

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On December 18, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On February 11, 2020, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On June 3, 2020, we remanded the case to the Judge on a due process issue. In her first appeal, Applicant noted that she was advised in the File of Relevant Material (FORM) that she could object to the admission of her interview summary into evidence. In our first decision, we concluded the Judge erred by considering Applicant’s interview summary over her objection and instructed the Judge to issue a new decision in which he did not rely on information contained in the interview summary.

In his Remand Decision, the Judge made the following evidentiary ruling:

In compliance with the Appeal Board’s decision, I will decide this case without relying on Item 4 (two interview summaries, January and March 2018). Item 4 will be used for explaining Applicant’s employment and medical history, and her plan to repay the delinquent creditors. [Decision at 2.]

The Judge also stated that he intends to “base’ his decision in part on “Item 4 (employment and medical history and her approach for paying the smaller debts before the larger ones)[.]” *Id.* We do not understand how the Judge used or based his decision on Item 4 without relying on it.

In her second appeal, Applicant again raises the issue of the Judge’s consideration of Item 4. She states:

The language use by the investigator in the FORM [she apparently is referring to her interview summary] lends itself to indicate to the reader that I am somehow incompetent and that could not be further from the truth, so in my previous appeal I stated in the very first paragraph that I object to have the applicable parts of the FORM [interview summary] from being entered into evidence. Yet, again, in the remand, the judge attests otherwise. It is clear for one to see the harmful effects of having such aggressive and inflammatory remarks sewn into charges against you, it is impossible to unsee those accounts and proceed objectively. [Appeal Brief at 2-3.]

Applicant’s interview summaries were part of a DoD personnel background report of investigation (ROI). Without appropriate authentication, all or portions of an ROI cannot be admitted into evidence over an applicant’s objection. Directive ¶ E3.1.20. On remand, the Judge erred in considering information in Item 4 over Applicant’s objection. We are unable to conclude

this was a harmless error. More specifically, we are unable to discern exactly what information the Judge considered in Item 4 and what impact that information may have had in his Remand Decision.

As we have previously stated, public confidence in the fairness and integrity of a national security eligibility determination depends, to a large degree, on there being both the substance and the appearance of fairness and impartial in DOHA adjudications. *See, e.g.*, ISCR Case No. 02-23979 at 4 (App. Bd. Aug. 25, 2004). A Judge's continued consideration of inadmissible evidence in a Remand Decision contrary to the Appeal Board's instruction could cause a reasonable person to question his or her impartiality.

Given the above circumstances, we conclude the best course of action is to remand this case for assignment to a new Judge for issuance a decision consistent with the requirements of the Directive.

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