

KEYWORD: Guideline H

DIGEST: Jurisdictional defects can be raised at any point in a DOHA proceeding including for the first time on appeal. The matters submitted by Applicant raise a serious legal issue which cannot be resolved without fact finding beyond the record. Adverse decision remanded.

CASENO: 06-19169.a1

DATE: 11/02/2007

DATE: November 2, 2007

_____)	
In Re:)	
)	
-----)	ISCR Case No. 06-19169
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 25, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant

requested a decision on the written record. On May 29, 2007, after considering the record, 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 issue on appeal: whether the Judge lacked subject matter jurisdiction to issue his decision. We remand the case to the Judge.

Applicant's brief contains new evidence. *See* Directive ¶ E3.1.29. We are presenting the entirety of her arguments solely for the purpose of addressing her jurisdictional challenge. Applicant contends that, after receiving a request from DOHA to provide a response to the File of Relevant Material (FORM), she and her employer asked the employer's security officer to terminate her request for a security clearance. He agreed to do so. She states she then believed that she did not need to reply to the FORM. She further advises that she was "dismayed" upon receipt of the Judge's adverse decision, because she believed the case was over. Applicant states that "[i]n a telephone call to [security officer] on June 6, 2007, he told me that he did everything he needed to do to withdraw the application and had done so the same day that he told me he would (March 23). He also told me that he believed the failure to withdraw the case was an error on the part of DOHA." Accompanying her brief is a statement by the security officer, to the effect that, following the request from Applicant and the employer, he spoke with a representative at DOHA, who advised him to withdraw Applicant's SCA by means of the Joint Clearance and Access Verification System (JCAVS). The security officer states that he did as instructed by the DOHA representative.

Directive ¶ 4.4 provides that if an applicant's need for classified information terminates, then processing of his or her case shall cease. Exceptions to this policy are if a hearing has commenced, a decision issued, or the applicant provides a written request for the case to continue. DOHA Operating Instruction 29 sets forth detailed implementation of this policy. Applicant contends, in effect, that her need for a clearance had been properly terminated prior to the date for responding to the FORM. As a consequence, her case should have been terminated without a decision.

Jurisdictional defect can be raised at any point in a DOHA proceeding, "including for the first time on appeal." ISCR Case No. 02-24227 at 4 (App. Bd. Oct. 7, 2003). The matters submitted by Applicant raise a serious legal issue which cannot be resolved without fact finding beyond the matters contained in the FORM. Such fact finding is beyond the scope of the Board's authority, and we cannot base a decision on new evidence. Therefore, we remand this case to the Judge to reopen the record (1) to allow the parties to present evidence as to the facts and circumstances regarding the alleged withdrawal of Applicant's SCA and (2) to make a ruling as to whether Applicant's case should have been terminated without a clearance decision being issued. *See Id.* at 5.

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