

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 29, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Although Applicant requested a decision on the written record, he subsequently moved to convert his case to a hearing. Department Counsel did not object. On April 28, 2008, after a proceeding conducted telephonically, Administrative Judge Mark W. Harvey denied Applicant’s request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether he was denied due process as set forth in the Directive and whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding error, we remand the case to the Judge.

The SOR alleges that Applicant has numerous delinquent debts and that he deliberately provided false answers on the security clearance form. On appeal Applicant states that the telephonic procedure which the Judge employed in this case denied him the benefit of a hearing as contemplated by the Directive, specifically an opportunity for the Judge to evaluate his demeanor. Applicant requests an opportunity to present his case in person. We construe this to be a request to remand the case to the Judge for a new proceeding.

We have examined the record. We note that Government Exhibit (GE) 4 contains a series of e-mail messages between the Judge and the parties concerning the proposed hearing. Specifically, Applicant was not able to attend the hearing in person, due to his presence in a war zone. There were logistical difficulties setting up a video teleconference (VTC), which, in his appeal, he attributes to technical difficulties at DOHA. By e-mail dated February 22, 2008, the Judge mentioned a telephonic interview as an alternative to the VTC, advising Applicant that “You have a right to an in personam hearing . . . A speaker phone interview is not a hearing. A hearing requires the judge to assess credibility through observing demeanor. A speaker phone interview would be recorded and transcribed. A speaker phone interview is a lawful manner for you to present information for my consideration . . .” Subsequently, Applicant sent the following message to the Judge and to Department Counsel: “It looks like the VTC is not going to work out as well as we had planned. I will put this in writing so everyone will know that I am requesting this. I, [Applicant], am requesting a tele-conference for my interview with the personnel listed in this email.”

Accordingly, the parties arranged for a telephonic interview of Applicant, which occurred on March 20, 2008. At the beginning of the proceeding, the Judge advised Applicant that he had a right to a hearing in person or by video-teleconference and asked Applicant if he waived that right. Applicant replied that he did so waive. Tr. at 14.¹

¹Prior to the proceedings in this case, Department Counsel objected to the proposed telephone interview of Applicant. See GE 6, Government Motion, February 21, 2008. At the beginning of the telephonic proceeding the Judge acknowledged those objections, stating that they were part of the record. Tr. at 14. However, Department Counsel did not raise these objections on appeal. Therefore, they are not before the Board.

An applicant has a right under the Directive to present matters to a Judge in an effort to mitigate any security concerns in his case. He can do so in writing, the Judge deciding the case on the written record. Directive ¶ E3.1.7. He can also do so by means of a hearing in which he appears in person. Directive ¶ E3.1.8. There is no other alternative means for an Applicant to present his case to DOHA. In the case at issue here, Applicant initially requested a determination on the written record. He later changed his mind and requested a hearing, to which the Department Counsel did not object. A review of the record suggests that, throughout the processing of his case, Applicant desired the benefits of a hearing, agreeing to the telephonic interview only when a VTC could not be accomplished. By advising Applicant that the telephonic interview was not a hearing but, rather, a means by which Applicant could make a statement, the Judge appears, in effect, to have converted the case to an administrative determination on the written record, Applicant's telephonic interview serving as an alternative to a written response to the Government's File of Relevant Material. Despite Applicant's having stated that he waived his right to a VTC, it is not clear that Applicant understood the significance of the procedure utilized in his case. The Board notes that on more than one occasion during the telephonic interview the Judge referred to the procedure in question as a "hearing," that he provided the Department Counsel with an opportunity to present evidence, examined Applicant's capacity to represent himself, and advised Applicant of the proper method by which he should lodge any objections to that evidence. *See, e.g.*, Tr. at 3 - 8. The Judge advised Applicant of the extent to which the Federal Rules of Evidence would apply to the interview, a procedure more pertinent to a hearing. Tr. at 8. *See* Directive ¶ E3.1.19. He also advised Applicant that "the hearing will be open" unless Applicant requests otherwise, which is a rule with no applicability to a determination on the written record. Tr. at 9; Directive ¶ E3.1.12. The Judge appears to have conducted the interview more in the manner of a hearing than merely of transcribing a statement for use in a determination on the written record. Examining the record as a whole, it is reasonable to conclude that, despite the Judge's advice concerning the limitations of a telephonic interview, Applicant may have believed himself to be receiving more of the benefits of a hearing than was actually the case.

While applicants can waive various rights under the Directive, including the right to a hearing, waivers must be knowing and intelligent. *See* ISCR Case No. 06-24460 (App. Bd. Apr. 30, 2008)(waiver of right to counsel); ISCR Case 05-01237 (App. Bd. May 10, 2007)(waiver of right to 15 day notice of the hearing). *See also* ISCR Case No. 03-08512 at 3 (App. Bd. Jun. 8, 2005) for list of factors demonstrating a proper waiver of the right to a hearing. Given Applicant's *pro se* status, the likely exigencies of communicating to DOHA from a war zone, and the circumstances highlighted above, a reasonable person could conclude that Applicant's waiver of his right to a hearing was not sufficiently knowing so as to satisfy the due process requirements of Directive. Accordingly, the Board concludes that the best course of action is to remand the case to the Judge for a new proceeding, either a determination on the written record or a hearing that complies with the requirements of the Directive (making appropriate allowances given Applicant's presence in a conflict zone). The remaining issue is not ripe for consideration.

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

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