

Date: September 27, 2022

_____))
In the matter of:))
))
))
-----))
))
Applicant for Security Clearance))
_____))

ISCR Case No. 20-00914

APPEAL BOARD DECISION AND REMAND ORDER

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 July 31, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On August 11, 2022, after consideration of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Eric H. Borgstrom found for Applicant on the Guideline E allegations, found against Applicant on the Guideline F allegations, and denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. The Judge’s favorable findings under Guideline E are not in issue on appeal.

Under Guideline F, the SOR alleged that Applicant had two delinquent child support accounts and three other delinquent debts. In responding to the SOR, Applicant denied one allegation and admitted the other four, asserting that he had paid two of the admitted accounts. He did not include any documentary evidence to support his claims of resolution or dispute. On March 25, 2022, Department Counsel submitted a file of relevant material (FORM) to Applicant for his review and response. The Judge noted that Applicant did not submit a response to the FORM and concluded that “[a]bsent documentary evidence of any debt-resolution efforts or other evidence demonstrating his financial responsibility, none of the mitigating conditions apply.” Decision at 7.

On appeal, Applicant asserts that he submitted five documents for the Judge’s consideration, to include receipts and pay stubs showing payments. In support of that issue, Applicant’s brief contains an email chain in which he discussed his case with a DOHA administrative staff member and forwarded two attachments for consideration by the Judge. We also note this email chain reflects that Applicant stated, “If possible i’d (sic) like to speak with you [the administrative staff member] prior to the hearing[,]” which raises the issue whether Applicant requested a hearing or intended to request a hearing. This latter issue should have been appropriately addressed and resolved before the FORM was sent to the Judge for a decision on the written record.

The Appeal Board is generally prohibited from considering new evidence. Directive ¶ E3.1.29. However, we may consider new evidence insofar as it bears upon questions of due process or jurisdiction. *See, e.g.*, ISCR Case No. 17-01472 at 2 (App. Bd. Aug. 6, 2018). The email chain attached to Applicant’s brief confirms the communications on May 16, 2022, which was a timely response to the FORM. As such, Applicant has made a credible proffer that documents were submitted to DOHA that were, for unknown reasons, not forwarded to Department Counsel for inclusion in the FORM submitted to the Judge. In his reply brief, Chief Department Counsel indicates the Government has no objection to remanding this case for the Judge to consider the documents that were submitted.

Based on the above, we conclude the best course of action is to remand the case to the Judge to determine whether Applicant requested a hearing or intended to request a hearing, and to reopen the record to provide Applicant an opportunity to re-submit the documents that should have been presented to the Judge. As provided in Directive ¶ E3.1.35, the Judge shall, upon remand, issue a new decision in the case. The Board retains no continuing jurisdiction over a remanded decision. However, a decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28. to E3.1.35. *See* Directive ¶ E3.1.35.

Order

The Decision is **REMANDED**.

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: Jennifer I. Goldstein

Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Member, Appeal Board