

KEYWORD: Guideline F

DIGEST: The Judge erred by failing to issue a clearance decision on remand. Case remanded.

CASENO: 17-03043.a2

DATE: 06/11/2019

DATE: June 11, 2019

In Re:)
-----) ISCR Case No. 17-03043
)
Applicant for Security Clearance)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 16, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 27, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28. and E3.1.30.

At the hearing, the Judge read the contents of Applicant’s exhibits into the record and returned them to the Applicant. Those documents were not included in the record. In a prior decision on March 12, 2019, we concluded the Judge failed to preserve a complete record which impaired our ability to perform our review function. We remanded the case to the Judge “to identify the documents that Applicant desired him to consider and include these documents in the record.”

In an undated document entitled “Remand Order,” the Judge noted, at p. 2, that “The four documents are provided as directed by the Appeal Board.” He also stated, “The Appeal Board did not ask me to take any action beyond the collection of the four documents” and, at p. 1, “The decision denying Appellant’s access to classified information remains in effect, subject to the decision of the DOHA Appeal Board.” On April 4, 2019, the Hearing Office sent to Applicant the “Remand Order” with a cover letter that described the Judge’s product as an “**unfavorable** security clearance decision.” Applicant appealed the Judge’s Remand Order. We accepted Applicant’s Notice of Appeal.

In retrospect, the Appeal Board erred in accepting the Notice of Appeal (NOA). Directive ¶ E3.1.28. provides that either party may appeal an Administrative Judge’s clearance decision. We have no authority to accept an appeal of a Remand Order. Instead of accepting the NOA, we should have referred the matter to the DOHA Director for appropriate corrective action.¹ However, having accepted the NOA and permitted the parties to submit briefs, we are issuing this decision.

The Judge erred by failing to issue a clearance decision. Directive ¶ E3.1.35. provides:

Upon remand the case file shall be assigned to an Administrative Judge for correction of error(s) in accordance with the Appeal Board’s clearance decision. The assigned Administrative Judge shall make a new clearance decision in the case after correcting the error(s) identified by the Appeal Board. The Administrative Judge’s clearance decision after remand shall be provided to the parties. The clearance decision after remand may be appealed pursuant to items E3.1.28. and E3.1.35., above. [Emphasis added.]

¹The Board does not have supervisory jurisdiction or authority over the conduct of Department Counsel or Hearing Office Administrative Judges. *See, e.g.*, ISCR Case No. 02-04344 at 3 (App. Bd. Sep. 15, 2003).

Additionally, the DOHA Director's Memorandum, dated March 12, 2019, which returned the case to the Judge, stated that the case was remanded to him "to make a decision in accordance with the Directive." The Judge was also required to comply with those requirements.

Directive ¶E3.1.25. provides that "The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR, and whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant." The Judge's Remand Order fails to meet those requirements of a clearance decision.

Given the circumstances, we conclude that we must remand the case to the Judge for issuance of a new decision in accordance with the Directive.

Order

The case is **REMANDED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board