KEYWORD: Guideline F; Guideline H

DIGEST: The due process clause of the Fifth Amendment applies to actions taken by the Federal Government, while that clause in the Fourteenth Amendment applies to state actions. Both clauses provide that no person shall be deprived of "life, liberty, or property, without due process of law." An individual, however, has no life, liberty, or property interest in a security clearance. See Department of the Navy v. Egan, 484 U.S. 518, 528 (1988) ("It should be obvious that no one has a 'right' to a security clearance."). Adverse decision affirmed.

CASE NO: 20-01217.a1

DATE: 07/19/2021

DATE: July 19, 2021

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
Asya Hogue, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 4, 2020, 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 H (Drug Involvement and Substance Misuse) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On March 25, 2021, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman 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 Pertinent Findings of Fact and Analysis

Applicant, who is in his 40s, works for a Federal contractor. He is not married and has no children. He has an associate's degree and has never held a security clearance.

In 2005, Applicant was convicted of felony possession of marijuana and cocaine and was sentenced to two years of probation. He stopped using cocaine after his arrest. After successfully completing the probation, his conviction was expunged. He used marijuana from about 1994 to 2019, including after he submitted his security clearance application. He submitted no evidence of treatment. None of the Guideline H mitigating conditions are applicable.

Applicant failed to file and pay, as required, his Federal and state income taxes for 2011-2018. He also failed to file, as required, his Federal and state income taxes for 2010, but did not owe any taxes for that year. He has filed his 2018 Federal income tax return but has not paid the $4,137 in tax owed for that year. He has two consolidated student loans totaling about $129,000 that have been referred to collection and has a revolving charge account for $142 that has been charged off. He submitted no documentation showing he has taken steps to resolve those debts. None of the Guideline F mitigating conditions are applicable.

Discussion

Due Process Issue

Applicant represented himself in the proceeding below. In his brief, Applicant argues that he was not provided adequate notice of the adjudicative procedures, that he was not provided an adequate opportunity to refute, extenuate, or mitigate the Government's case, and that he should be provided another opportunity to present his case. These arguments are not convincing.

In support of his arguments, Applicant cites *Londoner v. Denver*, 210 U.S. 373 (1908) that addresses the application of the due process clause of the Fourteenth Amendment of the U.S. Constitution in a challenge to a tax assessment for a street improvement. That decision provides no support to Applicant's argument. The due process clauses in the Fifth and Fourteenth Amendments do not apply in DOHA proceedings. The due process clause of the Fifth Amendment applies to actions taken by the Federal Government, while that clause in the Fourteenth Amendment applies to state actions. Both clauses provide that no person shall be deprived of "life, liberty, or property, without due process of law." An individual, however, has no life, liberty, or property interest in a security clearance. *See Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("It should be obvious that no one has a 'right' to a security clearance."). *See also Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990)("[T]here is no liberty interest in employment requiring such clearance. There is also no protected property interest in the clearance or in a job requiring such clearance."). Executive Order 10865 and the Directive—not the U.S. Constitution—set forth an applicant's due process rights in a DOHA proceeding.

Furthermore, contrary to his contention, Applicant was given adequate notice of the adjudication process and procedures. He was provided a copy of the Directive when he received the SOR. Enclosure 3 of the Directive explains the differences between a hearing and a decision based on the written record. Directive ¶ E3.1.15 makes clear "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ 4.3.4 provides an applicant may be represented by counsel or personal representative in the proceeding. Applicant chose to have his case decided on the written record. On November 30, 2020, Department Counsel mailed to Applicant a copy of the File of Relevant Material (FORM) that contained the Government's evidence for the Judge to consider. Applicant received the FORM on December 28, 2020. The FORM clearly advised him that he had 30 days from its receipt to submit objections and documentary information in rebuttal, explanation, extenuation, or mitigation. He did not submit a response to the FORM and, in doing so, waived his opportunity to present such evidence. *See, e.g.*, ISCR Case No. 18-00044 at 2, n.1 (App. Bd. May 17, 2019). His argument that he was not provided adequate notice of procedures or an opportunity to present evidence lacks merit.

Applicant also contends:

> [T]he notice dated November 20, 2020, does not list specific tailored examples of evidence. Additionally, the notice is written in a way in which a layperson like the Appellant could not fully appreciate the determination process. The notice only provides procedural guidelines for determination, but it is purposely absent of guidelines referring to evidence requirements for applicants. [Appeal Brief at 5.]

The "notice" that Applicant is referencing is Department Counsel's FORM. DOHA proceedings are adversarial in nature. *See, e.g.*, ISCR Case No. 03-06174 at 9 (App. Bd. Feb. 28, 2005). A Department Counsel is not authorized to advise an applicant on how to present his or her case or to serve as his or her advocate. To do otherwise would be inconsistent with his or her duty to represent

the interests of the United States. *See, e.g.*, ISCR Case No. 12-02329 at 3 (App. Bd. Aug. 17, 2015). As discussed above, the Directive provided Applicant adequate notice of the adjudication process and procedures, including lists of the applicable mitigating conditions. Thus, even if Applicant's cite to *Londoner* was only intended to relate by analogy to his case, it fails to be persuasive given the procedural history of the case.

