

KEYWORD: Guideline F; Guideline J; Guideline E

DIGEST: This case has an unusual history, including three hearings that occurred over the better part of a year, each with a different Judge. DOHA's authority to adjudicate an Industrial Security Clearance application is predicated upon the applicant's need for access to classified information. Should that need be terminated, DOHA is divested of jurisdiction, and all actions pursuant to the Directive cease. There are three exceptions to this rule, one of which arises when the applicant's need for a clearance terminates after "[a] hearing has commenced." In that situation, DOHA can continue to process the case through the appeal, if any. In this case a hearing to adjudicate Applicant's clearance commenced on March 12, 2015, at which time DOHA clearly possessed jurisdiction because Applicant's employer sponsored him. Applicant's employer did not take steps to separate him until months after that date, which was during pendency of the adjudication previously begun. That separation action did not divest DOHA of jurisdiction. The Judge was authorized to issue his Decision. This is true despite whatever Applicant's current employment status may be.

CASENO: 14-03753.a1

DATE: 09/23/2016

DATE: September 23, 2016

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In Re:)	
)	
-----)	ISCR Case No. 14-03753
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 13, 2014, DoD 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), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive).¹ Applicant requested a hearing. On May 31, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge James F. Duffy denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether DOHA lacked jurisdiction to issue the Decision. Consistent with the following, we affirm.

Applicant asserts that he no longer works for the sponsoring employer and that DOHA had no jurisdiction to issue a Decision. Department Counsel has provided a Reply Brief in which he argues that jurisdiction has attached. The briefs of the parties contain matters from outside the record. Normally, we cannot consider new evidence on appeal. Directive ¶ E3.1.29. However, we will consider new evidence insofar as it pertains to threshold issues such as jurisdiction or due process. *See, e.g.*, ISCR Case No.14-00812 at 2 (App. Bd. Jul. 8, 2015). Because the parties’ briefs do not conflict regarding the dispositive facts, we do not need to remand the case for additional fact-finding.

This case has an unusual and complex history, including three hearings that occurred over the better part of a year, each with a different Judge. The first hearing began on March 12, 2015. At that time Applicant’s employer sponsored him for a clearance. The Judge granted a continuance so that Applicant could obtain counsel. Tr., March 12, 2015, at 50. The hearing reopened on October 5, 2015, at which time Applicant’s employer still sponsored him for a clearance. Applicant failed to appear that this hearing and was found to be in default. Tr., October 5, 2015, at 17. His employer assigned him a separation date. Reply Brief at 5. Subsequently, the DOHA Director vacated the default. *Id.* Applicant’s employer advised DOHA that it was again sponsoring him for

¹The Guideline J allegations were subsequently withdrawn.

a clearance. *Id.* A hearing occurred on December 9, 2015, and the Judge issued his Decision as set forth above.

DOHA's authority to adjudicate an Industrial Security Clearance application is predicated upon the applicant's need for access to classified information. Should that need be terminated, DOHA is divested of jurisdiction, and all actions pursuant to the Directive cease. Directive ¶ 4.4.

There are three exceptions to this rule, one of which arises when the applicant's need for a clearance terminates after "[a] hearing has commenced." Directive ¶ 4.4.1. *See* ISCR Case No. 05-04831 at 4 (App. Bd. Nov. 29, 2006) ("[S]ubject matter jurisdiction attaches by commencement of the actual adjudication phase of the proceedings[.]") In that situation, DOHA can continue to process the case through the appeal, if any. In the case before us, a hearing to adjudicate Applicant's request for a clearance commenced on March 12, 2015, at which time DOHA clearly possessed jurisdiction because Applicant's employer sponsored him. Applicant's employer did not take steps to separate him until several months after that date, which was during pendency of the adjudication previously begun. Therefore, that separation action did not divest DOHA of jurisdiction. We conclude that the Judge was authorized to issue his Decision, as are we to decide Applicant's appeal. This is true despite whatever Applicant's current employment status may be.

Having so concluded, we note that Applicant has not otherwise raised an issue of harmful error. Our scope of review is limited to those cases in which the appealing party raises such an issue. Directive ¶ E3.1.32. Therefore, the Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board