

U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C. 20250

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Subject:	Date: September 13, 2013
Procedures for the Denial or Revocation of Access to National Security Information	Originating Office: Office of Homeland Security and Emergency Coordination

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1. PURPOSE

This regulation updates policies, procedures, and responsibilities for United States Department of Agriculture (USDA) employees and applicants who have been determined ineligible for access to classified national security information pursuant to Executive Order (E.O.) 12968, "Access to Classified Information" (hereafter, E.O. 12968).

This regulation also establishes a whistleblower reprisal review program and sets forth the procedures to be followed by USDA employees, including applicants and probationary employees (hereinafter USDA employees), and USDA contractors when making protected disclosures. Further, this regulation prohibits USDA officials from taking, failing to take, or threatening to take a personnel action or making a decision/recommendation impacting a USDA employee's or contractor's eligibility for access to classified information in reprisal for making a protected disclosure. This regulation also promulgates the policies and procedures for USDA employees and contractors to file whistleblower reprisal complaints with the USDA Office of Inspector General (OIG).

2. SPECIAL INSTRUCTIONS/CANCELLATION

This Departmental Regulation (DR) is a revision of, and cancels, DR 4600-002 (amended), dated February 11, 2002.

3. BACKGROUND

E.O. 12968 requires the Department to establish a formal review process for individuals who elect to appeal a decision to deny or revoke their access to classified information. The Department established a Personnel Security Review Board (PSRB) in 2001 to handle these formal reviews. This formal appeal and review process is referred to as “due process.” PSRB is comprised of three senior career officials, who must occupy a Critical Sensitive duty position. Two of the members are selected from outside the security field.

Due process allows for an individual to provide a written appeal to the PSRB. In addition to the written appeal to PSRB, individuals may request an opportunity to make a personal appearance before an Administrative Law Judge to present relevant documents, material, or information prior to PSRB rendering a final written decision.

On October 10, 2012, President Barack Obama issued Presidential Policy Directive/PPD-19, Protecting Whistleblowers with Access to Classified Information. PPD-19 prohibits retaliation against agency employees who report fraud, waste, and abuse, while still protecting classified national security information. The Directive requires certain agencies to establish internal procedures to review allegations of whistleblower reprisal. Section B sets forth the requirements for non-Intelligence Communities agencies that have employees who have access to classified information, including but not limited to USDA.

4. POLICY

- a. Any USDA officer or employee who has authority to take, direct others to take, recommend, or approve any action affecting a USDA employee’s Eligibility for Access to Classified Information shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, any action affecting a USDA employee’s Eligibility for Access to Classified Information as a reprisal for a Protected Disclosure, as defined in PPD-19.
- b. No USDA employee shall be deemed to be eligible for access to classified information merely by reason of Federal service or contracting, licensee, certificate holder, or grantee status, or as a matter of right or privilege, or as a result of any particular title, rank, position, or affiliation. Eligibility shall be granted only where the facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the

United States, and any doubt shall be resolved in favor of national security.

- c. The authority to issue decisions to deny or revoke access to classified information is delegated to the Director, Office of Homeland Security and Emergency Coordination (OHSEC), who shall convey the decision in writing.
- d. With the exception of a case that falls within the guidelines of PPD-19, the OHSEC Director's decision will be implemented immediately and will not be postponed by the filing of an appeal.
- e. The Director, OHSEC may suspend an employee's security clearance upon notification or discovery of credible adverse information. The clearance will remain suspended until the information is adjudicated and the Director either reinstates or revokes the security clearance. Due process is not applicable to a clearance suspension and can only begin after the Director makes a decision to revoke or deny a clearance.
- f. All Department personnel involved in the appeal process must ensure that the employee's privacy rights are adhered to throughout the appeal process. The process is designed to give individuals fair treatment and an opportunity to refute or mitigate any derogatory information that has surfaced during the personnel security clearance process.
- g. Agency officials shall not serve to intervene in due process procedures, unless the individual has identified the official in writing as his/her personal representative.
- h. A decision to deny or revoke a security clearance is not considered an adverse personnel action and is not subject to the provisions of the Merit Systems Protection Board.
- i. Should the individual choose not to appeal, the decision is final and will result in termination of any further proceedings.

