

KEYWORD: Guideline F

DIGEST: Applicant reasonably believed the record would remain open until October 18, 2019, and a review would be conducted on that date to determine whether it should remain open for a longer period. Applicant was not definitively informed the record would close on October 18th. Applicant reports that he sent the Judge an email on October 18th, indicated he did not receive a response to his email, and assumed the record would be left open while he was unemployed. We conclude the best course of action is to remand the case to the Judge to determine what occurred on October 18th and then take whatever action is appropriate in accordance with the Directive. The case is remanded.

CASE NO: 19-01011.a1

DATE: 01/30/2020

DATE: January 30, 2020

In Re:)	
)	
-----)	ISCR Case No. 19-01011
)	
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 April 15, 2019, 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 initially requested a decision on the written record but later requested a hearing. On November 26, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant’s appeal brief raises a due process issue. He is contending essentially that he was not notified the record closed and believed he would have the opportunity to submit additional matters before the Judge issued the decision. For reasons stated below, we remand the decision to the Judge.

At the hearing held on September 25, 2019, the Judge indicated that Applicant requested to postpone the hearing until mid-October. The Judge denied the postponement request but noted that, if necessary, he would hold the record open until October 18th to provide Applicant the opportunity to submit additional documentary evidence on ongoing actions involving his debts. Tr. at 7-8. The Judge also advised Applicant that, if upon completion of the ongoing debt actions, he wanted to continue a live, in-person hearing he could request the hearing be reopened. *Id.* at 8-9. The Judge stated, “Whether or not we need to reconvene this hearing will be determined after we complete as far as we can today.” *Id.* at 9. During his testimony, Applicant indicated that the defense contract on which he was working had been awarded to a new company, and he did not know whether the new contractor would offer him a job. Tr. at 47-48. Later in the hearing, the following occurred:

[Judge]: . . . I’m not going to adjust the record opening [sic] date. I’m going to leave it at October 18 realizing that we may have to extend that a bit longer just depending on what happens during the month of October. [Tr. at 75.]

* * *

[Judge]: Okay. [Applicant], you mentioned character statements. If during the period where the record is open, the 18th, you wish to submit testimonials to your good character, trustworthiness, job performance, you can add those to the list of documents to be submitted. That’s discretionary, it’s up to you, but if you want to do it I will accept them and consider them.

[Applicant]: Okay. Thank you.

[Judge]: Okay. So we’re going to hold the record open until 18th of October. And on that date we’ll review the -- see what we have.

I may close the record on that date. I have indicated that I would entertain a motion to reopen the hearing, but the burden would be on you, [Applicant], to convince me that it's necessary and that the documents don't speak for themselves.

So at some point in October we're going to come to closure on this and I'm going to have as complete a record as we have. And I'll sit down and write my written decision and that will be mailed to you.

[Applicant]: Okay. [Tr. at 84-85.]

In the decision, the Judge stated that he kept the record open until October 18, 2019, and informed Applicant that he would entertain a request to reopen the record if any documents submitted were not self-explanatory. The Judge also noted that Applicant did not submit any additional documentary evidence or request that the hearing be reopened.

In the appeal brief, Applicant contends that he sent the Judge an email on October 18, 2019, "stating [he] was still unemployed and will be in touch with him once [he] was working again" and noted his debts were deferred while he was unemployed. Appeal Brief at 1. He also stated that, "Since then, there [have] been no communications from the Defense Office of Hearings and Appeals and I made the assumption that a judgement was made to leave the case open due to my unemployment." *Id.* In general, assertions and documents that are not in the record constitute new evidence that the Appeal Board is prohibited from considering. Directive ¶ E3.1.29. However, we may consider new evidence in examining a due process issue. *See, e.g.,* ISCR Case No. 14-00812 at 2 (App. Bd. Jul 8, 2015). Applicant's purported email of October 18th is not contained in the record or in the parties' briefs. Of note, a Judge is required to prepare a full and complete record. *See* Directive ¶¶ E3.1.19 and E3.1.29. Failure to create or preserve a complete record is error and can impair our ability to perform our review function. *See, e.g.,* ISCR Case No. 03-08257 at 5 (App. Bd. Feb. 8, 2007). Department Counsel's Reply Brief, however, does contain an email the Judge sent to Department Counsel on November 20, 2019, stating, "I kept the record in this case open until October 18. I have not received anything from Applicant, except for an email telling me that he was looking for another job. Have you received anything?" Department Counsel responded in the negative.

Based on the foregoing, Applicant reasonably believed the record would remain open until October 18, 2019, and a review would be conducted on that date to determine whether it should remain open for a longer period. Applicant was not definitively informed the record would close on October 18th. Applicant reports that he sent the Judge an email on October 18th, indicated he did not receive a response to his email, and assumed the record would be left open while he was unemployed. We recognize that Applicant should have contacted the Judge after sending his email to confirm whether the Judge decided to leave the record open for a longer period. However, without having an opportunity to review Applicant's email of October 18th, we cannot conclude Applicant's assumption that record would remain open was unfounded or unreasonable. Given these circumstances, we conclude the best course of action is to remand the case to the Judge to determine what occurred on October 18th and then take whatever action is appropriate in accordance with the Directive.

Order

The case is **REMANDED**.

Signed: Michael Y. Ra'anan
Michael Y. 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