

Date: December 21, 2022

In the matter of:	)	
	)	
	)	
-----	)	ISCR Case No. 20-02266
	)	
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 June 23, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 14, 2022, after the hearing, 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.

We construe Applicant’s brief as challenging the Judge’s conclusion that his circumstances raise Guideline B security concerns. In resolving this assignment of error we must address certain threshold issues on record completeness and the extent to which Applicant may have been denied the due process afforded by the Directive.

In its case in chief, the Government requested that the Judge take administrative notice of a U.S. Department of State document entitled *U.S. Relations with Kosovo*. Though acknowledging that terrorist activity occurs in Kosovo, the general tenor of the document is that Kosovo is a strong partner of the U.S., working closely with us to become a prosperous democracy and to maintain peace and regional security. Government Exhibit (GE) 4, Request for Administrative Notice. GE 4 contains no documents other than the State Department fact sheet. Though he granted the Government's request, the Judge expressed some skepticism as to whether GE 4 included sufficient information to enable him to make a reasoned determination regarding heightened risk, a central criterion underlying Guideline B analysis. Tr. at 62-63.

In the Decision, the Judge stated that he had considered the contents of GE 4 but that he required additional information about Kosovo. To that end, he cited to non-classified information available on websites maintained by the State Department and the Central Intelligence Agency. From these sources he made findings to the effect that human rights violations frequently occur in Kosovo and that government officials are often corrupt. He went on to find:

Persistent ethnic strife, terrorist activities, an uneven human rights record, and other conditions on which the State Department has based its travel advisories for Kosovo, all support a finding that *there is a heightened risk associated with having personal and financial ties there*. Decision at 6 (emphasis added).

The particular documents upon which the Judge based these findings are not included in the record. This raises two issues. First, as it stands the record is not complete. We have held in the past that merely citing to a website or URL is not sufficient to preserve an issue for appellate review. We “cannot consider in a vacuum, without reference to a properly developed record,” whether a Judge’s notice or treatment of pertinent documents is sustainable. ADP Case No. 14-01655 at 2 (App. Bd. Nov. 3, 2015). *See also* ISCR Case No. 00-0628 at 3-4 (App. Bd. Apr. 26, 2002). It is the Judge’s responsibility to ensure that the record is complete, and in this case it is not. This impairs our ability to address the applicability of Guideline B disqualifying conditions, in particular the issue of heightened risk.

Secondly, there nothing to show that Applicant received copies of the documents in question before the record closed. While a Judge has authority to take administrative notice of appropriate matters *sua sponte* (*see, e.g.*, ISCR Case No. 17-03026 at 4, n. 4 (App. Bd. Jan. 16, 2019)), an applicant enjoys the right to present evidence in mitigation. In order for an applicant to exercise this right effectively, he must have notice of the evidence to be asserted against him. For the Judge to have based the decision, even in part, on information of which Applicant was never made aware denied him of a reasonable opportunity to prepare for the hearing. That is, Applicant had no reason to know that the relatively harsh assessment of the political situation of Kosovo contained in the documents noticed *sua sponte* would be brought to bear on the adjudication of his case.<sup>1</sup> Had the Judge made him aware of the documents he could possibly have sought additional

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<sup>1</sup>GE 4 contained the following assertion by the Department Counsel: “In the present case, the Government’s heightened risk concern is based primarily upon Applicant’s various ties to Kosovo . . . rather than specific country conditions therein.” GE 4 at 2. This further underscores that Applicant had no reason to believe that political conditions in Kosovo would likely be determinative and that he should focus his preparation on addressing the nature of his family and economic ties with that country.

evidence or other administrative notice material that could have supported his effort to obtain a clearance. Under the facts of this case, Applicant was denied due process. *Compare*, ISCR Case No. 15-04472 at 3 (App. Bd. Feb. 9, 2017).

Accordingly, we conclude that the best resolution of the issues before us is to remand the case to the Judge to identify the particular documents upon which he relied, provide them to Applicant and Department Counsel for inspection and for any objections they may have, and include them in the evidentiary record. After providing Applicant and Department Counsel an opportunity to address the documents in question and present additional evidence if desired, the Judge will issue a new decision. We do not retain jurisdiction over remanded cases. After the Judge issues a new decision, the appropriate party can appeal pursuant to Directive ¶¶ E3.1.28-35. Other issues in Applicant's brief are not ripe for consideration.

### **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