5. RESPONSIBILITIES

- a. Secretary of Agriculture is responsible for:
 - (1) Ensuring USDA's personnel security clearance program is viable and effectively supports USDA's work with classified national security programs, which includes active oversight and continuing security education and awareness programs to ensure effective implementation of E.O. 12968;
 - (2) Designating a senior USDA executive responsible to develop, direct, and administer a Department-wide, comprehensive personnel security

clearance program, to include due process rights, for employees and applicants (see DR 4600-001, Personnel Security Clearance Program); and

- (3) Exercising his/her authority granted in 5 U.S.C. 7532 to suspend without pay, and then remove, a Department employee, when the Secretary considers the action necessary in the interests of national security. The authority to remove an employee under 5 U.S.C. 7532 may not be re-delegated.
- b. Subcabinet Officers, Agency Administrators, and Staff Office Directors are responsible for:
- (1) Ensuring successful implementation of the provisions of this DR to uphold due process rights for employees and applicants within their areas of responsibility; and
 - (2) Ensuring that employees who have been issued a letter of intent to deny or revoke a security clearance are not permitted to have access to classified information until an appeal process has been completed and only after a favorable eligibility determination has been rendered.
- c. Mission Area and Human Resource Directors are responsible for:
- (1) Ensuring that, upon notification that an employee's security clearance has been suspended, immediate action is taken to restrict the employee to non-sensitive duties; temporarily reassigning the employee to a non-sensitive position with the same grade and pay; or, placing the employee on administrative leave with pay;
 - (2) Ensuring that an applicant whose position requires access to classified information has an opportunity to exercise due process rights prior to withdrawing a conditional job offer, if applicable;
 - (3) Canceling an appointment to a national security position if an applicant is denied a security clearance; and
 - (4) Removing employees from Special Sensitive, Critical Sensitive, or Non-critical Sensitive duty positions, after a denial or revocation of the security clearance has been sustained by PSRB (should the individual choose to appeal).
- d. Assistant Secretary for Administration or his/her designee, is responsible for:
- (1) Ensuring the establishment and sustainment of the PSRB;

- (2) Delegating operational responsibilities of the PSRB to the Director, OHSEC; and Appointing PSRB members.
- e. Director, OHSEC, or his/her designee, is responsible for:
- (1) Establishing, disseminating, and enforcing the provisions of this DR and relevant Departmental Manuals;
 - (2) Coordinating with OIG on all cases that fall within the guidelines of PPD-19.
 - (3) Suspending an individual's access to classified information or assignment to sensitive duties based on the receipt of relevant derogatory information, notifying the individual in writing as to the reasons for the suspension, and making a final eligibility determination for all suspensions;
 - (4) Ensuring that the Personnel and Document Security Division (PDSD) has issued the individual a Letter of Intent (LOI) to deny or revoke the individual's access to classified information, which conforms to the following process:
 - (a) The LOI shall include a Statement of Reasons (SOR), which will inform the individual of PDSD's intention to deny or revoke a security clearance and will include all findings from the investigation and/or information on which the action is based;
 - (b) The LOI will include a copy of all pertinent adjudicative guidelines upon which the SOR is based;
 - (c) The LOI/SOR will be mailed to the individual's home, via Priority Mail - Delivery Confirmation. The individual will have 30 calendar days to respond, which begins upon PDSD being notified by the US Postal Service of delivery confirmation. A copy of the LOI, excluding the SOR and any specific information, will be forwarded to the employing agency/office and security office, to take any necessary administrative action as deemed necessary;
 - (d) Upon receipt of the LOI/SOR, the individual will have 30 calendar days to request any documents, records and reports used as a basis for the SOR from appropriate agencies. PDSD must receive a copy of any and all Freedom of Information requests at the time they are made to ensure they are accomplished within the allotted time;
 - (e) Any reports not under the direct control of USDA must be requested from the originating Agency/Department (e.g. OPM). To request a background investigation from OPM, the request must be made in

