

KEYWORD: Guideline B; Guideline E

DIGEST: Appeal Board will consider evidence from outside the record to resolve threshold issues of due process or jurisdiction. Applicant argued matters that were outside the record to the effect that he had been denied his right to submit evidence. Adverse decision remanded.

CASE NO: 12-05232.a1

DATE: 02/10/2014

DATE: February 10, 2014

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John Bayard Glendon, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

Cathryn E. Young, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 11, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 8, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Marc E. Curry 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 Judge’s decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board remands the case to the Judge.

The Board notes a threshold issue raised by Applicant. In his brief he makes the representation that he submitted evidentiary matters after the hearing that were not considered by the Judge. As such, Applicant has made representations from outside the record. As a general rule, the Board cannot consider new evidence on appeal. Directive ¶ E3.1.29. However, in the past, the Board has considered new evidence or assertions outside the record insofar as it raises questions of due process or jurisdiction. *See, e.g.*, ISCR Case No. 12-01038 at 1-2 (App. Bd. Mar. 22, 2013).

At the hearing, Applicant submitted, and the Judge accepted into evidence Applicant Exhibits A through HH. The hearing transcript verifies Applicant's assertion that he indicated his desire for the record to be kept open to enable him to submit documents after the hearing. The record also verifies Applicant's statement that the Judge agreed to hold the record open for approximately seven days until August 23, 2013 for additional submissions. Tr. at 57-58.

On appeal, Applicant asserts that subsequent to the hearing, he submitted Supplemental Exhibits FF through QQ in a timely fashion to the Judge and Department Counsel. The Judge's decision does not reflect either the receipt of, or the consideration of, these exhibits, with the exception of Exhibits FF, GG, and HH.<sup>1</sup> Department Counsel's reply brief does not address this issue. These circumstances suggest that Applicant made submissions that were not considered by the Judge. Applicant requests that the documents submitted by him after the hearing be admitted into evidence and considered.

Given these circumstances, the Board concludes that the best course of action is to remand the case to the Judge for further processing. Other issues raised by Applicant's appeal brief are not ripe for our consideration.

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<sup>1</sup>There is a discrepancy between the record evidence and Applicant's claim on appeal regarding Exhibits FF, GG, and HH. Given that these three exhibits are part of the record, why Applicant made their purported omission an issue on appeal is not clear.

**Order**

The decision of the Judge is REMANDED.

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