

KEYWORD: Guideline J, Guideline E

DIGEST: The Directive requires that an applicant be given 15 days notice of a hearing in order to properly prepare for it. Applicants can waive that notice under appropriate circumstances which require a discussion of the notice provision at the hearing with a clear statement by Applicant that he is making a knowing and intelligent waiver the 15-day notice requirement. Adverse decision remanded.

CASENO: 06-24213.a1

DATE: 06/10/2008

DATE: June 10, 2008

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 06-24213
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison P. O’Connell, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 28, 2007, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On January 29, 2008, after the hearing, Administrative Judge Mark W. Harvey denied Applicant’s request for a security clearance.¹ Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge erred by not giving Applicant 15 days notice of the hearing. Finding error, we remand the case to the Judge for a new hearing in accordance with the Directive.

The Judge received Applicant’s case on January 17, 2008. A long series of e-mail messages ensued between the Judge, Department Counsel, and Applicant. The Judge initially suggested January 24. When that date was not acceptable to Department Counsel, the Judge and Department Counsel continued to consider other dates. Applicant asked for time to consider the effect of the prior hearing and use of the transcript from the prior hearing. (See footnote 1.) On January 22, the Judge stated that he was scheduling the hearing for January 29, although it could be canceled if not needed. On January 28, Applicant left a voice-mail message for the Judge saying that he could not attend the hearing on January 29 because he had significant training that day. The Judge sent out an e-mail to the effect that Applicant could either fail to attend the hearing on January 29, in which case Applicant would lose his clearance by default, or he could choose a date during the week of February 11-15. Applicant indicated that he had further training the week of February 11. Applicant attended the hearing on January 29.

At the hearing on January 29, Applicant stated that he was not prepared for the hearing. The Judge offered to postpone the hearing until later in the day to allow Applicant time to review the record. Applicant declined the offer. The Judge also stated that he would suspend the hearing at any time if Applicant wanted to take time to study the record. Applicant did not request such a suspension.

The Directive requires that an applicant be given 15 days notice of a hearing in order to properly prepare for it. Directive ¶ E3.1.8. The Board has acknowledged that applicants can waive that notice under appropriate circumstances. Those circumstances generally require a discussion of the notice provision at the hearing with a clear statement by Applicant that he is making a knowing and intelligent waiver the 15-day notice requirement. *See, e.g.*, ISCR Case No. 05-12037 at 2-3 (App. Bd. May 10, 2007).

¹Another Administrative Judge conducted a hearing on this case on November 7, 2007. However, that Judge left government service without issuing a decision. At Department Counsel’s request, the decision was made to hold another hearing with the transcript of the first hearing to be admitted as evidence.

The on-the-record discussion of waiver in the previously cited case is very different from the record in the case before us. In this case, the Judge states the following in his decision: “When the hearing began, Applicant cited his desire to attend training that day, and objected to the hearing being held that day. At the start of the hearing, he also indicated he did not believe he was prepared for the hearing.” Decision at 2. The Judge then states his offer to delay the start of the hearing for perhaps three hours or to suspend the proceedings at any time to give Applicant a chance to review the record. *Id.* The Judge says that “[d]uring his opening statement, Applicant expressed his appreciation for the early start on the proceeding [7:30 am], and never expressed a clear objection to going forward with the hearing without delaying it.” Decision at 2-3. The Judge then quotes an exchange between the Judge and Applicant near the end of the hearing in which Applicant says he didn’t want to miss his training and didn’t want to “keep dragging it out” and delay the Judge. Decision at 3. Nowhere in the record does Applicant state a knowing and intelligent waiver of the 15-day notice provision of the Directive ¶ E3.1.8. This is true notwithstanding a statement on page ten of the transcript where Department Counsel noted her impression that Applicant “was willing to waive his 15-day notice to allow the hearing to be held today rather than in mid-February.” The specific reference to the 15-day requirement was never commented on by the Judge, nor was Applicant asked about it at any time. Given the absence of a discussion on the record between the Judge and the parties on this issue, the Board cannot determine with certainty that Applicant clearly understood his rights under the Directive and knowingly waived them. *See, e.g.*, ISCR Case No. 04-12732 at 8 (App. Bd. Nov. 2, 2006).

In the absence of such a waiver, the Board remands the case to the Judge with instructions that the case be reopened and that Applicant be given an opportunity to have a new hearing with proper notice.

Order

The decision of the Judge denying Applicant a security clearance is REMANDED.

Signed: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board