writing and the individual must include their full name, complete social security number, and date and place of birth. The request must be mailed to: Freedom of Information/Privacy Act Office, OPM-FIPC, P.O. Box 618, Boyers, PA 16018-0618. The individual must notify PDSD with the date of receipt immediately upon receiving the requested information from the outside agency.

- (f) After receiving all requested information, the individual will have 30 calendar days to provide a response to the LOI/SOR to the Director, OHSEC. The response should be addressed to the Director, OHSEC and mailed to the following address: US Department of Agriculture, Personnel and Document Security Division, 1400 Independence Ave, SW, Room S-310, Mail Stop 5050, Washington, DC 20250-5050, Attention: Division Chief, PDSD - Eyes Only;
 - (g) Upon receipt of a response provided to the LOI/SOR, PDSD will review the response and make a recommendation to the Director, OHSEC, who will render a final adjudicative determination that either reinstates, denies, or revokes the individual's eligibility for access to national security information; or
 - (h) Should 30 calendar days elapse without a response being received from the individual, the Director, OHSEC, will render a final adjudicative determination that either denies, or revokes the individual's eligibility for access to national security information.
 - (i) Within 10 days of the adjudication determination, the Director, OHSEC will provide the employee and the employee's agency a Letter of Notification with the reasons for and results of the determination concerning the employee's eligibility for access to classified information. If the employee is deemed ineligible for access to classified information, the Letter of Notification will also inform the employee of the following: (1) His/her right to appeal in writing to the PSRB. (2) His/her right to appear in person and to present relevant documents, materials and evidence before a presiding officer of the Office of Administrative Law Judge.
- (5) Corresponding directly with the individual, regardless of whether or not the individual has selected someone to represent them during the appeal process;
 - (6) Providing all case documentation, including the written appeal and summary of personal appearance, if one is held, to the PSRB;
 - (7) Managing adherence to established timeliness by all parties during each phase of the appeal process;

- (8) Ensuring that only Departmental Officials with a need-to-know are apprised of any specific information pertaining to due process cases;
 - (9) Nominating qualified PSRB members from outside the Mission Area or specific employing agency of the affected individual; and
 - (10) Providing written notification to the individual, and the Administrator or Director of the employing Agency or Office, of the PSRB's decision.
- f. Office of the Administrative Law Judge (OALJ) is responsible for:
- (1) Conducting a hearing that allows for the personal appearance by the individual (if so chosen), to present documents, material, and information to refute and/or mitigate the security concerns cited in the final determination letter. The hearing should not exceed one hour, will be scheduled within 30 calendar days of request, held in the Washington, DC area, and any travel expenses incurred will be borne by the employing Agency/Office;
 - (2) Arranging to have a transcript of the hearing prepared; and
 - (3) Providing the transcript with recommendations to OHSEC within 15 calendar days of the hearing.
- g. PSRB is responsible for:
- (1) Meeting to review all information and documentation provided by OHSEC within 30 calendar days of receipt, and, if applicable, reviewing transcripts from the OALJ;
 - (2) Selecting one of the three board members to act as President for the Board; and
 - (3) Issuing the final eligibility decision in writing, within 30 calendar days, to the Director, OHSEC. The decision is final and may not be appealed to the Secretary. The PSRB may decide one of the following options:
 - (a) Sustain the OHSEC Director's decision;
 - (b) Overturn the OHSEC Director's decision; or
 - (c) Grant the individual access to classified information with conditions. The conditions will be clearly outlined in the decision memorandum to the Director, OHSEC.

