

KEYWORD: Guideline F; Guideline J; Guideline E; Guideline G

DIGEST: . The Judge concluded that Applicant provided deliberately false answers on his security clearance application and that Applicant had failed to mitigate the Guideline E security concerns. However, the Judge made no findings or conclusions regarding the allegations under Guidelines F, J, and G. He stated that to undertake such findings and conclusions would be “pointless. The Directive says “The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR . . .” This provision does not authorize a Judge to enter findings and conclusions only as to some of the allegations. Rather, it requires the Judge to address all of them. The parties and the Board have a right to know what findings the Judge is making with respect to all of the SOR allegations, not just some of them. Adverse decision remanded.

CASENO: 08-07803.a1

DATE: 09/21/2009

DATE: September 21, 2009

In Re:)	
)	
-----)	ISCR Case No. 08-07803
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq.,

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 9, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations), Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 15, 2009, after the hearing, Administrative Judge Michael H. Leonard denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30, and Department Counsel subsequently cross-appealed pursuant to Directive ¶ E3.1.28.

Applicant raised the following issue on appeal: whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel raised the following issue on cross appeal: whether the Judge’s decision is arbitrary, capricious, or contrary to law in that he failed to make findings of fact and reach conclusions concerning the security concerns alleged under Guidelines F, J, and G. Finding error, we remand the case to the Judge.

The Judge found that, on two different security clearance applications, Applicant provided false answers concerning his prior illegal drug use. The Judge concluded that Applicant’s answers were deliberately false and that, viewed in light of the entire record, Applicant had failed to mitigate the Guideline E security concerns. However, the Judge made no findings or conclusions regarding the allegations under Guidelines F, J, and G. He stated that, because such findings and conclusions, even if favorable, would not change the ultimate adverse decision, to undertake them would be “pointless.” Decision at 6.

“The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR . . .” Directive ¶ D3.1.25. This provision does not on its face authorize a Judge to enter findings and conclusions only as to some of the allegations. Rather, by its plain language it requires the Judge to address all of them. The Board has previously held that the “parties and the Board have a right to know what findings the Judge is making with respect to all of the SOR allegations, not just some of them.” ISCR Case No. 03-22883 at 3 (App. Bd. Jan. 19, 2006). The Board does not accept the Judge’s view that it would be futile to address the entirety of the security concerns alleged in the SOR. For one thing, failure to make findings with regard to all the SOR allegations substantially impairs a losing party’s ability to submit a meaningful appeal, preventing *ab initio* an examination of the evidentiary sufficiency of factual findings or compliance with Executive Order 10865 or the Directive. See Directive ¶ D3.1.32 for the Appeal Board’s scope of review. Should the losing party demonstrate error under the one Guideline with findings and conclusions, the prevailing party would

be precluded from arguing that the decision is nevertheless sustainable in light of the findings under the remaining Guidelines.¹ More fundamentally, without findings and conclusions on all the allegations in the SOR, DOHA is precluded from issuing a final agency decision.² Finality, along with a complete record, is a necessary precondition to proper evaluation of an applicant's request for reconsideration, in accordance with Directive ¶¶ E3.1.37 and 38. In light of the above, the only recourse is to remand the case to the Judge for a new decision, one in which he makes findings of fact and reaches conclusions as to all the allegations in the SOR.³ The issues raised by Applicant in his appeal brief are not ripe for consideration at this time.

Order

The Judge's adverse security clearance decision 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

¹Department Counsel Brief on Appeal at 7: "Implicit in the Administrative Judge's stated reasons for not addressing the non-guideline E allegations are two assumptions: that his findings and conclusions under Guideline E will be upheld in their entirety on appeal, and those findings and conclusions will be deemed sufficient to support his unfavorable security clearance decision. The Judge's implicit assumptions ignore the possibility that Applicant might be able to persuade the Appeal Board that one or more of the Judge's findings and conclusions are not sustainable. And, the Judge's implicit assumptions ignore the possibility that Department counsel might want to argue, in the alternative, that any error identified by Applicant on appeal is harmless in light of the [remaining] sustainable findings and conclusions."

²The Supreme Court has defined a final action as a "definitive" statement of the agency on the matters at issue in a case. *Federal Trade Commission v. Standard Oil*, 449 U.S. 232, 239 (1980). An agency must give "reasoned consideration to all the material facts and issues" in cases before it. *Greater Boston Television Corp. v. Federal Communication Commission*, 444 F.2d. 851, (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). The Board concludes that the Directive imposes a similar requirement for finality in security clearance cases.

³*Compare* ISCR Case No. 04-09488 at 2 (App. Bd. Nov. 29, 2006), in which the Board held that a Judge's failure to make findings and conclusions regarding one allegation in the SOR was harmless error.

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board