

KEYWORD: Guideline B; Guideline F

DIGEST: A Judge is required to create and preserve a complete record. This requirement includes adding to the record any communications between the Judge and parties after the hearing regarding post-hearing submissions or modification of the date in which the record is scheduled to close. Failure to include such post-hearing communications in the record can impair the Board’s ability to perform its review function. Adverse decision affirmed.

CASE NO: 19-03043.a1

DATE: 06/02/2021

DATE: June 2, 2021

In Re:	)	
	)	
-----	)	ISCR Case No. 19-03043
	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Gerard Arcilla, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 3, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and 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 February 10, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether he was denied due process and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline B were not raised as an issue on appeal. Consistent with the following, we affirm.

### **The Judge's Pertinent Findings of Fact and Analysis**

Applicant, who is in his mid-30s, is married with children. He has earned an associate's degree and is seeking a security clearance for his employment with a defense contractor.

The SOR alleges that Applicant has ten delinquent debts totaling about \$100,000. In responding to the SOR, he admitted eight of the alleged debts. Credit reports confirm the alleged debts. In late 2015, Applicant encountered financial problems, such as tenants vacating his wife's rental property due to a gas leak, that resulted in his earnings not being sufficient to cover his bills. His mortgage fell into arrears, but it is now current. In 2017, he hired a credit repair company that assisted him in setting up a financial plan to resolve his delinquent debts. Although he started the plan, he was unable to complete it due to an unexpected financial setback.

Applicant has been employed since the spring of 2019. In late 2019, he hired another debt management company. He believes they are negotiating with creditors to reduce his debts, and their payment plan places him on a path to avoid bankruptcy. However, the pandemic has impacted his earnings and his ability to pay the past-due debts. He plans to pay the debts when he has the money to do so and notes some of the debts are no longer owed or appear on his credit report.

Applicant has a history of financial problems. Circumstances beyond his control, such as loss of employment, have contributed to those problems. He has made some attempts to repay his debts. However, with the exception of bringing his mortgage current, little has changed with his financial situation over the past several years. He hired a debt management company and expressed an intent to resolve his debts but did not present adequate evidence to show meaningful progress in resolving most of the debts. While he has received letters of recommendation from military and professional associates praising his work performance, including during tours in combat zones, he has fallen short of mitigating the alleged Guideline F security concerns.

### **Discussion**

#### Due Process Issue

Applicant contends that the Judge issued the decision before the record was scheduled to close. Applicant represented himself at the hearing below, which was held on November 13, 2020. At the hearing, the Judge indicated that the record of the proceeding would be left open until November 30, 2020. Tr. at 98-100. Department Counsel requested that Applicant's post-hearing submission should be submitted to an email address monitored by two clerks who would forward the submission to him. Tr. at 99-100. The record contains no additional communications from the Judge or the parties regarding the closure of the record. In the decision, the Judge noted that the record was left open until January 27, 2021, and that Applicant submitted no additional documentation.

Because the decision reflects the record closed on a date later than the one indicated in the transcript, it is reasonable to conclude that communications occurred between the Judge and the parties modifying the closure date of the proceeding that are not contained in the record. A Judge is required to create and preserve a complete record. *See, e.g.*, ISCR Case No. 17-03043 at 3 (App. Bd. Mar. 12, 2019), citing Directive ¶¶ E3.1.19 and E3.1.29. This requirement includes adding to the record any communications between the Judge and parties after the hearing regarding post-hearing submissions or modification of the date in which the record is scheduled to close. Failure to include such post-hearing communications in the record can impair the Board's ability to perform its review function.

Applicant's appeal brief contains assertions and documents that are not contained in the record. The Appeal Board is generally precluded from considering new evidence. Directive ¶ E3.1.29. However, we will 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). Applicant contends the record was scheduled to close on February 13, 2021. In support of this assertion, Applicant provided screen shots from his cell phone reflecting that he apparently talked to one of the DOHA clerks on January 13, 2021, and also sent an email to the clerk's address on that date requesting a 30-day extension of the deadline for submitting additional documents. Exhibit B of Appeal Brief. He submitted no document showing that request was granted. He also provided a screen shot of an email sent to the clerk's address on February 12, 2021, reflecting that he submitted something to be downloaded. *Id.* This later email was sent two days after the Judge had already issued the decision in this case.

In his reply brief, Department Counsel provided an email chain reflecting messages sent to and from Applicant, Department Counsel, and the clerk. This email chain contains Applicant's 30-day extension request of January 13, 2021, and the clerk's response to it sent that same day, which reads in pertinent part:

#### ORDER OF THE COURT

Applicant's request for an extension to submit Post-Hearing Exhibits is granted for two weeks from today's date. Applicant has until close of business on January 27, 2020 [sic], to submit this documentation. No further extensions will be granted.

Judge Lokey-Anderson [Appendix 1 of Reply Brief at 1.]

Even though this message contains an obvious error regarding the year in which the record would close, this error was not misleading given the context of the message.

A party has no right to have the record kept open indefinitely so that he or she can continuously submit new evidence for the Judge's consideration. *See, e.g.*, ISCR Case No. 00-0250 at 3-4 (App. Bd. Feb. 13, 2001) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555 (1978)). "[T]here must be some reasonable degree of administrative finality in DOHA adjudications." *Id.* The abuse of discretion standard is used to review a Judge's decision whether or not to leave the record open for submission of additional matters. *See, e.g.*, ISCR Case No. 16-00164 at 2-3 (App. Bd. Apr. 6, 2018). In this case, we find no error in the Judge's decision to leave the record open until January 27, 2021.

Furthermore, Applicant has not provided the evidence he believes would have mitigated the Judge's concerns. Even if we had accepted his assertions about the closing of the record, we would have no basis to conclude that Applicant's proposed evidence would likely have made a difference.

Based on the foregoing, Applicant has failed to show the record was scheduled to close on February 13, 2021, as he contends. He has not demonstrated that he submitted post-hearing matters before the deadline that the Judge established. We conclude that Applicant has failed to establish that he was denied the due process afforded him under the Directive.

### Analytical Issues

In his appeal brief, Applicant does not challenge any of the Judge's specific findings of fact. Rather, he contends the Judge failed to adhere to Executive Order 10865 and the Directive by not considering all of the record evidence and by not properly applying the mitigating conditions and whole-person concept. Applicant, however, has failed to identify any specific record evidence, mitigating condition, or whole-person factor that the Judge purportedly did not consider. His arguments are neither sufficient to rebut the presumption that the Judge considered all of the evidence in the record nor enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

### Conclusion

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

**Order**

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

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