform subject of time limits for response and right to respond in writing
- Must retain subject in pay status during response time, if employed
- Must advise subject of right to representation

#### Respondent's Answer

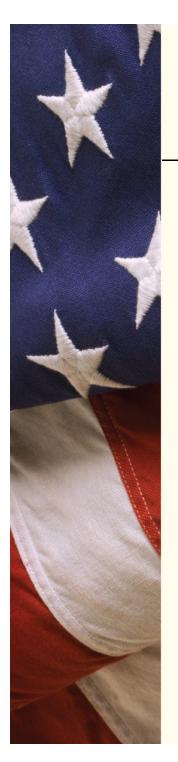
- May answer charges in writing
- May furnish documentation and/or affidavits



## Part 731 Procedural Requirements

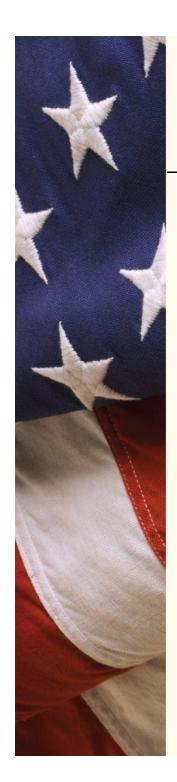
### **Final Decision**

- Must be in writing and dated
- Must inform respondent of reasons for decision
- Must give appeal rights to MSPB
- Removal is effective within five workdays following the date of the decision



## Reporting

- Agencies must report all actions taken as a result of an OPM suitability investigation
- Agencies must report to OPM when they believe a Governmentwide debarment might be appropriate in a specific case
- Agencies must provide information about the level and result of each background investigation, suitability determination, and suitability action taken to OPM



## Is the Decision/Action Reviewable?

Employees/Appointees may appeal an unfavorable suitability determination to the Merit Systems Protection Board

The procedures for filing an appeal with the Board are found at 5 CFR part 1201



## **Establishing Fitness Criteria**

- Agency heads have the authority to establish fitness criteria and make fitness determinations based on them
- Agency heads have discretion to determine if their criteria is equivalent to suitability standards under 5 CFR 731
- Agency heads shall take into account OPM guidance when determining whether their criteria is equivalent



## Suitability vs. Security

### **SUITABILITY/FITNESS**

Objective – The examination of individual personal character and conduct

Suitability – Would the person's employment in a covered position promote the efficiency and protect the integrity of the Service?

Fitness – Does the person have the required level of character and conduct necessary to perform work for or on behalf of a Federal agency?

### **SECURITY**

Objective – A determination regarding whether employment would constitute a risk to National Security. Influences such as foreign associates or ties are also considered in this determination

Does the person have personal conduct or influences that could affect or potentially affect his or her trustworthiness?



# Guidelines for Determining Eligibility for Access to Classified Material

# Guidelines list security concerns, conditions that may be disqualifying, and conditions that could mitigate in thirteen areas:

- A. Allegiance to the United States
- B. Foreign Influence
- C. Foreign Preference
- D. Sexual Behavior
- E. Personal Conduct
- F. Financial Considerations
- G. Alcohol Consumption

- H. Drug Involvement
- I. Psychological Conditions
- J. Criminal Conduct
- K. Handling Protected Information
- L. Outside Activities
- M. Misuse of Information Technology



# Procedural Requirements for Access Denials and Revocations

- Comprehensive and detailed written explanation
- Information upon which revocation or denial is based (upon request, within 30 days)
- Right to representation at own expense and entire investigative file if requested (and permitted by law)
- Reasonable time to reply in writing and request a review of the determination
- Written notice of results of review, identity of deciding official, and written notice of right to appeal
- Appeal in writing to high level panel appointed by agency head (3 members, 2 outside security)
- Opportunity to appear in person at some point in the process



## What Actions May be Taken?

- Transfer to a non-sensitive position
- Indefinite Suspension pending final revocation.
  (Follow agency policy on placement in other position if required)
- Removal



## Is the Decision/Action Reviewable?

MSPB may not review the substance of the decision to remove an employee based on revocation of a clearance, only whether:

- the employee's position required a security clearance;
- his/her security clearance was denied or revoked;
- transfer to a non-sensitive position was not feasible; and
- the agency followed the procedural requirements in processing the removal action.



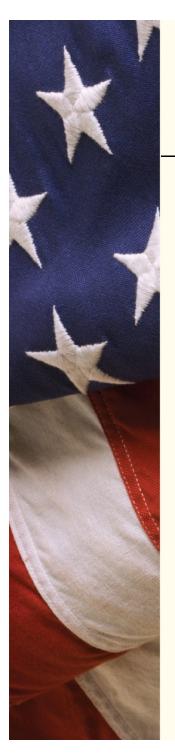
## **Other Adjudicative Authorities**

- 5 CFR 315 Competitive Service probationary employees
- 5 CFR 359 SES probationary employees
- 5 CFR 752 Adverse actions (employees past probationary period, etc.)



# Reciprocity of Suitability Determinations

- No new suitability determination when person already determined suitable or fit based on character or conduct unless:
  - New investigation is required because the position requires a higher level of investigation than previously conducted
  - New information calls suitability into question
  - Investigative record shows conduct that is incompatible with core duties of position
- Favorable decisions on cases with issues should be reviewed and re-adjudicated if warranted
- Agencies cannot appoint an individual to a position covered by 5 CFR 731 when the person is under an OPM debarment



# Reciprocity for Fitness Determinations

- When reciprocity is required
  - Gaining agency uses equivalent criteria
  - Prior fitness/suitability determination based on equivalent criteria
  - No break in service
- When reciprocity does not apply
  - New investigation is required
  - New information calls fitness into question
  - Conduct incompatible with core duties of position
- Favorable decisions on cases with issues should be reviewed and re-adjudicated if warranted



# Reciprocity Related to National Security Clearances

- E.O. 12968 requires agencies to mutually and reciprocally accept existing access background investigations and eligibility determinations
- Exceptions
  - Substantial information that employee may not satisfy the standards
  - Existing security clearance was discretionary did not meet adjudicative or investigative standards (conditions, deviations, and waivers)
  - In exceptional circumstances for special access programs where additional, but not duplicative, procedures are required to protect the national security (polygraph, non-U.S. immediate family members, requirement for investigation within seven years regardless of classification level)