KEYWORD: Guideline E; Guideline F

DIGEST: The record does not support Applicant's claim that Department Counsel misled him. First, Applicant has failed to specify exactly what Department Counsel stated to mislead him, what information he provided Department Counsel that now concerns him, and how disclosure of that information may have harmed him. Second, Applicant did not raise this issue at the hearing and, therefore, did not provide the Judge an opportunity to inquire into it. Third, Applicant first called Department Counsel "a couple of weeks" before the hearing. In Department Counsel's discovery letter, Department Counsel advised, "I am the attorney assigned to represent the Government at the hearing" at which "you may represent yourself, retain an attorney, or be assisted by a personal representative, such as a friend, family member, or union representative." Adverse decision affirmed.

CASENO: 17-03228.a1

DATE: 03/01/2019

DATE: March 1, 2019

In Re:	)	
	)	
----------	)	ISCR Case No. 17-03228
	)	
	)	
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 September 28, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 24, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski 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 he was denied due process. The Judge's favorable findings under Guideline E have not been raised as an issue on appeal and are not discussed further below. Consistent with the following, we affirm.

The SOR alleged that Applicant had multiple delinquent debts. The Judge found against him on three of those debts, *i.e.*, a mortgage account charged off for about $24,400, a credit account charged off for about $5,500, and a credit card account charged off for about $4,100. The Judge concluded that Applicant needed to show greater progress toward reestablishing financial stability to fully mitigate the financial security concerns. In his appeal brief, Applicant does not challenge any of the Judge's specific findings of fact or conclusions.[1]

At the outset, we note that Applicant submitted an appeal brief on December 28, 2018. Since then, he made three untimely submissions. Of further note, the Directive authorizes only one brief for each party. Directive ¶ E3.1.30. *See also*, ISCR Case No. 12-09389 at 3, n.1 (App. Bd. Sep. 18, 2015). Even if we could consider his untimely submissions, we note they are largely repetitive of the issues raised in his appeal brief and do not raise any other assertions of harmful error.

Applicant's appeal brief asserts that his security clearance adjudication was unfair. We examined the record as a whole in analyzing Applicant's alleged denials of due process. In his brief, Applicant contends that he was not provided a copy of the Office of Personnel Management (OPM)

[1] The Appeal Board does not review cases *de novo.* There is no presumption of error below, and the appealing party has the burden of identifying factual or legal error that warrants remand or reversal. *See, e.g.* ISCR Case No. 04-01047 at 3 (App. Bd. Oct. 20, 2005). In his appeal brief, Applicant does state, "There are several mistakes in the report. I work with officers that have never done an SF86 or Backgrounds. Some have questionable issues in the past." Presumably, Applicant is referring to the Judge's decision when he uses the term "report." The Judge made no findings or conclusions about Applicant's claim regarding the security clearance status of other security officers. In his closing argument, Applicant briefly mentioned that coworkers stated, "We didn't even do the e-QIP, you know, or took this long." Tr. at 129. However, he did not present any evidence on that issue at the hearing. Arguments by parties are not evidence. *See, e.g.*, ISCR Case No. 14-03392 at 2, n.3 (App. Bd. Apr. 15, 2015). By raising this issue for the first time on appeal as a basis for challenging his adverse clearance decision, he is effectively submitting "new evidence" that the Appeal Board cannot consider. Directive ¶ E3.1.29. Moreover, the security clearance status of other individuals or whether they were required to complete security clearance applications as part of their employment are not relevant considerations in determining Applicant's security clearance eligibility. Each case must be adjudicated on its own merits. Directive, Encl. 2, App. A ¶ 2(b).

investigation.[2] At the hearing, Applicant submitted an exhibit reflecting that he requested a copy of the OPM investigation, and the following exchange occurred:

