

KEYWORD: Guideline F

DIGEST: The Board does not have the authority to make factual findings. Applicant's assertions raise a possibility that procedural due process may have been impaired in this case. Adverse decision remanded.

CASENO: 08-11526.a1

DATE: 02/15/2011

DATE: February 15, 2011

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In Re: )  
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 ----- ) ISCR Case No. 08-11526  
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 Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James Duffy, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 15, 2009, DOHA 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 hearing. On April 30, 2010, after the hearing, Administrative Judge Rita C. O'Brien denied Applicant's request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the record should be reopened to allow Applicant to submit matters that were not available for the Judge's consideration at the time she reviewed the evidence and rendered her decision in the case. For the following reasons, the Board remands the Judge's unfavorable decision.

As a preliminary matter, Department Counsel correctly points out that the Board will consider statements (and where appropriate, other matters) not in the record for the limited purpose of deciding whether a party was wrongfully denied procedural due process, in this case the right to have evidence entered into the record for the Judge to consider. Lacking any other guidance in the matter, the Board will consider the representations of the parties concerning pertinent procedural aspects of this case.

Concerning the procedural issue of whether there is good cause to set aside the Judge's decision and to reopen the record to allow Applicant to submit additional materials for the Judge's consideration, the record indicates that at the April 8, 2010 hearing, the Judge granted Applicant a period of time post-hearing during which he could augment the record with additional documents. That time period expired on April 22, 2010. Applicant was instructed to forward any documents to Department Counsel by that time. Applicant makes the following representations on appeal: Applicant represented himself below. On April 14, 2010, he attempted to fax the documentation to the number that he was given. Several attempts to transmit the fax resulted in failure. He then made attempts to contact Department Counsel and an administrative assistant at DOHA in an attempt to get the correct number for the fax. Applicant indicates that he left several messages with the administrative assistant and eventually got her on the phone. He states that the assistant indicated she would inform Department Counsel and the Judge and would let him know what additional steps he should take. Applicant asserts that he never heard back from the administrative assistant. The time period granted for extension expired, and the Judge rendered her decision.

Department Counsel opposes Applicant's appeal. He asserts that Applicant was provided with his fax number. He asserts that there is a presumption of good faith and regularity in administrative proceedings, and that, in this particular case, there is a rebuttable presumption that had Applicant spoken to anyone at DOHA, they would have contacted Department Counsel or the Judge. Department Counsel argues further that Applicant was ultimately responsible for ensuring that any documents he desired to have considered were submitted in a timely manner. Therefore, one would reasonably expect that Applicant would have made other efforts to ensure his documents were submitted. In particular, Department Counsel asserts that Applicant failed directly to contact Department Counsel using the telephone number he had been provided.

The Board does not have the authority to make factual findings. Nor can we determine from the record before us that Applicant's appeal is without merit. *Compare, e.g.*, ISCR Case No. 06-22217 at 3 (App. Bd. Jul. 11, 2008) ("The record as it now stands is inconsistent with Applicant's contention on appeal that she detrimentally relied on poor advice from Department Counsel in presenting her case"). *See* ISCR Case No. 05-03941 at 2 (App. Bd. Aug. 2, 2007). In similar situations, the Board has remanded the case to the Judge to address the matter raised on appeal. *See* ISCR Case No. 04-07825 at 4 (App. Bd. Jan. 18, 2006) (Applicant's response to the FORM not included in the record); ISCR Case No. 06-19169 at 2 (App. Bd. Nov. 2, 2007) (Jurisdictional defect); ISCR Case No. 01-20562 at 3 (App. Bd. Aug. 28, 2003) (Record ambiguous as to whether Applicant was provided an opportunity to respond to a document considered by the Judge). Accordingly, we conclude that the best resolution of the issue raised in this case is to remand it to the Judge. She should reopen the record and give the parties an opportunity to address the issue raised on appeal, bearing in mind that federal agencies are entitled to a presumption of good faith and regularity in the performance of their responsibilities. *See* ISCR Case No. 06-06496 at 3 (App. Bd. Jun. 25, 2009); *see also* ISCR case No. 01-22311 at 3 (App. Bd. Apr. 4, 2003) (A party seeking to rebut the presumption of good faith has a heavy burden). Thereafter, she should conduct further appropriate processing of the case, consistent with the Directive.

### **Order**

Pursuant to Item E3.1.33.2 of the Directive's Additional Procedural Guidance, the Board remands the case to the Judge for further processing consistent with this decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board