



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



In the matter of:)	
)	
)	ISCR Case No. 10-02264
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

03/20/2012

Memorandum

HEINY, Claude R., Administrative Judge:

Applicant failed, without reasonable cause, to appear at his security clearance hearing set for February 3, 2012. The case file is being forwarded to the Director, DOHA, requesting a default decision and the automatic denial or revocation of Applicant’s security clearance.

History of the Case

Applicant contests the Department of Defense’s (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on March 1, 2011, detailing security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct).

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

On May 23, 2011, Applicant answered the SOR and requested a hearing. On August 3, 2011, the case was assigned another administrative judge. On September 12, 2011, DOHA issued a Notice of Hearing setting the case for hearing on October 18, 2011. On October 6, 2011, Appellant stated he had filed for bankruptcy protection on August 31, 2011, and he had made a FOIA request to the FBI. He was awaiting a response. On July 28, 2011, discovery was sent to Applicant.

On October 12, 2011, a telephone conference call was held between the presiding judge, Department Counsel (DC), and Applicant. (Tr. 5) A continuance was granted until the end of the year to allow Applicant to obtain documents he sought. The judge specifically stated the delay was not open ended. (Tr. 10) Applicant was directed to provide DC with all proposed exhibits currently in his possession by October 31, 2011, and any additional documents seven days before the hearing. No documents were received by DC. (Tr. 7, 11) Applicant was also directed to provide the judge with email responses on: November 1, 2011, November 15, 2011, December 1, 2011, and December 15, 2011. The request was related to his efforts to obtain documents.

Applicant responded to the November 1, 2011 deadline indicating he had nothing new to report. On November 18, 2011, the judge sent Applicant an email stating Applicant was supposed to provide a status update on November 15, 2011, and the update had not been received. Applicant was told that if the status update was not received by November 21, 2011, the judge would conclude that the Applicant's failure or refusal was a deliberate noncompliance with his directions. On November 17, 2011, Applicant stated his email sent on November 15, 2011, had not been delivered due to an error in transmission. Applicant responded by the November 21, 2011, deadline.

On December 1, 2011, in his status report, Applicant stated he had nothing new to report. In his December 16, 2011 status report, he said he had received a certified letter from the Department of Justice (DOJ), had not seen the contents, but assumed it contained the documents he was anticipating.

On December 19, 2011, the case was assigned to a different judge. On December 20, 2011, the second judge sent Applicant an email indicating he had reviewed Applicant's email stating the receipt of DOJ correspondence and indicated the case would be scheduled for the Dallas – Fort Worth area during the week of January 23, 2012. Applicant did not respond to the email, so the judge called and left him a message. On January 10, 2012, Applicant called and left the judge a message.

On January 12, 2012, the case was assigned to the undersigned. DC sent Applicant an email stating the hearing would take place on February 1 or 2, 2012. Not receiving a reply to the email, DC called and received no reply. (Tr. 6) On January 10, 2012, another email was sent. Applicant responded to the email stating he desired to have the hearing the following week. (Tr. 6) On January 11, 2012, a teleconference was held between the judge, DC, and Applicant in which hearing dates were discussed. Applicant stated that during the week of January 30, 2012, through February 2, 2012, he anticipated being out of state on company business, but might return the evening of

February 2, 2012, or the morning of February 3, 2012. It was decided the hearing would be set for 12:00 o'clock noon on February 3, 2012. It was also understood that if Applicant was unable to start exactly at noon, the court would allow him reasonable time to get from the airport to the hearing location. On January 19, 2012, DOHA issued a Notice of Hearing set for February 3, 2012.

On February 3, 2012, the hearing was convened at 1:58 p.m., approximately two hours later than the start time listed in the notice of hearing. At that time, Applicant had failed to appear. Neither I nor the DC received a telephone call, fax, or email from Applicant stating he had been delayed. The last communication DC had with Applicant was during the January 11, 2012 telephone conference. (Tr. 3)

On February 3, 2012, the day of the scheduled hearing, at 12:36 p.m., Applicant sent an email to the second of the three judges who were assigned his case stating his flight had been delayed due to weather in Texas. Early the morning of February 3, 2012, the hearing location in Texas had experienced light rain, but by 10:00 a.m. that morning all rain had left the area. Both the Judge and DC were at the hearing location and experienced no problems with rain. Applicant's email stated he would not be returning to Texas until much later the night of February 3, 2012. It is noted the flight time from his out-of-state location to the hearing location was more than three hours flying time and he would have had to know about the flight delay by seven or eight o'clock the morning of the hearing. He provided no documentation from the airline showing flight delays due to weather.

On February 13, 2012, DOHA received the hearing transcript (Tr.).

Procedural Matters

At the hearing, DC moved for default in accordance with Guideline E, Personal Conduct. Revised Adjudicative Guideline (AG) ¶ 15 articulates the security concerns relating to personal conduct. Additionally, it states:

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperating with medical or psychological evaluation.

¶ 6.2 of the Directive, Procedures, states if an applicant should refusal or failure to cooperate, at any stage of the adjudicative process, to proceed in a timely or orderly fashion in accordance with this Directive, or to follow the directions of an Administrative Judge, then the Director, DOHA, may revoke any security clearance held by the applicant and discontinue case processing. (¶ 6.2, ¶ 6.2.2, ¶ 6.2.3)

Findings of Fact

In Applicant's Answer to the SOR, he denied his student loans were more than 120 days past due and denied intentionally submitting a false and fraudulent business expense report. He asserted he was current on his student loans. (Tr. 9) Applicant has a law degree. (Tr. 4) He admitted all of the remaining allegations in the SOR, and his admissions are incorporated herein. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

In Applicant's SOR answer, he admitted owing \$60,000 on a judgment filed in 2008 and \$1,515 on another judgment for legal fees filed by the professional firm that represented him. (Tr. 9) He admitted owing a \$42,273 collection account to a university; \$68,359 owed to a collection agency on a bank account; and \$4,524 owed on a charged-off credit card account. He also admitted owing approximately \$650 on an additional collection account and an account placed for collection.

On February 3, 2012, the hearing commenced at 1:58 p.m. and ended at 2:25 p.m. Applicant failed to appear at the hearing and produced no documents.

Analysis

The case was originally set for hearing on October 18, 2011. For good cause, that hearing was cancelled. In December 2011, Applicant was informed the hearing would be scheduled in late January 2012. On January 11, 2012, Applicant was informed in a telephone conference that the hearing would take place on February 3, 2012. The notice of hearing was dated January 19, 2012. Applicant failed to appear at the hearing. Twenty one minutes prior the start of the hearing, Applicant stated his flight had been delayed and he would not be attending the hearing. Weather at the hearing location did not support his reasons for the delay.

Conclusion

Applicant, without reasonable cause, failed to appear at his scheduled security clearance hearing. The file is forwarded to the Director, DOHA for the administrative termination of further processing for clearance eligibility.

CLAUDE R. HEINY II
Administrative Judge