> [Judge]: Here's a request -- marking as Applicant Exhibit L, this is a one-page request for his investigative file. Did you receive that file?
>
> [Applicant]: I did not.
>
> [Judge]: Did not. Okay. There is no date on this. When did you request it?
>
> [Applicant]: It was when I -- when I got the background stuff. There was a separate form saying I had to request it, so I sent it right after that.
>
> [Judge]: And they haven't complied with that request, I guess.
>
> [Applicant]: No.
>
> [Judge]: All right. Well, given that, I don't know what the status is. Did you ever contact Department Counsel to ask -- to ask if they could help you? -- no? -- obtain that?
>
> [Applicant]: No. The first time I talked to him was probably a couple [of] weeks ago, I think, when I called him.
>
> [Judge]: All right.
>
> [Applicant]: But it didn't -- that didn't come up in conversation. I just didn't... understand the whole process.
>
> [Judge]: Okay.
>
> [Applicant]: So I was calling him about making sure he knew I got his emails and stuff.
>
> [Judge]: Okay. Are you prepared to continue with your case here, nothwithstanding you did not receive your investigative record?
>
> [Applicant]: I think I can cover --
>
> [Judge]: Okay.

[2] DOHA is not a release authority for OPM investigations. As part of the Government's exhibits, Applicant was provided a copy of the OPM investigator's summary of his interview. GE 2.

[Applicant]: -- the issues.[3]

Given his response to the Judge's last question, Applicant effectively waived any objection that he may have had to proceeding with the hearing without the OPM investigative report.[4]

Applicant raises another due process issue by claiming Department Counsel misled him. Applicant states that, in a prehearing conversation with Department Counsel, "I was [led] to believe [Department Counsel] was going to help me." Appeal Brief at 1. Essentially, Applicant claims that, if he had known that Department Counsel "would be using the information for the best interest of the government[,]" he "wouldn't have explained myself so honestly giving myself a better chance to present my case." *Id*. at 1-2. The record does not support Applicant's claim that Department Counsel misled him. First, Applicant has failed to specify exactly what Department Counsel stated to mislead him, what information he provided Department Counsel that now concerns him, and how disclosure of that information may have harmed him. Second, Applicant did not raise this issue at the hearing and, therefore, did not provide the Judge an opportunity to inquire into it. Normally, a party is expected to raise objections or similar claims in a timely manner during the proceeding before the Judge in order to preserve them for appeal. *See, e.g.*, ISCR Case No. 03-06212 at 3 (App. Bd. Jan. 17, 2006). Third, as noted in Applicant's above-quoted statements at the hearing, he first called Department Counsel "a couple of weeks" before the hearing to make "sure he [Department Counsel] knew I got his emails and stuff." By using the term "stuff," Applicant is apparently referring to Department Counsel's discovery letter (Hearing Exhibit (HE) 1) that forwarded to him the proposed Government exhibits. HE 1was sent to him more than four months before the hearing, which was held on May 17, 2018.[5] In HE 1, Department Counsel advised, "I am the attorney assigned to represent the Government at the hearing" at which "you may represent yourself, retain an attorney, or be assisted by a personal representative, such as a friend, family member, or union representative." Moreover, on April 19, 2018, Department Counsel sent Applicant an email advising that the Judge planned to schedule his hearing for the following month.[6] In that email, Department Counsel appropriately identified himself as "Department Counsel," and

[3] Tr. at 40-41.

[4] The Directive does not provide that applicants are entitled to their background investigations; rather, it states they are entitled to "a copy of any pleading, proposed documentary evidence, or other written communication to be submitted to the Administrative Judge." Directive ¶ E3.1.13. The record reflects that Applicant was provided with the documents and procedural rights to which he was entitled under Executive Order 10865 and the Directive. Tr. at 9-14 and 16-23. Additionally, Applicant has not made any proffer that the OPM investigation contains information that would have changed the outcome of this case. Based on the record, the issue of whether the OPM investigation contains information favorable to Applicant is a matter of speculation.

[5] HE 1 is dated January 3, 2018. It was sent to Applicant by a different Department Counsel from the one who represented the Government at the hearing.

