

KEYWORD: Guideline F

DIGEST: Failure to rule at all on specific matter that has been brought before the Judge is an abuse of discretion. A liberal mandate exists with regard to granting motions to amend SORs. Administrative pleadings should be liberally construed and easily amended. As long as there is fair notice to the affected party and the party has a reasonable opportunity to respond a case should be adjudicated on the merits and not concerned with pleading niceties. Favorable decision Remanded.

CASENO: 04-08547.a1

DATE: 08/30/2007

DATE: August 30, 2007

	)	
In Re:	)	
-----	)	ISCR Case No. 04-08547
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Jr., Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 2, 2005 DOHA issued a statement of reasons (SOR) advising Applicant of the

basis for that decision—security concerns raised under Guideline F (Financial Considerations) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant chose to have his case resolved on the written record. On October 31, 2006 Administrative Judge Arthur E. Marshall, Jr. granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge’s denial of his motion to amend the SOR by adding to allegations under Guideline E was error and whether such error warrants reversal of the Judge’s favorable security clearance decision. We remand the Judge’s decision with instructions.

### **Whether the Record Supports the Judge’s Factual Findings and Ultimate Conclusions**

This is an appeal that raises procedural, rather than substantive, issues. A detailed review, discussion and analysis of the Judge’s substantive findings and conclusions is therefore not necessary. Moreover, Department Counsel’s brief concerns itself only with the issue of the Judge’s denial of his motion to expand the SOR by adding new allegations under a new Guideline. The Judge’s favorable findings and conclusions under Guideline F remain wholly unchallenged and, thus, stand.

The June 2, 2005 SOR contained nine allegations under Guideline F. Applicant submitted an answer to the SOR on June 24, 2005. Allegation 1.c. of the SOR maintained that Applicant was indebted to a credit organization in the approximate amount of \$23,000.00 after resale of an automobile that had been repossessed. The allegation stated that as of November 21, 2003, the debt had not been satisfied. Applicant denied allegation 1.c., stating that the account had been filed with the bankruptcy courts (Applicant had filed a Chapter 13 Bankruptcy in May 2001 that was quickly converted to a Chapter 7 Bankruptcy), and that according to a more recent credit report, the account had been closed.

In his June 24, 2005 answer, Applicant indicated that he wanted a hearing. In anticipation of the hearing, on May 5, 2006, and May 11, 2006, Department Counsel mailed documents he would be offering at the hearing to Applicant (FORM Item 15). These documents included an official memorandum from the Army and Applicant’s Certificate of Release or Discharge from the Army. Together, these documents indicated that Applicant was discharged from the Army due to a personality disorder, and that the Army had raised the issue of Applicant’s judgment and reliability in the context of his ability to safeguard the national security. On May 15, 2006, Applicant retracted his request for a hearing and expressed his preference for the Judge to decide the case on the record. This was due to the fact that Applicant was working overseas and he did not expect to return for a considerable length of time (FORM Item 4).

In response to Applicant’s retraction of his request for a hearing, Department Counsel submitted a File of Relevant Material (FORM) to Applicant on August 8, 2006. The FORM contained the official memorandum from the Army and Applicant’s DD Form 214. The FORM also included, as a preliminary matter, Department Counsel’s Motion to Amend SOR. Specifically, Department Counsel moved to add two allegations under Guideline E (Personal Conduct). The first proposed allegation asserted that Applicant falsified his answer to the original SOR (allegation 1.c.

as described in a previous paragraph) by indicating that he had included the \$23,000.00 automobile debt in his bankruptcy petition, when, in fact, he had not. The second proposed allegation asserted that Applicant had been discharged from the United States military in 2000 because of concerns regarding his judgment or reliability with regard to safeguarding classified national security information or special nuclear information or material.

Applicant responded to the FORM on September 18, 2006. Regarding Department Counsel's Motion to Amend the SOR, Applicant responded in a portion of his submission entitled "Objection to Amend Statement of Reasons." His detailed responses were essentially denials of what was alleged in the proposed amendments. Applicant then countered with his own motion to keep the SOR in its original configuration and for the Judge to enter findings based upon the non-amended allegation[s].