- h. Office of General Counsel is responsible for providing guidance and assistance, when requested, to appropriate personnel to ensure the Department's compliance with this DR. The Office of General Counsel will make available an attorney to participate as a non-voting member in the board deliberations, address legal questions or issues raised by board members, and provide legal counsel to the PSRB. In addition, the attorney will review appeal decisions for legal sufficiency prior to issuance. The General Counsel will keep the Board President advised of any potential litigation risk resulting from Board decision.

- i. Office of Inspector General is responsible for reviewing cases that falls within the guidelines of PPD-19. Such reviews will be handled in accordance with Appendix B.

- j. Employees and Applicants who receive a final Letter of Notification to deny or revoke their eligibility for access to national security information are responsible for:
 - (1) Notifying OHSEC in writing, within 30 calendar days of receipt, if they appeal a denial or revocation decision, limiting their responses to the disqualifying factors listed in the Letter of Notification;
 - (2) Notifying OHSEC in writing, within 30 calendar days of receipt, when they desire a personal appearance before an OALJ official as part of their appeal;
 - (3) Requesting to review, within 30 calendar days of receipt, should they desire, materials that the employee or applicant provided in response to the LOI/SOR upon which a denial or revocation decision is based;
 - (4) Exercising their right, if they choose, to be represented by counsel or other representative at their own expense and identifying such representative in writing to OHSEC; and
 - (5) Providing their full cooperation during the appeal process to ensure timely decisions.