[6] Department Counsel's email dated April 19, 2018, is attached to the Reply Brief, which constitutes matters from outside the record that we are generally precluded from considering. Directive ¶ E3.1.29. However, we will consider new evidence insofar as it bears upon threshold questions such as jurisdiction or due process. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul. 8, 2015).

informed Applicant that "you may hire an attorney to assist you, bring a non-attorney to assist you, or represent yourself." Furthermore, on April 24, 2018, the Judge sent Applicant the Notice of Hearing that contained the Prehearing Guidance for DOHA Industrial Security Clearance (ISCR) Hearing and Trustworthiness (ADP) Hearings. In the Prehearing Guidance, the Judge advised Applicant "[t]he hearing is an adversarial proceeding in which the parties have the responsibility to present their respective cases[,]" notified him "[t]he Government is normally represented by an attorney known as a Department Counsel[,]" and informed him of his rights to obtain attorney or non-attorney representation. Contrary to Applicant's contention, the record reflects that Department Counsel appropriately advised him of his role in the proceeding and of Applicant's representation rights. Fourth, there is a presumption that Department Counsel carried out his duties properly and in good faith.[7] Applicant has failed to rebut the presumption. Based on our review of the entire record, we conclude that Applicant has not established a *prima facie* showing that he was denied the due process afforded him by the Directive.[8]

Applicant also contends that the Office of Personnel Management (OPM) investigator "said with my background and experience I was not a threat to security."[9] Appeal Brief at 1. The statement Applicant is citing, however, summarizes his responses to the investigator's questions. It does not constitute the investigator's opinion as to Applicant's security clearance worthiness. *See, e.g.*, ISCR Case No. 14-03069 at 3 (App. Bd. Jul. 30, 2015). In any event, even if an investigator provided such an opinion, it would not bind the DoD in its evaluation of an applicant's case. *Id.*

Additionally, Applicant notes that he does not have access to classified information in the performance of his duties. However, this is not a relevant matter for our consideration. Our jurisdiction is limited to consideration of whether the Judge's findings are supported by substantial

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[7] "[T]here is a well-established legal presumption that Government officials carry out their duties properly and in good faith, and a person seeking to rebut or overcome that presumption has the burden of presenting clear evidence to the contrary." *See*, ISCR Case No. 02-20947 at 3 (App. Bd. Jun. 18, 2004) (citing, *National Archives and Records Administration v. Favish,* 541 U.S. 157, 174 (2004)).

[8] Applicant also contends that he spoke to the Judge on the telephone before the hearing, she pulled his file from the rotation, "she felt she had minimal concerns[,]" and gave him additional time to submit matters if he so desired. He also asks the question, "If there was a concern for my clearance then why pull it from the rotation?" Appeal Brief at 2. This contention fails for lack of specificity. It does not assert the Judge committed any harmful error. An appealing party must state with sufficient specificity what it is about a Judge's decision that he or she believes constitutes error so as to enable reviewing authorities, such as the Appeal Board, to address the assignment of error. *See, e.g.*, ISCR Case No. 14-05920 at 3 (App. Bd. Jan. 8, 2016). The Judge's purported comment about having "minimal concerns" apparently relates to her thoughts about delaying the hearing. While the Directive provides that Judges shall conduct all proceedings in a timely manner (¶ E3.1.10), they are generally permitted to exercise their discretion in scheduling hearings. Applicant has not explained how the Judge's decision to give him additional time to prepare his case inured to his detriment.

[9] Applicant is apparently basing this statement on a line in the summary of his background interview that states, "There is nothing in the Subject's background that could place the Subject in a position to be blackmailed or coerced." Government Exhibit (GE) 2, marked as Page 11. *See also*, AE W in which Applicant states, "This is a copy of the investigation [summary of background interview] done by OPM. In the report it states 4 times "There is nothing about these circumstances that makes the subject vulnerable to blackmail, coercion, or being under duress."

evidence; whether the Judge adhered to the procedural requirements of the Directive; and whether the Judge's rulings and conclusions are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32. We have no authority to consider the extent to which an applicant may or may not actually have access to classified information in the course of his or her job. *See, e.g.*, ISCR Case No. 14-00508 at 2-3 (App. Bd. Jan. 23, 2015).

Applicant was provided the procedural rights afforded him under the Directive. He has not established that his security clearance adjudication was unfair. 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.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *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 case is **AFFIRMED**.

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