Applicant's appeal brief also contains a Declaration in Support of Remand in which he declares he had a "lack of preparedness, ignorance, and inability to understand the requirements of presenting [his] case to the court[,]" a lack of understanding the rights he was giving up by waiving a hearing, a lack of knowledge of how to file documents with the court, and a lack of knowledge that there were attorneys who specialized in security clearance adjudications. Exhibit A of Appeal Brief. As Department Counsel notes in the reply brief, there is a rebuttable presumption that an applicant, as an adult, is legally competent and capable to making rational decisions concerning his actions. *See, e.g.* ISCR Case No. 01-20579 at 3, (App. Bd. Apr. 14, 2004). Additionally, an applicant's *pro se* status does not relieve him of the obligation to take timely, reasonable steps to protect his rights under Executive Order 10865 and the Directive. *Id.* If Applicant did not understand his rights and obligations in the proceeding below, it was not due to any insufficiency in the information that DoD provided him. Neither the Judge nor Department Counsel bear any responsibility for Applicant's lack of understanding of the process and procedures. As it stands, we find no reason to conclude that Applicant was denied the due process afforded him by Executive Order 10865 and the Directive.

Absent a showing of factual or legal error that affects a party's right to present evidence in the proceeding below, a party does not have the right to have a second chance at presenting his or her case before an administrative judge. Applicant has not demonstrated error below and is not entitled to have another opportunity to present his case. *See, e.g.*, ISCR Case No. 14-02730 at 2 (App. Bd. Jun. 24, 2016).

Analytical Issues

In his appeal brief, Applicant does not challenge any of the Judge's specific findings of fact. Rather, he contends the Judge failed to adhere to Executive Order 10865 and the Directive by not considering all of the record evidence and by not properly applying the mitigating conditions and whole-person concept. He argues, for example, that the Judge failed to consider the passage of time since his drug conviction and that the conviction was expunged after he successfully completed the probation. None of his arguments are sufficient to rebut the presumption that the Judge considered all of the evidence in the record or 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. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Conclusion

Applicant has failed to establish 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.'" *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 of the Judge is **AFFIRMED**.

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

See Concurrring Opinion
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board

Concurring Opinion of Administrative Judge James E. Moody

I agree with everything my colleagues have stated regarding the issues under consideration. I would like to add some comments about the due process issue. The Appeal Brief asserts that Applicant was not properly advised of the sort of evidence that he should present in making his case for mitigation and that he did not understand how he should go about submitting evidence to the Judge.

Under Guideline F, the FORM advised Applicant that his financial and tax delinquencies raised four disqualifying conditions: Directive, Encl. 2, App. A ¶¶ 19(a-c), (f): inability to satisfy debts; unwillingness to satisfy debts; a history of not meeting financial obligations; and failure to file and/or pay Federal of state tax obligations. The FORM also addressed two possible mitigating conditions, Directive, Encl. 2, App. A ¶¶ 20(b), (g): that Applicant's financial problems arose from circumstances beyond his control and that he has acted reasonably under the circumstances; and that Applicant has made arrangements to file or pay his taxes. The FORM stated that Applicant had not provided sufficient information concerning whether the conditions leading to his financial problems

were beyond his control, nor had he presented evidence of progress in resolving his debts. In addition, the FORM advised Applicant that he had not presented evidence of any effort at resolving his tax obligations, save for one late tax return that has been filed.

Under Guideline H, the FORM stated that Applicant's circumstances raised two disqualifying conditions, Directive, Encl. 2, App. A ¶¶ 25(a), (g): any substance misuse; and expressed intent to continue drug involvement or failure clearly to commit to discontinue such involvement. The FORM did not identify specific Guideline H mitigating conditions that might apply to Applicant's case. However, it did cite to problematic aspects of the record, such as the length of time that Applicant had used marijuana as well as his failure clearly to commit to abstaining from such use in the future, that should have alerted a reasonable person as to a good starting point for developing a strategy for mitigation and gathering available evidence in support thereof.

The FORM was accompanied by a cover letter from Department Counsel in which he advised that Applicant had 30 days in which to provide a response to the FORM and that he had the right to hire an attorney at his own expense. The cover letter stated that Applicant could submit his response by mail or by email, and it included the appropriate addresses for either choice. In addition, Applicant received a copy of the Directive which, among other things, sets forth in detail the various disqualifying and mitigating conditions at issue, as well as Applicant's duty to present evidence in mitigation and the time standards within which he should respond. Despite guidance and advice, Applicant presented no evidence at all in response to the FORM.

A thorough examination of the record shows that Applicant received detailed, case-specific information from DOHA sufficient to have placed a reasonable person on notice of the concerns raised in his case and the sort of conditions that possibly could mitigate those concerns. I note that Applicant's brief includes no citation to any evidence not already in the record that Applicant claims he would have presented but for his purported ignorance of DOHA procedures and requirements. All in all, I find no reason to believe that Applicant was denied the due process afforded by the Directive.

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board