FIGURE 1

Due Process Flow Chart

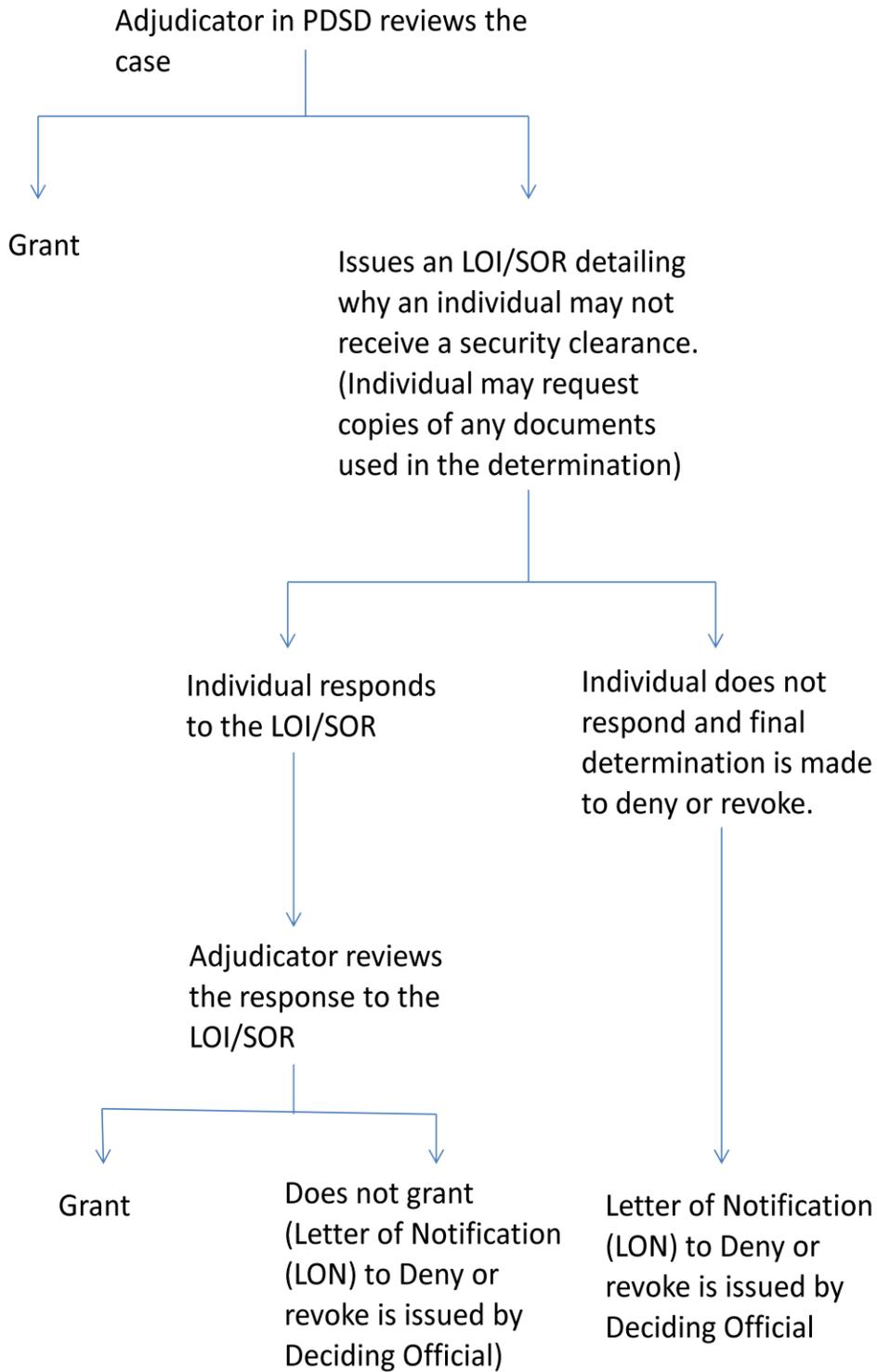
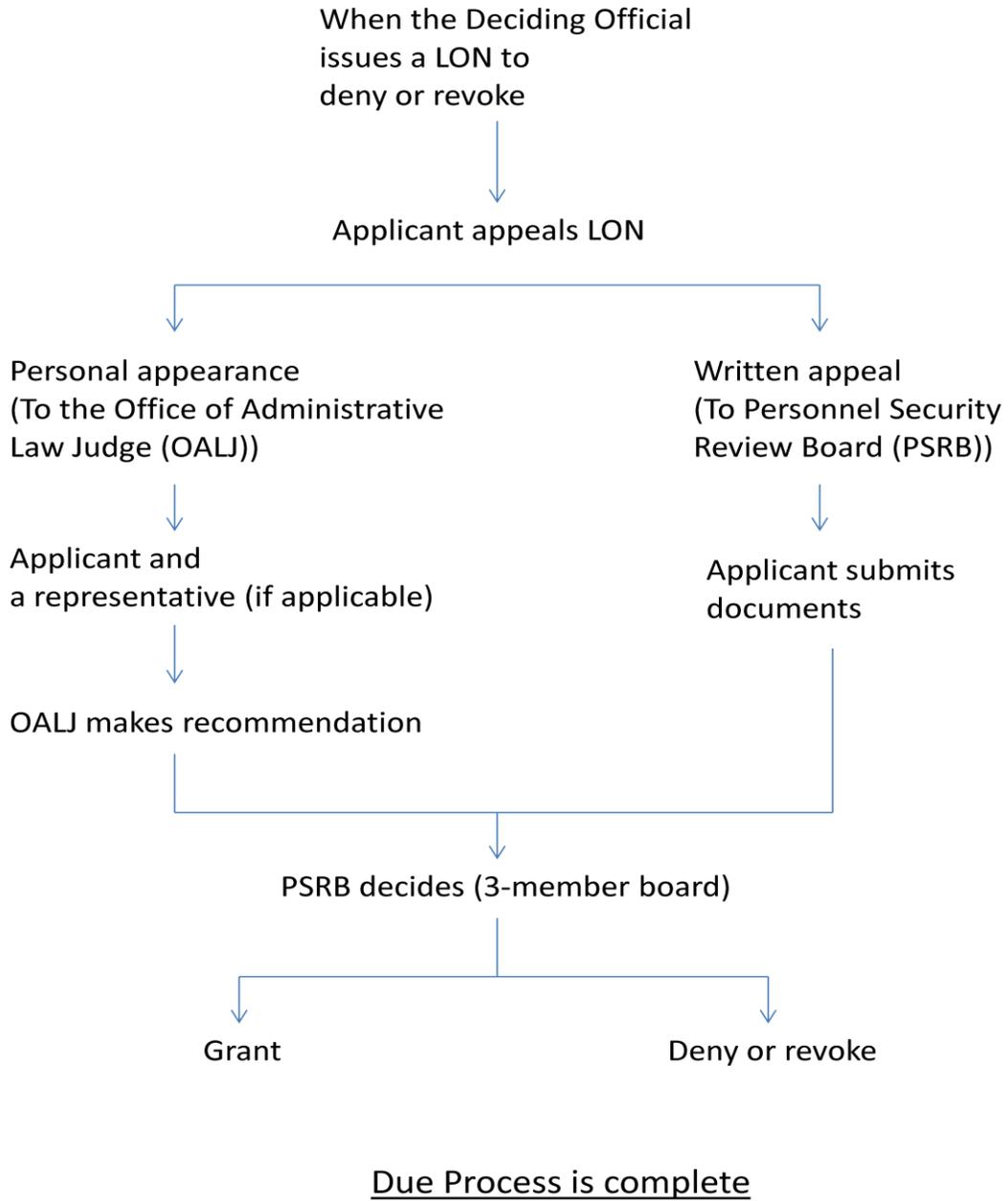


