



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 08-09776
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esquire, Department Counsel
For Applicant: *Pro Se*

February 23, 2010

Remand Decision

RIVERA, Juan J., Administrative Judge:

On September 11, 2009, the Appeal Board remanded Applicant's case requesting clarification of whether Applicant possessed a need for access to classified information before the commencement of the hearing. I find Applicant did possess a need for access to classified information before the commencement of his hearing. Even though Applicant was not working in a particular contract or being paid by his employer, Applicant was still being sponsored for a clearance by his employer who intended to rehire him.

Statement of the Case

On July 3, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On January 14, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2,

1992, as revised.¹ The SOR alleges a security concern under Guideline F (Financial Considerations). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, denied or revoked.

On February 5, 2009, Applicant responded to the SOR allegations, and requested a hearing before an administrative judge. The case was assigned to me on February 26, 2009. DOHA issued a notice of hearing on March 24, 2009. The hearing was convened as scheduled on April 14, 2009. The government offered Government Exhibits (GE) 1 through 4, which were admitted without objection (Tr. 23). Applicant testified on his own behalf, and submitted Applicant Exhibits (AE) 1 through 3, which were admitted without objection (Tr. 23). DOHA received the transcript of the hearing (Tr.) on April 22, 2009. I issued a decision denying eligibility for access to classified information on July 13, 2008.

Findings of Fact

Applicant appealed the decision to deny his clearance. On September 11, 2009, the Appeal Board, without addressing Applicant's appeal issues, *sua sponte* remanded Applicant's case because of a possible jurisdictional issue.² The Appeal Board remanded Applicant's case for clarification of the following:

1. How was the document entitled a "Person Summary," obtained from the Joint Personnel Adjudications System (JPAS) – now identified as Appellate Exhibit (App. Ex.) 1 -- entered into the record;³

2. Whether Applicant had lost his job before the commencement of the hearing; and,

3. Whether DOHA had lost subject matter jurisdiction to adjudicate Applicant's security clearance under Directive ¶ 4.4.

The Appeal Board stated:

¹ On August 30, 2006, the Under Secretary of Defense (Intelligence) directed application of revised Adjudicative Guidelines (AG), promulgated by the President on December 29, 2005, to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended.

² ISCR Case No. 08-09776 (App. Bd. Sept. 11, 2009, Remand Decision).

³ In its pertinent parts, App. Ex. 1 stated "Separation Status: Separation" and "Separation Date: 2009 03 09."

Although the Board is authorized to resolve jurisdictional questions, due to the ambiguities presented by the record, the appropriate course is to remand the case to the Judge for additional proceedings. Therefore, we remand the case to the Judge to reopen the record to allow the parties to present evidence as to the facts and circumstances regarding the jurisdictional issue outlined above, including the question of whether Applicant still possessed a need for access to classified information by the time of the hearing. Other issues raised by Applicant on appeal are not ripe for adjudication.

ISCR Case No. 08-09776 at 2 (App. Bd. Sep. 11, 2009).

On October 8, 2009, I conducted a hearing to allow the parties to present evidence concerning the issues raised by the Appeal Board. At the hearing, Department Counsel and Applicant denied presenting App. Ex. 1 during the April 2009 hearing. Because of the DOHA transmittal letter attached to the JPAS Person Summary (App. Ex 1), I assume the document was placed into the record by administrative personnel from the Hearing Office, along with other routine documents such as the hearing notice and correspondence explaining the Applicant's procedural rights.

At the October 2009 hearing, Department Counsel presented, without objection, three documents that were marked as App. Ex. 2 through 4. App. Ex. 2 is a letter, dated April 13, 2009, sent by Applicant's employer's facility security officer (FSO) to Department Counsel requesting that she continue with Applicant's security clearance hearing scheduled for April 14, 2009. The FSO stated in her email: "I will maintain [Applicant's] record in JPAS until a decision has been made about his jurisdiction. He lost his job when the loss of jurisdiction happened."

Department Counsel explained that three or four days before Applicant's hearing (scheduled for April 14, 2009), she looked into JPAS to ensure DOHA had jurisdiction over Applicant's case. She noted a JPAS entry indicating Applicant had been separated as of March 9, 2009 (App. Ex. 1). Department Counsel telephonically contacted Applicant's FSO for a clarification of Applicant's employment situation. She was informed that Applicant's company was still sponsoring Applicant for a security clearance. Department Counsel was further informed that the company wanted Applicant's hearing to take place as scheduled, and that the company intended to retain or rehire Applicant if he received his clearance (2nd Tr. 10-14). The FSO forwarded App. Ex. 2 to Department Counsel to memorialize their conversation.

As a result of Department Counsel's conversation with the FSO, the FSO made corrections in Applicant's JPAS Person Summary indicating in its pertinent parts: "Separation Status: N/A" and "Separation Date: N/A" (App. Ex. 3 (The document was printed on April 14, 2009)).

Applicant was terminated from his contractor job in January 2009, when his employer's contract ended. A second government contractor picked up the contract and

intended to hire Applicant to continue working in other government contracts. Because of the security concerns raised by the SOR, the second contractor declined to hire Applicant. The initial government contractor/employer continued sponsoring Applicant's security clearance and intended to rehire Applicant if he received a favorable security clearance adjudication (App. Ex. 2 and 3). Applicant was unemployed from January 2009 to his hearing day because of the termination of his employer's contract and the security concerns raised by his current financial situation (Tr. 97).

App. Ex. 4 is a JPAS Person Summary for Applicant, with a printed date of September 18, 2009, indicating in its pertinent parts: "Separation Date: 2009 07 14" and "Separation Status: Separation." My initial decision denying Applicant's security clearance was published July 13, 2009. The transcript for the second hearing (2nd Tr.) was received on October 16, 2009.

Conclusion

Directive ¶ 4.4 provides, that "actions pursuant to [the] Directive shall cease upon termination of the applicant's need for access to classified information" except in those cases in which a hearing has commenced, a clearance decision has been issued, or an applicant's clearance has been suspended and the applicant requested that the case be continued.

Considering the evidence as a whole, I am convinced that Applicant was not "separated" and he was still being sponsored for a clearance by his employer, even though he was not working on a particular contract or being paid. Based on the App. Ex. 2 and 3, and Department Counsel's and Applicant's representations, I am satisfied that Applicant still had a need for access to classified information. Thus, pursuant to Directive ¶ 4.4, DOHA had jurisdiction when the hearing commenced and as of the date of the initial decision.

JUAN J. RIVERA
Administrative Judge