

KEYWORD: Guideline F

DIGEST: Applicant submitted an email to the Government before the extension expired for him to submit matters. In that email, he provided an update on the actions he has taken to resolve the debts and asked whether he needed to submit further information. Department Counsel and the Judge should have been provided a copy of that email. Decision is Remanded.

CASE NO: 20-00388.a1

DATE: 03/22/2021

DATE: March 22, 2021

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In Re:	)	
-----	)	ISCR Case No. 20-00388
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 15, 2020, 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 requested a decision on the written record. On December 15, 2020, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Matthew E. Malone denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30 and raised the following issues: whether Applicant was denied due process and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. For the reasons stated below, we remand.

Applicant represented himself below. For about the past 16 years, he has worked overseas for various defense contractors. The SOR alleged that he had six delinquent debts totaling about \$35,700. In responding to the SOR, he admitted three of the debts with explanations and denied the others. The Judge found against him on five of the six allegations, noting the lack of documentation supporting his claims of debt resolution.

In his appeal brief, Applicant asserts he was denied due process. He contends that he “requested for an extension of time on numerous occasions from Department Counsel via the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) as well as what additional documentation was required, and his requests were ignored.” Appeal Brief at 2.

Applicant’s appeal brief contains documents from outside the record to support his claimed denial of due process. These documents consist of email exchanges between Applicant and the DCSA CAF (marked as Appellant Exhibit A) and documents from creditors, a computer screen shot from a credit union, and a copy of check (marked as Appellant Exhibit B). Generally, the Appeal Board is prohibited from considering new evidence (Directive ¶ E3.1.29); however, we will consider new evidence to address threshold issues such as jurisdiction and due process. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul 8, 2015).

The record reflects that Applicant responded to the SOR on June 1, 2020. Department Counsel submitted her File of Relevant Material (FORM) on August 20, 2020. The record contains no signed receipt from Applicant showing when he received the FORM. On October 13, 2020, DOHA received an undated FORM Response from Applicant. In that response, Applicant stated he received an “eyes-only package” (the FORM) on August 29, 2020, and he requested “an extension of at least 30 days[.]” FORM Response at 1. The record does not reflect whether Applicant sent his FORM Response to DOHA directly or to DCSA CAF, which then forwarded it to DOHA. In an email to Applicant on October 13, 2020, Department Counsel noted that his FORM Response was due on September 28, 2020 (30 days of its receipt), and she granted him an extension to submit additional matters until October 30, 2020. The record contains no later submissions from Applicant or requests from him for additional extensions to submit matters. On November 12, 2020, the Judge received the case file for issuance of a decision. Decision at 2.

Appellant Exhibit A contains an email that Applicant sent to DCSA CAF on September 23, 2020, in which he acknowledged receipt of an “eyes-only package 29 Aug 20” and requested “an extension of at least 30 days.” Although this email does not reflect that it contained an attachment, it may have contained his FORM Response because it does indicate he will forward a password in a separate email. Appellant Exhibit A also contains an email that Applicant sent to DCSA CAF on October 29, 2020, indicating that he did not receive a follow-up to his last email, that he had resolved all but one of the accounts, and that he sent a payment on the remaining unresolved account but it was not received and was resubmitted by certified mail. This later email also noted that one of Applicant’s accounts was being paid down on schedule and he was waiting verification that some accounts had zero balances. He further asked to be informed “if there was any further information I can send in to assist in this case.” The salutations in both of these emails to DCSA CAF were addressed to Department Counsel. Consequently, Appellant Exhibit A reflects that Applicant apparently thought he was communicating with Department Counsel when he was sending emails to DCSA CAF and that he apparently did not receive Department Counsel’s email of October 13, 2020, granting him an extension to submit additional matters until October 30, 2020.

Neither a Judge nor Department Counsel are authorized to act as an applicant’s advocate. *See, e.g.*, ISCR Case No. 12-02329 at 3 (App. Bd. Aug. 17, 2015). In the past, we have also stated that DOHA personnel have no authority to provide advice to applicants concerning what rights they should exercise and should refrain from going beyond the language of the Directive and, if applicable, the current Prehearing Guidance in their interactions with applicants. *See, e.g.*, ADP Case No. 18-00329 at 3 (App. Bd. Dec. 14, 2018). That said, we also recognize that it is not uncommon for a Judge or Department Counsel to ask a *pro se* applicant if he or she has any documents that would corroborate his or her claims that alleged debts are resolved or being resolved.

Based on the above, Applicant submitted an email to the Government before the extension expired for him to submit matters. In that email, he provided an update on the actions he has taken to resolve the debts and asked whether he needed to submit further information. Department Counsel and the Judge should have been provided a copy of that email. *See, e.g.*, ISCR Case No. 19-02119 at 2 (App. Bd. Sep. 9, 2020)(remanded when FORM response was sent to the adjudicator instead of Department Counsel). The case file presented to the Judge did not contain the email Applicant submitted. It is, of course, unknown how much weight the Judge would have given this email or what action he may have taken regarding it. Given these circumstances, we conclude the best course of action is to remand the case for the Judge to consider Appellant Exhibit A, to take any appropriate action, and to issue a new decision in accordance with Directive ¶ E3.1.35. Applicant has raised other issues that are not ripe for consideration at this time. 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: 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