FIGURE 2

DUE PROCESS FLOW CHART (CONT.)



APPENDIX A

RECONSIDERATION

1. The following are guidelines and requirements for requesting reconsideration of a prior decision by the Director, Office of Homeland Security and Emergency Coordination (OHSEC) or the USDA Personnel Security Review Board (PSRB) that resulted in the denial or revocation of an individual's eligibility for a security clearance.
 - a. Individuals are not permitted to request reconsideration; request for reconsideration will be considered only when forwarded by, and recommended by, a senior official (Senior Executive Service) of the employing agency.
 - b. The passage of at least one calendar year since the last adjudicative action on the case. The year is counted from the date of the final denial/revocation decision by the Director, OHSEC or the PSRB decision, whichever is later. Occasionally, the issues in a case will be so recent or serious that a longer time may be appropriate to accomplish the actions necessary to overcome the issues and/or to establish an affirmative track record to minimize probability of recurrence. Not all cases meet the test for reconsiderations. Passage of time alone is not sufficient criterion. An agency request for reconsideration to simply "test the water" is prohibited.
 - c. An agency request for reconsideration must meet an operational need of the agency. There has to be an actual requirement for a security determination. The individual should be selected or tentatively selected for a sensitive position that requires access to classified information. The request for reconsideration must include an explicit statement of the agency's support.
 - d. The agency's security point-of-contact will ensure the request for reconsideration is complete. All information and evidence of mitigation must be submitted by the individual with the request. The request should include evidence that the issues, which caused the denial or revocation, have been resolved. For instance, if the denial or revocation was for Financial Considerations, the request should include evidence (e.g canceled checks, monthly statements, correspondence with creditor, credit reports, trustee report for Chapter 13) showing that delinquent debts have been or are being serviced; finances subsequent to a bankruptcy have been managed responsibly; and, the individual is living within available financial means; etc.

- e. Once the request for reconsideration is submitted, no supplemental information will be accepted or considered unless requested by PDSD.
2. A request for reconsideration does not “reopen” or otherwise affect the finality of the OHSEC Director’s denial/revocation or the PSRB decision. The OHSEC Director’s approval of a request for reconsideration provides PDSD with the authority to request any necessary information required for an adjudicative determination and recommendation. Acceptance or denial of a request for reconsideration is an OHSEC Director’s determination. The OHSEC Director’s determination is final. No due process is afforded for denial of a request for reconsideration. Resubmission of a denied request for reconsideration is not permitted for one year from the date of the OHSEC Director’s determination.

