

KEYWORD: Guideline E; Guideline J

DIGEST: Without a showing of identifiable prejudice to the appealing party, delay in the processing of a case does not warrant a finding of error. No one has a right to a security clearance. Adverse decision affirmed.

CASENO: 03-17601.a1

DATE: 03/16/2007

DATE: March 16, 2007

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| In Re: |) | |
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| SSN: ----- |) | ISCR Case No. 03-17061 |
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| Applicant for Security Clearance |) | |
| |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esq. Department Counsel

FOR APPLICANT

Richard Murray, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 5, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On June 16, 2006, after the hearing,

Administrative Judge Jacqueline T. Williams denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the delay of approximately one year between the hearing on Applicant's case and the issuance of the Administrative Judge's decision, which caused a subsequent delay in Applicant's ability to reapply for a security clearance, is arbitrary, capricious, and contrary to law.

Applicant claims that he has been harmed by the delay in the issuance of the Administrative Judge's security clearance decision because if he had a clearance he would have been eligible for a promotion which would increase his pay by \$500 per month. He notes that an applicant can reapply for a clearance one year after an adverse decision is issued. In Applicant's case, the hearing was held on June 7, 2005. Therefore, if the adverse decision in his case had been issued in what Applicant considers a timely manner, in the summer of 2005, he could have reapplied for a security clearance one year later, in the summer of 2006. Since the decision was issued on June 16, 2006, Applicant cannot reapply until June 2007. Applicant requests that the Appeal Board issue a *nunc pro tunc* order amending the date of the Administrative Judge's order to August 16, 2005, and award further relief as the Board deems appropriate.

Applicant cites no authority in support of the requested relief. The Board has no supervisory authority over Hearing Office Judges and no basis to assume how large an individual Judge's caseload may be. There is no basis in the record to conclude that the Judge processed Applicant's case in a way that would constitute error. Without a showing of identifiable prejudice to the appealing party, delay in the processing of a case does not warrant a finding of error. *See, e.g.*, ISCR Case No. 04-06517 at 3 (Oct. 21, 2005); ISCR Case No. 03-10880 at 4 (June 24, 2005); ISCR Case No. 02-32581 at 3 (June 9, 2005); ISCR Case No. 03-20005 at 3 (May 17, 2005).

While Applicant claims to have been harmed by the delay in the issuance of a security clearance decision, the harm he cites—his failure to be promoted and a delay in his ability to reapply for a security clearance—is ancillary to the purposes of a DOHA hearing. In any event, information about Applicant's job which was not introduced at the hearing also constitutes new evidence, which the Board cannot consider on appeal. *See* Directive, ¶ E3.1.29. Moreover, since no one has a right to a security clearance, the outcome of any subsequent security clearance application Applicant might submit is speculative.

Concerning our authority to modify the date of the Administrative Judge's decision, we are limited in the remedies which we may award. In cases in which a Judge has committed harmful error, we may reverse the Judge's decision or remand the case to the Judge for further consideration. These are the only remedies which the Directive makes available to us. Harmful error may occur in the following ways: if (1) the Judge's findings of fact are not based upon substantial evidence; (2) the Judge failed to adhere to procedures required by the Executive Order or the Directive; and/or (3) the Judge's decision is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.33. In this case, Applicant has not established, or even claimed, harmful error as defined by the Directive. Therefore, Applicant has not met his burden of showing that the case should be reversed or remanded. Having failed in his burden, Applicant is not entitled to relief.

Order

The Administrative Judge's decision denying Applicant a security clearance is AFFIRMED.

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

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

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