

DATE: January 19, 2022

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In the matter of:)	
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-----)	ISCR Case No. 19-01504
)	
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 July 15, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline H (Drug Involvement and Substance Misuse), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing, which was conducted on May 12, 2021. On June 10, 2021, after the close of the record, 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.

On his initial appeal, Applicant raised the following issues: whether Applicant submitted documentary evidence post-hearing that was not included in the record and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. At the hearing, the Judge left the

record open until May 21, 2021, for Applicant to submit additional matters. Tr. at 71-72 and 77-78. In his decision, the Judge noted Applicant did not submit any additional matters. In his appeal brief, Applicant contended that he submitted matters on May 20, 2021; he forwarded with his appeal approximately nine documents that he asserted had been emailed to the Judge. Following our review of the record, we determined that the documents submitted on appeal supported Applicant's claim that he submitted matters the Judge did not receive. On September, 2021, we remanded the case to the Judge to reopen the record to provide Applicant an opportunity to submit additional evidence.

Upon remand, the Judge searched his email account and found the email sent by Applicant on May 20, 2021, with attachments. By email of September 25, 2021, the Judge notified Applicant that he would consider the additional evidence submitted on May 20, 2021, and gave Applicant until October 1, 2021, to submit any additional materials for consideration. The Judge did not receive any additional documents and admitted six documents that were attached to Applicant's email of May 20, 2021. On October 14, 2021, he issued his Decision on Remand, again denying Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. He asserts that he did not receive the Judge's email of September 25, 2021, that he was unaware of the opportunity to submit additional evidence, and that the Judge did not consider all the evidence submitted on May 20, 2021.

Although we are generally precluded from considering new material, 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). In resolving cases in which applicants claim to have submitted documents that were not received, we generally examine the record and the briefs to see whether there is any support for this claim. *See, e.g.*, ISCR Case No. 15-03712 at 2 (App. Bd. Jan. 11, 2018). In both appeals, Applicant has submitted nine documents that he asserts were submitted to the Judge by email of May 20, 2021: those documents include three letters of reference, two photographs, pages from his response to interrogatories, a certificate of completion of an anger management course, a document showing completion of an alcohol safety program, and a certificate of his child's dedication ceremony. Upon remand, the Judge admitted six documents, one of which is a duplicate. Said differently, Applicant asserts that four documents he submitted were not considered. The record tends to support Applicant's claim that he submitted matters the Judge did not consider.

Based on the above, we conclude the best course of action is to again remand the case to the Judge to reopen the record to ensure all of the post-hearing exhibits are included in the record and to provide Applicant an opportunity to submit additional evidence. As provided in Directive ¶ E3.1.35, the Judge shall, upon remand, issue a new decision in the case. 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: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board