APPENDIX B

OIG REVIEW OF WHISTLEBLOWER REPRISAL CLAIMS PURSUANT TO PPD-19

1 PURPOSE

This Appendix sets forth procedures for USDA employees and contractors (hereinafter complainant) to file whistleblower reprisal complaints with USDA-OIG.

2 SCOPE AND AUTHORITY

PPD-19 prohibits retaliation against agency employees who report fraud, waste, and abuse, while still protecting classified national security information. The Directive requires certain agencies to establish internal procedures to review allegations of whistleblower reprisal. Section B sets forth the requirements for non-intelligence community agencies that have employees who have access to classified information, including but not limited to USDA.

As part of the review process, the agency Inspector General (IG) is required to conduct a review to determine whether an action affecting Eligibility for Access to Classified Information violated PPD-19. The IG may recommend that the agency reconsider the employee's eligibility and recommend that the agency take other corrective action to return the employee to the position he/she would have held had the reprisal not occurred. The agency head shall "carefully consider" the IG's findings and recommended actions.

Additionally, Section C states that an employee alleging reprisal who has exhausted his/her agency's internal review process may request an external review by a three-member IG panel.

3 PROCEDURES FOR FILING WHISTLEBLOWER REPRISAL COMPLAINT

- a Allegations of whistleblower reprisal must be filed within 90 calendar days of the complainant being notified of the reviewable personnel action or a decision/recommendation impacting the complainant's eligibility for access to classified information.
- b To file allegations of whistleblower reprisal under PPD-19, the complainant should contact the OIG Hotline via one of the following methods:

Telephone: (800) 494-9121

Facsimile: (202) 690-2474

E-mail: usda.hotline@oig.usda.gov

U.S. mail: USDA OIG, P.O. Box 23399, Washington, DC 20026

The OIG Hotline staff will take the complainant's contact information and refer the matter to an OIG official who will contact the complainant in order to obtain additional information. Complainants should not provide any classified information to the Hotline staff when making the initial complaint.

- c The allegations of whistleblower reprisal must be filed directly with OIG by the complainant and not by a surrogate. However, OIG may grant certain, limited exceptions such as allegations of whistleblower reprisal forwarded to OIG by a Member of Congress or a Congressional Committee.
- d An allegation of whistleblower reprisal will be accepted for review when the complainant establishes a prima facie case of whistleblower reprisal. Consistent with Title 5 of the United States Code, a prima facie case requires a finding that:
 - (1) The complainant made a protected disclosure; and
 - (2) A personnel action or a decision and/or recommendation impacting the complainant's eligibility for access to classified information followed the protected disclosure.
- e Once the complainant establishes a prima facie case of reprisal, OIG will initiate a review.

4 OIG REPORTS

Upon completing its review of a complainant's whistleblower reprisal complaint, OIG shall:

- a Prepare a written report that sets forth its findings and any recommended actions. The report will be provided to OHSEC.
- b Issue a letter to the complainant notifying him/her of OIG's findings. The letter will include instructions on how to obtain a copy of the report if desired.
- c If the complainant wishes to obtain a copy of the OIG report, he/she must submit a written request to OIG, in accordance with instructions in the letter referred to in paragraph 4b. OIG will provide the complainant with a copy of the report, appropriately redacted.

5 CORRECTIVE ACTION

- a As part of the review process, OIG may recommend that USDA take specific corrective action to return the complainant, as nearly as practicable and reasonable, to the position such complainant held or would have held had the reprisal not occurred.
- b The Secretary shall carefully consider the findings of and actions recommended by OIG. To the extent authorized by law (including the Back Pay Act), corrective action may include, but is not limited to, reinstatement, reassignment, the award of reasonable attorney's fees, other reasonable costs, back pay and related benefits, travel expenses, and compensatory damages.

