

KEYWORD: Guideline H

DIGEST: The Judge did not consider evidence because it was not sent through department counsel as a formal post-hearing document, so it was not considered in his decision. Department Counsel concurs with Applicant's request to remand the case to the Judge for consideration of the documents in question. Given these circumstances, we conclude the best resolution of this appeal is to remand the case to the Judge for consideration of those documents and further processing of the case consistent with the Directive. Adverse decision remanded.

CASENO: 17-04287.a1

DATE: 04/09/2019

DATE: April 9, 2019

In Re: _____)
-----) ISCR Case No. 17-04287
)
Applicant for Security Clearance)
_____)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Sean M. Bigley, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 4, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement and Substance Misuse) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 26, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Thomas M. Crean denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

In the appeal brief, Applicant contends she timely and properly submitted documents into the record that were not received or considered by the Judge.¹ The documents in question are a substance abuse evaluation and the evaluator’s professional credentials. Applicant’s Counsel had not received these documents before the hearing and just became aware of them at or before the hearing. During the hearing, Applicant’s Co-Counsel, who was not present at the hearing, emailed the documents to Department Counsel and the Judge. At that time, the Judge and parties were unaware that they had been transmitted. The record of the proceeding was left open for 10 days for Applicant to submit additional documents. While the record remained open, Applicant’s Counsel advised Department Counsel through an email that she was offering into evidence the documents that had been transmitted the week earlier. The documents were not attached to that email because Applicant’s Counsel already believed Department Counsel and the Judge had them. Department Counsel later emailed the Judge advising that the record could be closed with the introduction of the evaluation into evidence.

After reading the Judge’s decision, Applicant’s Counsel emailed him expressing concern that the evaluation had not been considered. The Judge responded:

I do not have any record of receiving the [name omitted] evaluation document from [Department Counsel]. I did receive an e-mail on November 7, 2018, from [Applicant’s Co-Counsel] with the documents attached. It was not sent through department counsel by you as a formal post-hearing document, so it was not considered in my decision.²

¹ The Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29. However, we can consider new evidence to address the threshold issues of jurisdiction and due process. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul. 8, 2015). In this case, while some representations of the parties in their briefs as well as documents attached thereto constitute new evidence, we will consider those matters in analyzing the due process issue that has been raised.

² Applicant’s Supplemental Submission, *i.e.*, Judge’s email of Mar. 11, 2019, and Reply Brief at 4. In the Reply Brief, Department Counsel expresses dissatisfaction, as an opposing party in the proceeding, with serving as an agent or a conduit for the submission of an applicant’s post-hearing submission. Department Counsel notes that this practice adds an unnecessary layer to the post-hearing submission process and creates a possible basis for accusations of due process violations. We concur with Department Counsel contention that “[a] far better practice, consistent with other courts and administrative bodies, would be that, when the record is left open, documents are sent directly to the Administrative Judge with a copy to the Department Counsel for review and possible objection.” Reply Brief at 7.

Department Counsel concurs with Applicant's request to remand the case to the Judge for consideration of the documents in question. Given these circumstances, we conclude the best resolution of this appeal is to remand the case to the Judge for consideration of those documents and further processing of the case consistent with the Directive.

Order

The Decision is **REMANDED**.

Signed: Michael Y. Ra'anan

Michael Y. 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