

KEYWORD: Guideline F

DIGEST: Applicant’s failure to object forfeits any issue he may otherwise have had about the completeness of Item 3. Although pro se applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights. Moreover, we conclude that both the DoD CAF and DOHA provided Applicant with information sufficient to have enabled him to make a knowing and intelligent choice of forum. Applicant’s Answer to the SOR and his Response to the FORM demonstrate that he has the requisite education and ability to understand the guidance that he received. Applicant was not denied the due process afforded by the Directive. Adverse decision affirmed.

CASENO: 18-02158.a1

DATE: 08/07/2019

DATE: August 7, 2019

In Re:)	
)	
-----)	ISCR Case No. 18-02158
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

C. Russell Georgeson, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 12, 2018, 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 decision on the written record. On May 22, 2019, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola 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 he was denied due process and 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

Applicant’s SOR lists five delinquent debts, which he attributes to a divorce and resulting loss of his former spouse’s income. These debts include the mortgage on a home, valued at about \$850,000 and which Applicant short sold for about \$795,000. There is no evidence regarding the apparent \$55,000 deficiency. Applicant’s SOR also lists a debt of about \$97,000, a charged-off home equity line of credit. Applicant presented nothing about the status of this debt. The remaining three debts total a little over \$700. Again, Applicant submitted no evidence regarding the status of these obligations.

Though noting that Applicant’s divorce and diminution of income were circumstances beyond his control, the Judge concluded that he had presented little evidence of responsible action in regard to his debts. He stated that Applicant did not demonstrate efforts to resolve his debts and that the record is silent regarding his ability to address them. The Judge concluded that Applicant had failed to meet his burden of persuasion as to mitigation.

Discussion

Applicant raises an issue of due process. He states that his request for a decision on the written record was done “through naivety and ignorance of the process.” Appeal Brief at 5. He also asserts that a page is missing from Item 3, Clearance Interview Summary, and that this missing page should not be considered in evidence. Item 3 as contained in the record includes the page asserted to be missing. However, the Judge did not cite to that page.

The DoD CAF sent Applicant his SOR accompanied by a copy of the Directive, which contains guidance about procedures to be followed regarding decisions on the record as well as hearings. *See* Directive ¶ E3.1.7 *et seq.* The SOR was also accompanied by a document whereby Applicant could make his forum selection. The option that Applicant chose, a decision on the administrative record, included the following information:

A decision based on the administrative (written) record, without a hearing before an Administrative Judge. This will include a memo prepared by a DoD Department Counsel. You will have an opportunity to respond to the memo and to provide documents or other evidence before the record is submitted to the Administrative Judge for decision. [Attachment to Answer to SOR.]

The record shows that Applicant signed his forum election on September 25, 2018. In his Answer, Applicant stated explicitly that he chose “a decision to be made by the Administrative Judge based upon the administrative record. I understand the Government may still elect a hearing.” There is nothing in Applicant’s answer to suggest confusion or misunderstanding.

The File of Relevant Material (FORM) prepared by Department Counsel and presented to Applicant advised Applicant that he had thirty days from its receipt to submit a documentary response “setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate.” Department Counsel accompanied the FORM with a cover letter, dated October 19, 2018, which provided similar information. In addition, in the FORM, Department Counsel drew Applicant’s attention to Item 3 and advised that Applicant could object to admission of the exhibit. In the alternative, Department Counsel stated that Applicant could comment on the accuracy of Item 3 and make any corrections, additions, and updates as necessary. Applicant responded to the FORM, addressing the circumstances underlying his financial problems. He submitted documentary evidence regarding the short sale of his home as well as a court order pertaining to his divorce. Applicant did not object to Item 3, nor did he bring to the Judge’s attention a missing page or make any other comment or complaint.

Applicant’s failure to object forfeits any issue he may otherwise have had about the completeness of Item 3. *See, e.g.*, ISCR Case No. 17-01962 at 3 (App. Bd. Oct. 25, 2018). Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights. *See, e.g.*, ISCR Case No. 17-02196 at 2-3 (App. Bd. Apr. 27, 2018). Moreover, we conclude that both the DoD CAF and DOHA provided Applicant with information sufficient to have enabled him to make a knowing and intelligent choice of forum. *See, e.g.*, ISCR Case No. 15-04472 at 3 (App. Bd. Feb. 9, 2017). Applicant’s Answer to the SOR and his Response to the FORM demonstrate that he has the requisite education and ability to understand the guidance that he received. Applicant was not denied the due process afforded by the Directive.

Applicant’s brief contains a substantial amount of information from outside the record. We cannot consider new evidence on appeal. Directive ¶ E3.1.29. Applicant cites to various aspects of the record, including his having informed appropriate officials at his place of employment of his security concerns, the contents of his credit reports, his work for a Defense contractor, the information contained in his security clearance application, and evidence that his problems were caused by his divorce. He also notes a sentence in the interview summary to the effect that there is nothing in Applicant’s background that could be used against him. This last point represents Applicant’s statement to the interviewer, not the interviewer’s judgment as to Applicant’s eligibility for a clearance. In any event, even if an investigator offered such an opinion it would not bind the DoD in its evaluation of an applicant’s case. *See, e.g.*, ISCR Case No. 17-03548 at 2-3 (App. Bd.

May 23, 2019). Applicant's arguments are not enough to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 16-04112 at 2 (App. Bd. May 28, 2019). In essence, Applicant argues for a different interpretation of the record, which is not enough 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. 18-02250 at 3 (App. Bd. May 23, 2019).

Applicant requests that he receive a clearance with a warning. *See* Directive, Encl. 2, App. A ¶ 2(h). This is appropriate only when an applicant's circumstances are not serious enough to warrant an adverse decision. Given the extent of Applicant's financial problems and the paucity of mitigating evidence, neither the Judge nor other officials erred by failing to apply this procedure. *See, e.g.*, ISCR Case No. 17-01661 at 2 (App. Bd. Mar. 22, 2019).

Applicant contends that the Decision is lacking in facts and analysis. However, though it is admittedly brief, we conclude that the Decision captures the essential facts of Applicant's case and arrives at conclusions consistent with a reasonable interpretation of the record. Despite Applicant's argument to the contrary, we conclude that the Judge's whole person analysis complies with the requirements of Directive ¶ 6.3 and Encl. 2, App. A ¶ 2(a) *et seq.*, in that the Judge considered the totality of the evidence in reaching his decision. *See, e.g.*, ISCR Case No. 15-03592 at 2 (App. Bd. Jun. 14, 2017). Applicant has not cited to any error that likely affected the outcome of the case. *See, e.g.*, ISCR Case No. 17-01181 at 4 (App. Bd. Apr. 30, 2018) for the definition of harmful error.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse 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 Decision 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