

KEYWORD: Guideline B; Guideline L; Guideline F

DIGEST: We conclude that the Judge erred in denying admission of the CPA letter. In light of the above, we remand the case for the Judge to consider the CPA letter and issue a new decision. If the case is remanded to a different Judge, he or she should inquire of the parties whether a new hearing is required or whether the Judge can rely on the transcript of the hearing contained in the case file. In light of this holding, the other issues that Applicant has raised are not ripe for consideration. Adverse decision remanded.

CASENO: 12-10335.a1

DATE: 07/21/2017

DATE: July 21, 2017

In Re:))	
-----))	ISCR Case No. 12-10335
Applicant for Security Clearance))	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Adam R. Webber, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 26, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence), Guideline L (Outside Activities), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On March 8, 2016, Department Counsel amended the SOR to add an additional allegations under Guideline F. Applicant requested a hearing. On April 21,

2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Philip S. Howe 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 Applicant was denied due process; whether the Judge failed to consider all of the record evidence; whether the Government presented substantial evidence of one of the Guideline F allegations, and whether the Judge's whole-person analysis was erroneous. The Judge's favorable findings under Guidelines B and L are not at issue in this appeal. Consistent with the following, we remand the case for a new decision.

Applicant has raised an issue of due process. In doing so, he asserts matters from outside the record, which we are generally not permitted to consider. Directive ¶ E3.1.29. However, we will consider new evidence insofar as it bears upon threshold issues such as jurisdiction or due process. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul. 8, 2015).

Applicant asserts, and Department Counsel does not deny, that Applicant's attorney requested a continuance of the hearing, due to his having been retained only a few days prior. The Judge denied the request. At the end of the hearing, the Judge stated that he had denied the request because it did not state good cause. Tr. at 193. However, he advised that he would hold the record open for four weeks to enable Applicant to present additional matters:

[Y]ou can send me anything that's relevant and probative . . . because you asked for the continuance and you were just hired last week, I'll give you a month to . . . present to me anything that you think is relevant and probative. Tr. at 195.

After the hearing, Applicant provided documents to the Judge. These documents included a letter by a certified public accountant (CPA). Department Counsel objected to this document on the ground that it was hearsay and that the CPA should have been made available at the hearing for cross-examination. Government Objections, dated October 17, 2016. The Judge sustained the objection due to the exhibit's status as hearsay. He stated that the letter's author should have been presented at the hearing.¹ Decision at 2.

We examine a Judge's rulings on admissibility of evidence to see if they are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 12-02296 at 3 (App. Bd. Mar. 12, 2014). Although the Federal Rules of Evidence serve as a guide in DOHA proceedings, the technical rules of evidence may be relaxed in the interest of a full and complete record. Directive ¶ E3.1.19. In administrative proceedings such as those conducted by DOHA, hearsay is admissible. *See, e.g.*, ISCR Case No. 11-12461 at 4 (App. Bd. Mar. 14, 2013).

¹Applicant also included a credit report in his post-hearing submission, arguing that the absence of his SOR debts from the report showed that he had resolved them. Department Counsel stated that she objected to this argument on the ground that a debt can fall off a credit report for reasons other than payment. The Judge sustained this objection as well. Decision at 2. It appears that Department Counsel was not objecting to the admissibility of the report but, rather, was arguing that it did not demonstrate meaningful debt resolution. The Judge's discussion of the credit report suggests that he admitted the report but found it to be lacking in probative value.

In the case before us, we conclude that the Judge erred in declining to admit and consider the letter from the CPA. It is not unusual in DOHA proceedings for Judges to admit letters and other such documents, especially when submitted by applicants. Moreover, under the facts of this case, the Judge advised Applicant that he could submit after the hearing anything that he believed to be relevant and probative, which the CPA letter undoubtedly is. Under the circumstances, we conclude that Applicant reasonably relied on the Judge's instructions regarding the sort of information that he could present post-hearing, a procedure the Judge authorized to compensate for his having denied Applicant's motion for a continuance. Accordingly, it was anomalous for the Judge to have denied the CPA letter on simply hearsay grounds, insofar as that is the very sort of evidence that a post-hearing format would likely entail. We conclude that the Judge erred in denying admission of the CPA letter.

In light of the above, we remand the case for the Judge to consider the CPA letter and issue a new decision. If the case is remanded to a different Judge, he or she should inquire of the parties whether a new hearing is required or whether the Judge can rely on the transcript of the hearing contained in the case file. In light of this holding, the other issues that Applicant has raised are not ripe for consideration.

Order

The Decision is **REMANDED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board