In his decision, the Judge denied Department Counsel's Motion to Amend prior to his resolution of the case under Guideline F. The Judge stated the following as his reasons for the denial: (a) Applicant was not previously provided any notice that his personal conduct or the security concerns posed under Guideline E were at issue; (b) the Guideline E concerns were raised for the first time after he chose to pursue a determination based solely on the written submissions, rather than personally appear before the Department; (c) by now attempting to introduce an entirely different litany of security concerns of which Applicant had no prior notice, Department Counsel has potentially abrogated Applicant's right to personally appear before the Department, as provided under the Directive; (d) to have afforded the Applicant the opportunity to request a personal appearance would have posed little more administrative burden than did Department Counsel's invitation to him to object to the motion at issue, and would have been in better keeping with both the spirit of the Directive and the basic tenets of administrative justice; (e) of more practical concern, Department Counsel has not presented evidence making a *prima facie* case of falsification (under proposed additional allegation 2.a.).

Regarding the Judge's ruling on the motion, Department Counsel asserts the following on appeal: (i) the Judge denied Department Counsel's motion as to proposed additional allegation 2.a. but did not consider and did not rule upon Department Counsel's motion as to proposed additional allegation 2.b.; (ii) the Directive and Appeal Board precedent envision broad latitude in granting amendments to SORs and, in this case, the Judge erroneously failed to follow the Board's liberal mandate with regard to granting motions to amend; (iii) the Judge erroneously injected a requirement that any amendment to the SOR have a nexus and relationship to the existing allegations; (iv) the Judge could have easily remedied his concerns about Applicant's due process rights by offering him a further opportunity to request a hearing; (v) the Judge's denial of Department Counsel's Motion to Amend constituted reversible error.

Administrative Judges' rulings on motions, such as a motion to amend an SOR, are reviewed for an abuse of discretion. *See, e.g.*, ISCR Case No. 03-26115 at 2 (App. Bd. Apr. 5, 2007); ISCR Case No. 02-12199 at 4 (App. Bd. Aug. 8, 2007). Department Counsel points out in his initial argument that the Judge fails to mention or discuss the merits of the Motion to Amend with regard to proposed allegations 2.b. When dealing with a procedural motion such as the one before us, the Board will not presume that the Judge considered an important component of that motion where the Judge's decision is silent as to it. Clearly, a failure of the Judge to rule at all on specific matter that

has been brought before him is an abuse of discretion. For this reason alone, the Judge's ruling on the motion cannot be sustained.

Department Counsel correctly points out that a liberal mandate exists with regard to granting motions to amend SORs. The Board has recognized the proposition that administrative pleadings should be liberally construed and easily amended. *See, e.g.*, ISCR Case No. 99-0447 at 4 (App. Bd. Jul. 25, 2000). As long as there is fair notice to the affected party and the affected party has a reasonable opportunity to respond, a case should be adjudicated on the merits of relevant issues and not concerned with pleading niceties. *See, e.g.*, *Yellow Freight System Inc. v. Martin*, 954 F.2d 353, 358 (6<sup>th</sup> Cir. 1992). The overall purposes of the industrial security program are not well-served by interpreting the Directive in a manner that emphasizes pleading formalities over a full and fair adjudication of cases on the merits. *Cf.* ISCR Case No. 98-0395 at 4 n.2 (App. Bd. Jun. 24, 1999) (Directive should be construed broadly in order to effectuate the purposes of the industrial security program). The restrictive approach toward SOR amendments taken by the Judge in this case is an abuse of discretion and is not necessary to ensure that Applicant's rights under the Directive are respected.

Indeed, the Judge's overall rationale for denying the motion is flawed in that it presupposes that Applicant's decision to forgo a hearing and proceed on a written record is a choice that cannot be undone, even in the face of changed circumstances such as Department Counsel's request for an amended SOR that involved the introduction of new security concerns under a different Guideline. The Judge was rightly concerned about the potential denial of due process that would result from a granting of Department Counsel's motion followed by the Judge's final adjudication of the case based solely on the written record. The fundamental shortcoming in his ruling on the motion was his failure to affirmatively act upon that concern. An administrative judge has the authority, under Items 10 and 17 of the Additional Procedural Guidance, to deal with a motion to amend the SOR in a manner that reasonably balances the right of the government to have relevant and material information considered and the right of an applicant to receive fair notice and a reasonable opportunity to respond. *See, e.g.*, ISCR Case No. 99-0447 at 6 (July 25, 2000). In the instant case, the Judge mentioned the appropriateness of affording Applicant the opportunity to request a hearing on the additional and distinct allegations proffered by Department Counsel in his motion, but then failed to recognize that it was within his authority to rule that Applicant be given the opportunity to request a hearing to respond to the new Guideline E allegations.<sup>1</sup> To restrict unduly a party's ability to amend the SOR, through a failure to recognize or employ an ancillary remedy that would facilitate amending the SOR while protecting the rights of the parties, was an abuse of discretion on the part of the Judge.

