

KEYWORD: Guideline F

DIGEST: Applicant challenges the Judge's decision not to consider the summary of her clearance interview. She argues that the interview contains information that she believes is beneficial to her. Under the particular facts of this case, we conclude that the best resolution is to remand the case to the Judge to consider Item 4, after which she will issue a new Decision. Adverse decision remanded.

CASENO: 15-05252.a1

DATE: 04/13/2016

DATE: April 13, 2016

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In Re: )  
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 ----- ) ISCR Case No. 15-05252  
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 Applicant for Security Clearance )  
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**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 25, 2015, 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 3, 2016, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Erin C. Hogan denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge’s ruling on the admission of evidence effectively denied Applicant an opportunity to present matters in mitigation and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand the case to the Judge.

### **The Judge’s Findings of Fact**

Applicant has a number of delinquent debts, for such things as student loans, cable television services, utilities, etc. She stated that she had consolidated three of the student loans and that they were no longer delinquent. The Judge found that she had not made proof of payment nor had she shown that the loans covered by the consolidation plan were those addressed in the SOR. Applicant is taking credit counseling classes.

### **The Judge’s Analysis**

The Judge concluded that Applicant had not provided enough information to mitigate the concerns raised by her delinquent debts. She stated that it was too soon to determine that Applicant’s problems were behind her. She also concluded that Applicant has only recently begun to address her problems, which is not enough to show that she has demonstrated a sufficient degree of responsible action. She stated that Applicant had not corroborated her claims to have paid certain debts. In the whole-person analysis, the Judge stated that Applicant had not provided evidence of timely payments, nor had she submitted a budget.

### **Discussion**

Applicant challenges the Judge’s decision not to consider the summary of her clearance interview. She argues that the interview contains information that she believes is beneficial to her. Applicant’s brief asserts matters from outside the record, which we are generally prohibited from considering. Directive ¶ E3.1.29. As noted below, however, we are treating this issue as one of due process, a threshold issue for which we will consider new evidence. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul. 8, 2015).

Department Counsel attached Applicant’s interview summary to the File of Relevant Material (FORM). This document was part of the DoD Report of Investigation (ROI) in Applicant’s

case. It bore no authentication, as required for admission by Directive ¶ E3.1.20.<sup>1</sup> In a footnote, Department Counsel advised Applicant as follows:

**IMPORTANT NOTICE TO APPLICANT:** The attached summary of your Personal Subject Interview (Item 4) is being provided to the Administrative Judge for consideration as part of the record evidence in this case. In your response to the [FORM], you can comment on whether it accurately reflects the information you provided and you can make any corrections, additions, deletions, and updates necessary to make the summary clear and accurate. Alternatively, you can object on the ground that the report is unauthenticated by a Government witness. If no objections are raised in your response to this FORM, or if you do not respond to this FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider it as evidence in your case.

In her response, Applicant did not make any reference to Item 4 at all, either to object, offer clarification, or explicitly to acquiesce in its admission. The Judge noted that Applicant had not objected. However, on her own motion she declined to consider this document, insofar as it was unsworn and not authenticated. She stated that, given Applicant's *pro se* status, she was more likely than not unaware of the legal meaning of waiver. She found that the record did not show that Applicant's failure to address Item 4 constituted a knowing and intelligent waiver of objection to the document's lack of authentication.

In her brief, Applicant challenges this ruling. She states that she was under oath when she answered the interviewer's questions, as reflected on the first page of Item 4. She states that she does not know what else needs to be done to have it authenticated<sup>2</sup> but that information in the report is beneficial to her. "I did an overall budget with the agent during the interview and I assumed it would be included in the packet[.]" Appeal Brief at 1. She states that this is why she did not include another budget. We note that the Judge cited to an absence of a budget as a matter that weighed against Applicant's case for mitigation. Applicant also notes that during the interview she corrected an error regarding her employment history. The Judge's findings do not reflect that correction.

While it is somewhat unusual to challenge a Judge's decision not to admit evidence submitted by a party opponent, in this case we conclude that the Applicant has established a basis for relief. Reading her brief in light of the record as a whole, it appears that she believed that the summary, which provided context for her debts as well as budgetary information, would be considered unless she explicitly objected. This, in turn, may well have influenced her decision as

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<sup>1</sup>This paragraph states that a DoD ROI "may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence."

<sup>2</sup>Applicant may not have understood the meaning of authentication, which she appears to have equated with her having been placed under oath prior to answering the interviewer's questions. Accordingly, she may not have understood that an issue of authentication was actually raised in regard to her interview summary.

to the quantum of evidence that she submitted in response to the FORM. The Judge's ruling, in effect, resulted in the Judge declining to consider a document containing some information that Applicant believed would support her effort to obtain a favorable decision. Under the particular facts of this case, we conclude that the best resolution is to remand the case to the Judge to consider Item 4, after which she will issue a new Decision. Other issues that Applicant has raised are not ripe for adjudication.

**Order**

The Decision is **REMANDED**.

Signed: Michael Y. Ra'anan\_\_\_\_\_

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

Signed: William S. Fields\_\_\_\_\_

William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody\_\_\_\_\_

James E. Moody  
Administrative Judge  
Member, Appeal Board