KEYWORD: Guideline F

DIGEST: Applicant has not shown that he was denied any procedural due process rights afforded him under the Directive. Adverse decision affirmed.

CASENO: 16-04112.a1

DATE: 05/28/2019

DATE: May 28, 2019

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

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 January 4, 2017, 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. At the hearing, the Judge amended the SOR by adding another Guideline F allegation. Tr. at 90-91. On February 26, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge John Grattan Metz, Jr., denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact and Analysis

The SOR, as amended, alleged that Applicant had eight delinquent debts totaling over $99,000. It also alleged that he had three Chapter 13 bankruptcies dismissed between 1999 and 2013, that he was granted a Chapter 7 bankruptcy discharge in 2014, and that he filed Chapter 13 bankruptcy in March 2018, which was pending approval of a plan. The pending bankruptcy lists debts – over $93,000 in an educational loan and nearly $9,000 in Federal and state taxes – that are likely not dischargeable. He paid three of the alleged debts after the SOR was issued. He and his wife have been plagued with a series of automobile accidents, injuries, and illnesses. They have incurred significant out-of-pocket expenses for medical treatments. Applicant documented that he received financial counseling and provided character references attesting to his honesty and trustworthiness.

The Judge found in favor of Applicant on four bankruptcy allegations in the SOR and against him on the remaining allegations, including the one involving the 2018 bankruptcy proceeding. Applicant did not address $4,000 in delinquent debts until after he received the SOR. He began a rehabilitation plan for his $95,000 educational loan before issuance of the SOR but failed to submit information about the status of the loan after March 2017. He encountered circumstances beyond his control, and his filing of the latest bankruptcy petition can be considered reasonable under the circumstances. However, he falls short of showing progress on the pending bankruptcy. His one payment on the still unapproved plan is insufficient to establish a favorable track record of payments. It is too soon to conclude that his financial problems have been resolved or are under control. He has not shown a good-faith effort to address his debts.

Discussion

Applicant challenges the Judge's analysis of the evidence. For example, he argues that his financial problems were due to conditions beyond his control and that he has acted responsibly under the circumstances in his attempts to resolve those problems. His arguments, however, are neither enough to rebut the presumption that the Judge considered all of the record evidence nor sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See*, *e.g.*, ISCR Case No. 17-02488 at 3 (App. Bd. Aug. 30, 2018).

Applicant contends that the Judge applied guidelines to him that pertain to military personnel. It appears that Applicant is making this contention based on the Judge's citation to *Department of the Navy v. Egan*, 484 U.S. 518 (1988) in the decision.[1] This contention does not raise any error.

[1] *Egan* is a U.S. Supreme Court decision that does not specifically address the granting or denial of security clearances to military personnel; however, it does generally address the Executive Branch's authority to grant or deny security clearances.

The Adjudicative Guidelines used in this case apply to practically all individuals who require access to classified information, including DoD contractors. *See* Directive, Encl. 2 ¶¶ B, C, D.4, D.5, and D.8 that address the applicability of the Adjudicative Guidelines.

Applicant argues that the Judge asked him more questions than Department Counsel. To the extent that Applicant is claiming the Judge was not impartial, we did not find that argument persuasive. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 14-03108 at 3 (App. Bd. May 20, 2015). Applicant has not rebutted the presumption that the Judge was unbiased.[2]

Applicant asserts that he received a security clearance in 2002 that was renewed in 2013 and that he should not have to renew it again until 2023. He also notes that the Judge indicated the reason for the current background investigation is unclear. To the extent that Applicant is arguing that the Government was precluded from reevaluating his security clearance eligibility, we do not find that argument persuasive. A favorable security decision does not give an applicant the right to retain a security clearance regardless of subsequent events or changed circumstances. The Government is not barred from issuing an adverse security clearance decision once it becomes aware of information that calls into question an applicant's suitability to hold a security clearance. *See, e.g.*, ISCR Case No. 04-08806 at 4 (App. Bd. May 8, 2007).

Applicant further argues that he should have a right to know any and all accusations against him and the decision should be based on what actually happened as opposed to what could happen. In making these arguments, he highlights that there is no proof that he engaged in any wrongdoing. The SOR provided Applicant adequate notice of the Government's security concerns.[3] Applicant has not shown that he was denied any procedural due process rights afforded him under the Directive. As the Appeal Board has previously stated, security clearance decisions are not an exact science, but rather involve predictive judgments about an applicant's security eligibility in light of the applicant's past conduct and present circumstances. The Federal Government need not wait until an applicant mishandles or fails to safeguard classified information before it can deny or revoke

[2] We note the things that our colleague has addressed in his separate opinion and agree that the Judge could have spoken more temperately at times. We do not believe that the matters raised in the separate opinion are sufficient to rebut the presumption that the Judge was impartial. *See, e.g.*, ISCR Case No. 17-02391 at 2 (App. Bd. Aug. 7, 2018). Moreover, the Judge provided Applicant with an opportunity to present additional evidence, including an affidavit from his wife, which significantly diminishes any harm that might otherwise have come about due to the ruling addressed in the separate opinion.