6 APPEALS BEFORE THE EXTERNAL REVIEW PANEL (ERP)

- a Consistent with PPD-19, a complainant who has exhausted the USDA review process may request an external review by a three-member Inspector General panel, the ERP. The ERP is chaired by the Inspector General of the Intelligence Community.
- b Procedures for filing appeals with the ERP (including timeframes and documentation requirements) are available from the Inspector General of the Intelligence Community, who can be contacted by one of the following methods:

Telephone: (703) 482-1300
Facsimile: (703) 482-3254
U.S. Mail: Office of the IC IG, Washington, DC 20511.
- c The Secretary shall carefully consider the recommendation of the ERP and, within 90 calendar days, inform the ERP and the Director of National Intelligence of what action the Secretary has taken.

7 DEFINITIONS

- a Covered Agency means an executive department or independent establishment, as defined under sections 101 and 104 of title 5, United States Code, that contains or constitutes an Intelligence Community Element, as defined below.
- b Eligibility for Access to Classified Information means the result of the determination whether an employee (a) is eligible for access to classified information in accordance with Executive Order 12968 (relating to access to classified information), or any successor thereto, and Executive Order

10865 of February 20, 1960, as amended (relating to safeguarding classified information with industry), or any successor thereto; and (b) possesses a need to know under such orders.

- c Intelligence Community Element means any executive agency or unit thereof determined by the President under section 2302(a)(2)(C)(ii) of title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities, including but not limited to the Office of the DNI, the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, and the National Reconnaissance Office. For purposes of this directive, the term “Intelligence Community Element” does not include the Federal Bureau of Investigation.

- d Personnel Action means an appointment, promotion, detail, transfer, reassignment, demotion, suspension, termination, reinstatement, restoration, reemployment, or performance evaluation; a decision concerning pay, benefits, or awards; a decision concerning education or training if the education or training may reasonably be expected to lead to an appointment, reassignment, promotion, or performance evaluation; a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities, or working conditions.

Personnel Action does not include:

- (1) the termination of an employee pursuant to 10 U.S.C. § 1609.
- (2) the termination of an employee pursuant to section 102A(m) of the National Security Act of 1947, section 104A(e) of the National Security Act of 1947, or 5 U.S.C. § 7532, so long as the official authorized by those provisions to terminate the employee (and not his or her delegee)
 - (i) determines that the alternative legal procedures to terminate the employee cannot be invoked in a manner consistent with the national security; and
 - (ii) promptly notifies OIG;
- (3) actions taken with respect to a position that the Secretary has designated, prior to the action as being of a confidential, policy determining, policymaking, or policy advocating character;
- (4) actions taken with respect to a member of the Armed Forces, as used in 10 U.S.C. § 1034.

(5) actions taken prior to the issuance of PPD-19 (October 10, 2012).

e Protected Disclosure means:

- (1) a disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General of the employing agency or Intelligence Community Element, to the Director of National Intelligence, to the Inspector General of the Intelligence Community, or to an employee designated by any of the above officials for the purpose of receiving such disclosures, that the employee reasonably believes evidences (i) a violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
- (2) any communication described by and that complies with subsection (a)(1), (d), or (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.); subsection (d)(5)(A) of section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. § 403q); or subsection (k)(5)(A), (D), or (G), of section 103H of the National Security Act of 1947 (50 U.S.C. § 403-3h);
- (3) the exercise of any appeal, complaint, or grievance with regard to the violation of Section A or B of PPD-19;
- (4) lawfully participating in an investigation or proceeding regarding a violation of Section A or B of PPD-19; or
- (5) cooperating with or disclosing information to an Inspector General, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the Inspector General,

if the actions described under subparagraphs 7e(3) through 7e(5) do not result in the employee disclosing classified information or other information contrary to law.