

DATE: December 29, 2009

In Re:)	
)	
-----)	ISCR Case No. 08-07664
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 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 decision on the written record. On September 24, 2009, after considering the record, Administrative Judge Mary E. Henry denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether he was denied the due process afforded by the Directive. For reasons set forth below, we remand the case to the Judge.

The Judge found that Applicant had financial problems that began with medical expenses occasioned by his daughter's serious illness. The Judge acknowledged that Applicant's reply to the file of relevant material (FORM) asserted that he had paid eight of the nine alleged debts and was resolving the remaining one. She went on to observe, however, that Applicant had "failed to submit any documents which show his debt payments and compliance with his payment plan." Due to the absence of corroborating evidence, the Judge concluded that Applicant had failed to mitigate the security concerns in his case.

In his appeal brief, Applicant contends that he possessed such corroborating evidence. He states that the two credit reports in the case file were outdated, because subsequent to their preparation he "had taken several steps towards adjudicating those debts *and had done so by the time this case was submitted to the Administrative Judge.*" (emphasis added) Applicant went on to state that he understood from Department Counsel that he did not need to submit the corroborating evidence.

I called [DOHA] and asked [Department Counsel] what information I needed to send in to the Judge as my defense. I was told that a letter stating why I did not agree with the investigation was sufficient material and I did not have to directly respond to each claim independently. Therefore, with that guidance, I submitted a letter of explanation to the circumstances which led to my situation and statement of Personal Finances. However, additional evidence is available to show that those debts have been settled as of the date indicated at the time of the hearing. Applicant Brief at 1.

In his reply brief, Department Counsel stated that DOHA sent Applicant a copy of the FORM, informing him of his right to submit material in mitigation. However, Department Counsel did not address Applicant's claim about the advice he purportedly gave as to the content of Applicant's reply to the FORM.

Applicant's appeal submission contains matters outside the record, and the Appeal Board may not consider new evidence on appeal. Directive ¶ E3.1.29; ISCR Case No. 08-06875 at 2 (App. Bd. Oct. 29, 2009); ISCR Case No. 08-06518 at 2 (App. Bd. Mar. 3, 2009). However, the Board has distinguished between new evidence as to the allegations in an SOR, which is outside our scope of review, and statements in an appeal which raise threshold issues of due process or jurisdiction. *See, e.g.*, ISCR Case No. 03-02994 at (App. Bd. May 12, 2005), which held that "the Directive does not prohibit the Board from considering, in an appropriate case, non-record statements for the limited purpose of deciding whether a party was wrongfully denied the opportunity to have evidence entered into the record for the Administrative Judge to consider in a case." *See also* ISCR Case No. 06-19169 at 2 (App. Bd. Nov. 2, 2007), in which the Board considered extra-record statements in an appeal brief in order to address a dispute over DOHA jurisdiction.

In the case presently under review, Applicant has made a claim that he relied upon advice from Department Counsel in preparing his reply to the FORM. Applicant contends that, in reliance upon this advice, he did not send to the Judge evidence in his possession at the time which would

have corroborated his claims to have paid his debts.¹ Department Counsel’s brief does not explicitly address this contention, either to refute it *in toto* or otherwise explain it. Consistent with the two prior cases cited above, the Board construes Applicant’s appeal not as raising new evidence regarding his Guideline F security concerns but, rather, as having made a claim that his right to submit matters to the Judge in mitigation was impaired. The parties’ submissions on appeal, viewed in their entirety, present a question of whether Applicant was denied due process, and, because the Judge explicitly stated that she was influenced by the paucity of corroborating evidence, the concomitant issue of harmful error, neither of which the Board is in a position to resolve, given the current state of the record. *See* ISCR 01-23362 (App. Bd. Jun. 5, 2006); ISCR Case No. 03-09915 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 (App. Bd. Aug. 26, 2002) for discussion of harmful error.

The Board does not have the authority to make factual findings. Nor can we determine from the record before us that Applicant’s question is without consequence. *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); ISCR Case No. 08-00613 at 3 (App. Bd. Nov. 17, 2009). 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 (App. Bd. Mar. 18, 2006) (Applicant’s response to the FORM not included in the record); ISCR Case No. 06-19169, *supra* (Jurisdictional defect); ISCR Case No. 01-20562 (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 (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.

¹The FORM states that “Applicant will be given the opportunity to submit documentary *information* in rebuttal or to explain adverse information in the FORM.” (emphasis added) It does not define “information” to include “evidence,” “corroboration,” *etc.*

Order

The Judge's adverse security clearance 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