[3] After the Judge indicated on the record the SOR amendment, Applicant's Counsel stated, "I have no heartburn with that amendment, but I do think that I should have the -- if Your Honor is going to give weight to various debts listed in that bankruptcy, that we were not put on notice of, then I should have an opportunity to address those specific allegations in a proper response to the SOR." Tr. at 91. In this regard, we note that it was Applicant who introduced into evidence that he filed Chapter 13 bankruptcy in March 2018. Applicant's Exhibit (AE) I and Tr. at 54-56. We also note that, as mentioned in the previous footnote, Applicant was also provided an opportunity to submit post-hearing matters, including matters about the debts in the bankruptcy and an affidavit from his wife. AE M (1-15).

access to classified information based on an applicant's conduct or circumstances that raise security concerns even in the absence of security violations. *See, e.g.,* ISCR Case No. 07-09966 at 3 (App. Bd. Jun. 25, 2008). A history of financial difficulties raises security concerns. Directive, Encl. 2, App. A ¶¶ 18 and 19. Guideline F security concerns are broader than the possibility that an applicant might knowingly compromise classified information in order to raise money to satisfy his or her debts. Those concerns also encompass the risk that applicants who are financially irresponsible might also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. *See, e.g.,* ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012). In this case, Applicant has failed to show that the Judge erred in his analysis of the record evidence under Guideline F.

Applicant has not established that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Egan* at 528. *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

See Dissenting Opinion
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

DISSENTING OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

Applicant's brief raises the issue of bias: "...it also seems that the decision had already been made." Applicant's brief at page 3. In reviewing the transcript of the hearing for evidence of bias (or absence thereof), I noted several instances of seemingly hostile demeanor or arbitrary rulings by the Judge against either Applicant, Applicant's wife, or Applicant's attorney, a former DOHA official. The attorney is not representing Applicant on appeal. Cumulatively, these episodes support a concern as to whether the Judge was biased or could reasonably be perceived as such.

Applicant's wife has been in multiple accidents and had multiple surgeries and hospitalizations over several decades. Furthermore, she is a cancer survivor. She attended the Hearing in a wheelchair. Her testimony regarding her medical history and the attendant billing was integral to Applicant's case. On pages 9-10 of the transcript, Applicant's attorney moved to have the wife testify first and not sequester her. The Judge responded to the motion as follows "Well, because, [Applicant's attorney] we get to go through whether or not there are any procedural issues in the case in which case there will be issues discussed on the record that the witness doesn't need to hear, so it is appropriate. So we're off the record. Please make whatever arrangements you need to do to have [Applicant's wife] rest comfortably while we finish the rest of the preliminary stuff and we begin the hearing, at which point you may then call her first, at which point after she has testified, because this hearing is open, she may remain in the hearing room. We're off the record. Thank you." At that point they went off the record for one hour and one minute. When the proceedings resumed neither party had any procedural issues to address.

After Applicant wife testified, the Judge said to her "Thank you for giving us your time here this morning. You are free to wheel yourself to the back of the hearing room and remain, as long as it takes." Transcript pp. 47-48. Note that the attorney had made no motion to have her stay in the room, indeed, he never spoke at all, at that juncture. On page 82, while Applicant is testifying, the Judge says "Yes $683 to [a bank] $312 to [another bank] $1,489 to [a third bank]. So with the alleged [cable tv company]–I'm sorry [Applicant's wife], you've testified, and you're done. I'm sorry. That's how it works.". . . . On page 86, Applicant's attorney asked "Your Honor, may I consult for a moment in the hall with [Applicant's wife] to find out what's on her mind, and determine whether to ask you to allow--" The Judge said "No, you may not. It's the risk you run. She stayed in the room. She's heard the testimony now. She had her chance to testify, and that was part of the reason for putting her on. You will have an opportunity here to augment the record before I get done with this. But you may not put [Applicant's wife] back on the stand. Any more evidence from you?"

On page 89, the Judge was discussing items that might be submitted after the hearing, the attorney interjected a question and the Judge said "Anything else, I'm just listing the things that cause me heartburn. If there are things that you think will be helpful to your client, by all means, submit them, as long as its done by the close of business on the 27th. I do note in making the offer that the Applicant has had the SOR for more than a year."

On page 90, the Judge (properly) decided to amend the SOR to include a bankruptcy that had not been part of the SOR before. At that point, Applicant's attorney asked for a written amendment to the SOR and an opportunity to respond to the amendment, at which point the Judge said, "Motion denied. I'm amending the SOR to allege that on or about March 9, 2018, the Applicant filed a Chapter 13 bankruptcy petition as encapsulated in Applicant's Exhibit I. . . ." After further discussion the Judge again denied the motion on page 92. No written amendment was put in the record.

The Judge's ruling against providing the SOR amendment in writing to Applicant's attorney and against providing time for a response run against the spirit if not the plain language of the second sentence of Directive ¶ E3.1.17: When such amendments are made, the Administrative Judge may grant either party's request for such additional time as the Administrative Judge may deem appropriate for further preparation or other good cause.

The Judge's approach to sequestering Applicant's wife, instructing her to "wheel yourself back to the back of the hearing room and remain, as long as it takes[,]" later prohibiting her from offering additional testimony, then prohibiting the attorney from finding out what she wanted to address, and his implying, contrary to the record, that it was the attorney's decision to have her stay in the room are deeply troubling. Proceedings at DOHA are subject to reasonable rules and procedures. However some flexibility is often accorded persons with disabilities or special needs. In isolation none of the Judge's pertinent rulings or comments might have been worthy of note, in combination they smack of either bias or the arbitrary wielding of authority.

Cumulatively, the issues I have noted justify remand to another Judge. Especially since Applicant and his wife have had an usually rough medical history and concomitant financial difficulties. It is quite plausible that another Judge would analyze this record differently.

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