

KEYWORD: Guideline F

DIGEST: Applicant has made assertions that, if true, would suggest that the Judge did not consider all of the evidence. There is nothing in the record or in the decision to support or corroborate those assertions. Therefore, Applicant has raised an issue that we cannot resolve, insofar, as we have no fact-finding power. Adverse decision remanded.

CASENO: 15-07050.a1

DATE: 06/08/2017

DATE: June 8, 2017

In Re:  -----  Applicant for Security Clearance	) ) ) ) ) ) )	ISCR Case No. 15-07050
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**APPEAL BOARD DECISION AND REMAND ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 9, 2016, 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 March 17, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Matthew E. Malone denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

As a threshold matter, a question exists about whether the record of this proceeding is complete. At the hearing, Applicant offered three exhibits (Ax A-C) that were admitted into

evidence. The transcript reflects the record closed at the end of the hearing. Tr. at 69. In his decision, the Judge only refers to Applicant's three exhibits. In the appeal brief, Applicant asserts that he submitted a post-hearing submission in January 2017, the Judge accepted the new documentation in early February 2017, but the Judge did not mention or take into account the new documentation in his decision.<sup>1</sup> The record does not contain a post-hearing submission. As such, Applicant has made a representation from outside the record. As a general rule, the Board cannot consider new evidence on appeal. Directive ¶ E3.1.29. However, in the past, the Board has considered new evidence or assertions outside the record insofar as it raises questions of due process or jurisdiction. *See, e.g.*, ISCR Case No. 12-02827 at 1-2 (App. Bd. May 8, 2014).

Through his attorney, Applicant has made assertions that, if true, would suggest that the Judge did not consider all of the evidence. There is nothing in the record or in the decision to support or corroborate those assertions. Therefore, Applicant has raised an issue that we cannot resolve, insofar as we have no fact-finding power. *See, e.g.*, ISCR Case No. 14-02394 at 2 (App. Bd. Aug. 17, 2015).

Given these circumstances, the Board concludes that the best course of action is to remand the case to the Judge for determination whether Applicant submitted post-hearing matters and, if so, for further processing.<sup>2</sup> Other issues raised by Applicant's on appeal are not ripe for our consideration.

### Order

The Decision of the Judge is **REMANDED**.

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy

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<sup>1</sup> In a footnote, Applicant refers to a letter sent to the Judge on January 31, 2017.

<sup>2</sup> Failure to preserve a complete record is an error. Even if a submission is excluded from evidence, the Judge should mark it for identification and place it in the case file. *See, e.g.*, ISCR Case No. 03-08257 at 5 (App. Bd. Feb. 8, 2007).

Administrative Judge  
Member, Appeal Board