

KEYWORD: Guideline F

DIGEST: For each of these emails the Judge acknowledged receipt. Given that Applicant sent documents to the Judge on three separate occasions, yet the Judge cited to only two such exhibits, we conclude that Applicant has made a prima facie showing that he provided information that was not considered. Adverse decision remanded.

CASENO: 16-03704.a1

DATE: 03/19/2018

DATE: March 19, 2018

In Re:

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Applicant for Security Clearance

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) ISCR Case No. 16-03704  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

James F. Jacobson, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 29, 2016, 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 hearing. On December 14, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey 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 submitted documents that did not make it into the record and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand.

### **The Judge’s Findings of Fact**

The Judge made the following findings pertinent to the issues raised on appeal: Applicant’s SOR alleges a charged-off credit card debt for over \$18,000. Applicant claimed that the creditor released this debt and that he paid taxes on the amount of the debt that the creditor had forgiven. The documents that Applicant submitted did not show that he had paid taxes as he claimed, and he did not provide an IRS Form 1099-C.

The SOR also alleged a charged-off department store debt for a little over \$2,000. Applicant contended that he paid taxes on the savings resulting from a release of liability, although he did not provide an IRS Form 1099-C or a tax return showing that it was paid. He did provide a 1099-C showing that a \$700 debt was cancelled, although he did not connect this debt to any allegation in the SOR.

### **The Judge’s Analysis**

Applicant relied primarily on the age of the two debts that the Judge found against him. However, the Judge noted that the fact that a debt may not be collectable provides little mitigating benefit. He stated that Applicant did not provide any proof of payments for these two debts, correspondence with the creditors, any credible basis to dispute the debts, or evidence that he had attempted to negotiate payment plans. The Judge cited to Applicant’s military service and to his having held a clearance during that time. However, he concluded that Applicant had not provided sufficient evidence of payment or other debt resolution, nor had he shown that he lacks the financial ability to address the debts at issue here.

### **Discussion**

Applicant contends that he submitted documents that did not make their way into the record. In making his argument, he presents new evidence, which we generally cannot 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.16-01129 at 2 (App. Bd. Aug 7, 2017).

Applicant notes that, toward the end of the hearing, the Judge gave him additional time to submit documentary evidence. Tr. at 42. The Judge stated in the Decision that Applicant submitted two documents, which he marked as Applicant Exhibits A and B. Applicant contends that he submitted additional ones, however. Attached to his brief is a series of email communications with the Judge which apparently contained documentary evidence. One email, dated November 17, 2017, transmitted a credit report and another, dated November 6, transmitted a letter apparently pertaining to one of the allegations that the Judge resolved in Applicant's favor. An earlier email, dated October 16, 2017, stated that it contained "additional exhibits discussed on the record at the . . . hearing in this matter." For each of these emails the Judge acknowledged receipt. Given that Applicant sent documents to the Judge on three separate occasions, yet the Judge cited to only two such exhibits, we conclude that Applicant has made a *prima facie* showing that he provided information that was not considered.

Applicant has attached to his appeal brief documents that he contends he sent to the Judge but that were not marked as evidence. These attachments consist of two credit reports, a DD 214, a state income tax return for 2009 and a Federal income tax return for 2010.

A review of the file shows that the only documents labeled A and B (and C) are the apparent attachments to Applicant's response to the SOR. Given the Judge's statements regarding post-hearing exhibits A and B and the additional documents cited by Applicant as post-hearing submissions, the Board concludes that the file in front of us is incomplete.

We remand the case for the Judge to contact the parties and establish a complete record. The record should have one system of enumerating Applicant's submissions with no repeat entries. The Judge should then issue a new Decision in accordance with the Directive.

**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