

KEYWORD: Guideline F

DIGEST: By email communication dated September 24, 2020, Department Counsel advised the Judge of this concern. On the same date, the Judge replied to Department Counsel. The Judge’s email and attachments present multiple problems, not the least of which is the sentence “I do not know what he [Applicant] could say or provide that would change my decision.”

We do not have authority to make findings of fact. We conclude that the best resolution to this case is to remand it to reopen the record and permit Applicant to have a new timeframe in which to submit response to the FORM. Given the language by the Judge quoted above, we conclude that the case should be remanded to a different Judge who shall administer the proceedings in accordance with the Directive and issue a new decision in accordance with Directive ¶ E3.1.35. The Board retains no continuing jurisdiction over a remanded decision. However, a Judge’s decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28. and E3.1.30. Decision is Remanded.

CASE NO: 19-03648.a1

DATE: 05/10/2021

DATE: May 10, 2021

In Re:)	
)	
-----)	ISCR Case No. 19-03648
)	
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 January 23, 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 February 4, 2021, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Claude R. Heiny denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

As a preliminary matter, the record raises at least one due process issue. The case file contains a series of email communications among various DOHA personnel to the effect that Applicant’s employer believed that Applicant had been granted a security clearance. Department Counsel expressed concern that Applicant himself may have been under the impression that his clearance had been approved and, therefore, did not need to provide a response to the File of Relevant material FORM.

By email communication dated September 24, 2020, Department Counsel advised the Judge of this concern. On the same date, the Judge replied to Department Counsel. The Judge’s email and attachments present multiple problems, not the least of which is the sentence “I do not know what he [Applicant] could say or provide that would change my decision.”

Again by email dated September 24, 2020, the Chief Administrative Judge directed the Judge to refrain from issuing a decision because Applicant was confused about his status and may decide to respond to the FORM. Applicant was not listed as a recipient on any of the email communications pertinent to this matter contained in the file. If Applicant was contacted about this matter, there is no documentation of it in the record.

The Judge issued his adverse decision on the date stated above, noting that Applicant did not respond to the FORM but failing to address the concern raised by the email communications described herein. Decision at 2. Accordingly, the case file is silent as to whether or when Applicant was made aware after September 24, 2020, that he did not hold a clearance and that he had a right to submit a response to the FORM.

We do not have authority to make findings of fact. We conclude that the best resolution to this case is to remand it to reopen the record and permit Applicant to have a new timeframe in which to submit response to the FORM. Given the language by the Judge quoted above, we conclude that the case should be remanded to a different Judge who shall administer the proceedings in accordance with the Directive and issue a new decision in accordance with Directive ¶ E3.1.35. The Board retains no continuing jurisdiction over a remanded decision. However, a Judge’s decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28. and E3.1.30.

Order

The Decision 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