KEYWORD: Guideline F

DIGEST: The Judge cited to Applicant's earlier Response to the FORM in support of his findings about this debt. Applicant contends that the Judge's citation to the Response was an error because the Response was never admitted into evidence. We find this argument to be persuasive. At the hearing, Department Counsel offered Applicant's security clearance application, interview summary, and credit reports, which the Judge admitted. Applicant offered two letters, which the Judge admitted. Neither party offered the Response, although it is located in the case file. Adverse decision remanded.

CASENO: 17-03627.a1

DATE: 04/01/2019

DATE: April 1, 2019

In Re: ------------------------ Applicant for Public Trust Position	ADP Case No. 17-03627

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Danel A. Dufresne, Esq.

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On November 27, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–trustworthiness concerns raised under Guideline F of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. After receiving the File of Relevant Material (FORM) and submitting a response thereto, Applicant requested that the case be converted to a hearing. On December 26, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola denied Applicant's request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's findings of fact were supported by substantial evidence, whether the Judge based his decision on information not contained in the record, and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand the case to the Judge.

The SOR alleged four delinquent debts. The one allegation that the Judge found adversely to Applicant pertained to a $30,000 Federal tax lien. The Judge cited to Applicant's earlier Response to the FORM in support of his findings about this debt. Applicant contends that the Judge's citation to the Response was an error because the Response was never admitted into evidence. We find this argument to be persuasive. At the hearing, Department Counsel offered Applicant's security clearance application, interview summary, and credit reports, which the Judge admitted. Tr. at 8. Applicant offered two letters, which the Judge admitted. Tr. at 9. Neither party offered the Response, although it is located in the case file.

Therefore, it was error for the Judge to have cited to the challenged document in making his findings of security concern.[1] We conclude that the best resolution is to remand the case to the

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[1] Directive ¶ E3.1.7 provides that, if neither party requests a hearing, the case shall be assigned to a Judge "for a clearance decision based on the written record." It further provides that Department Counsel shall provide the applicant with all relevant and material information that could be adduced at a hearing (generally referred to as the File of Relevant Material or FORM) and applicant shall have an opportunity to respond to it. The Directive envisions that the FORM and the applicant's response will be part of the written record. Directive ¶ E3.1.8 also provides that, if either party requests a hearing, the Judge shall base the clearance decision on the "hearing record." The Directive does not address the conversion of a FORM proceeding into a hearing and provides no guidance how to treat a partial or full written record that was created before the hearing conversion. Regarding this issue, we note a party's FORM submission often contains arguments, which are not evidence. *See, e.g.*, ISCR Case No. 14-03392 at 2, n.3 (App. Bd. Apr. 15, 2015).

In the Reply Brief, Department Counsel acknowledges that "it would have been better practice to have admitted Applicant's response into evidence." Reply Brief at 8. We agree the better practice would have been for the Judge to have clarified the evidentiary status of that document at the hearing. Department Counsel also argues the previously submitted FORM (which presumably includes Applicant's FORM response) was part of the record and the Judge had access to it. While the argument that the parties' previous submissions pertaining to the SOR allegations are part of the evidentiary record and should have been considered by the Judge in rendering a decision is not an unreasonable interpretation of the Directive, Department Counsel's handling of some FORM documents at the hearing undercuts that argument. At the hearing, Department Counsel offered documents from the FORM into evidence as Government

Judge to give the parties a chance to offer the Response or object to its admission, as appropriate. The Judge will then issue a new decision consistent with the Directive. The other issues that Applicant has raised are not ripe for our consideration.

Order

The Decision 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

Exhibits 1-3. If those documents were already in the record and should have been considered by the Judge in rendering a decision, why would Department Counsel need to offer them again and seek to obtain a ruling from the Judge on their admissibility? Based on our review of the record, confusion exists whether Applicant's FORM response was in the record for evidentiary purposes. As a matter of fairness, the Judge should have discussed this issue with the parties at the hearing, given them the option of offering or not offering the FORM response into evidence, and then proceeded accordingly.