It should be noted that Department Counsel concedes in his brief that the Judge had the power to allay his own concerns about the motion by offering Applicant a further opportunity to request a hearing. Department Counsel made this concession after arguing that it was not necessary to allow Applicant a further opportunity to request a hearing in this case. On this latter point the Board disagrees. As pointed out by the Judge, the proposed amendments were not minor alterations to existing SOR allegations. Rather, they were entirely new allegations brought under a Guideline not previously alleged. Proof of these allegations would require presentation of evidence wholly

---

<sup>1</sup>The Judge's language in this part of his decision seems to indicate his belief that the offering of a choice of a hearing to Applicant in the face of a Motion to Amend the SOR was the sole prerogative of Department Counsel.

separate and apart from the evidence used to establish Department Counsel's case under the original SOR. Under such circumstances, Applicant is entitled to an opportunity to request a hearing on the new Guideline and the specific allegations brought thereunder.<sup>2</sup>

The Judge concludes his remarks on the motion by indicating that as a matter of practical concern, Department Counsel had not presented evidence establishing a *prima facie* case of falsification (proposed additional allegation 2.a.). The Judge went on to discuss and analyze the evidence relating to the falsification, indicated his conclusion that Department Counsel's view of the evidence was incorrect, and included his analysis of the falsification evidence as a reason for denying Department Counsel's Motion to Amend the SOR. To do so was an abuse of discretion. The Judge was entitled to consider a number of factors when making a decision about a purely procedural request such as this one. These might include (but are not limited to) the timing of the request, the nature of the request and the extent to which the moving party had an earlier opportunity to proffer the proposed amendments. However, an evaluation of the strength of the moving party's case under the proposed additional allegation is not a proper matter for consideration when resolving a purely procedural matter. The substantive merits of Department Counsel's falsification case are irrelevant to consideration of whether his Motion to Amend should be granted. *See, e.g.*, ISCR Case No. 99-0018 at 3 (App. Bd. Apr. 11, 2000)(commenting upon the impropriety of considering substantive aspects of a case to resolve a purely procedural issue).

Department Counsel asks the Board to reverse the Judge's favorable decision in this case, arguing that the unfavorable evidence under Guideline E that the Judge erroneously refused to consider precludes granting Applicant a security clearance. The Board cannot grant Department Counsel the relief he seeks. By requesting reversal, Department Counsel is asking the Board to make findings and conclusions unfavorable to Applicant on the yet unadjudicated Guideline E allegations. The Board has no authority to step into the shoes of a Hearing Office Administrative Judge and make such findings and conclusions and then use them to determine the final outcome of a case on appeal. *See, e.g.*, ISCR Case No. 02-12199 at 7 (App. Bd. Oct. 7, 2004). Given the errors discussed earlier in this decision, remand is the proper remedy.

### **Order**

The Judge's formal findings under Guideline F are AFFIRMED inasmuch as they have not been challenged on appeal. Regarding the Judge's ruling denying Department Counsel's Motion to Amend the SOR, the case is REMANDED with instructions to allow Department Counsel to submit the SOR under Guideline E. Applicant should then be afforded an opportunity to (a) formally answer the new allegations, and (b) choose whether he desires a hearing on the new allegations. When providing these specific instructions on remand, the Board must take into account the fact that

---

<sup>2</sup>In his appeal brief, Department Counsel asserts the Judge erred by creating an applicant's right to be given another opportunity to request a hearing whenever an SOR is amended. Department Counsel reads the Judge's decision too broadly. When commenting on Applicant's right to a hearing, the Judge repeatedly notes Department Counsel's attempt to expand the SOR with the addition of a "new and distinct guideline." Thus, the Judge's remarks are confined to the facts of this case. Similarly, Department Counsel argues that the Judge erroneously injected a requirement that any amendment to the SOR have a nexus and relationship to the existing allegations. A fair reading of the Judge's decision reveals that the statement was made strictly in the context of whether or not Applicant would be entitled to another opportunity to elect a hearing, and was not intended to be a comment on a party's ability, generally, to amend the SOR.

the Judge below has, in essence, already made findings and conclusions on one of Department Counsel's proposed additional allegations in the context of ruling on the Motion to Amend. The evidence that the Judge reviewed was never formally incorporated into the record, and, when discussing and analyzing that evidence, the Judge resolved a matter that was not properly before him. Thus, the Judge appears to have prejudged a portion of Department Counsel's case. To preclude the possibility that this irregularity will prejudice the rights of one of the parties, the Board recommends that the case be remanded to a new Judge who has no prior involvement in the case.

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: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board