



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: January 27, 2022

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 In the matter of:)
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 Applicant for Security Clearance)
 _____)

ISCR Case No. 19-03648

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 23, 2020, 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). On about March 6, 2020, Applicant answered the SOR (SOR Answer), attached documents, and requested a decision on the written record. On July 9, 2020, Applicant received his copy of the Government’s File of Relevant Material (FORM), but subsequently failed to submit any matters in response. On February 4, 2021, Administrative Judge Claude R. Heiny denied Applicant’s request for a clearance. Applicant timely appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30 and provided documents relating to two alleged student loan debts.

By decision of May 10, 2021, the Appeal Board determined that the record raised due process concerns and remanded the decision for assignment to a different Judge to reopen the record and to afford Applicant an additional opportunity to submit matters in response to the FORM. On August 5, 2021, following communications and proceedings detailed below,

Administrative Judge Braden M. Murphy issued a Decision on Remand in which he denied Applicant's request for a security clearance. Applicant again appealed. Applicant's appeal brief makes no assertion of harmful error on the part of the Judge, but instead provides an updated status on the alleged debts. Consistent with the following, we affirm.

Proceedings Upon Remand

Following remand of the decision, the Administrative Judge held a conference call on May 19, 2021, with Applicant and Department Counsel. The Judge subsequently summarized the conference call in an email, Hearing Exhibit (HE) 1, which Applicant received. During the conference call, Applicant confirmed that he received the FORM, that he did not submit a response, and that he desired to do so. In compliance with the remand order, the Judge then reopened the record until June 18, 2021, to give Applicant the opportunity to submit documents in response to the FORM, to include "documents relating to specific SOR debts, relating to his finances generally, or any other matters he wishes to provide." HE 1 at 2. The Judge also requested that Applicant review the Government's documents included in the FORM and note any objections, calling his attention to the summary of subject interview, his security clearance application, and the credit reports.

Applicant failed to submit any response by the deadline of June 18, 2021. On July 8, 2021, the Judge emailed Applicant to verify whether he had submitted any documents to DOHA since the conference call of May 19, 2021. Applicant's email response of July 12, 2021, was unclear:

Hello. I have no additional documents to submit at this time. The only form that I've tried to submit were to be via fax. The only form is to be submitted is the form request by the administrative judge was the FORM document that contains all material required. I was unsuccessful in reaching everyone on the form; however, did get in contact with 2 in material presented but no documents was received to details any and additional information for FORM. [Applicant's Exhibit 1 at 1.]

By email sent the same day, the Judge requested that Applicant respond by July 14, 2021, to clarify whether he had submitted any documents for consideration, but Applicant failed to respond.

Judge's Findings of Fact and Analysis

Applicant is 40 years old and a 2009 college graduate. A long-term employee of a campus bookstore, he became unemployed in early 2017, when the store closed, but secured employment again a few months later. His recent employment history is unclear from the record. He has not previously held a security clearance.

The SOR alleges two delinquent student loans that total about \$54,000 and four consumer credit accounts that total about \$5,440. All debts are established by either Applicant's admissions or by the credit reports of record. In his March 2020 SOR Answer, Applicant asserted that he was in a rehabilitation program for one student loan and had recently authorized a payment of \$53, but has submitted no documentation of the plan or proof of any payments made under it since March 2020. Regarding the second student loan, Applicant asserted that it had been placed in forbearance,

with a graduated payment plan that was to begin in March 2020 and continue through 2034, but he has submitted no documentation that any monthly payments were made on the account since March 2020. Although payments of Applicant's federal student loans were likely suspended until at least September 2021 due to President Biden's extension of the temporary student loan relief, Applicant's accounts were delinquent for years, there is no evidence of any payments on either loan since March 2020, and there is nothing in the evidence of record to establish their current status.

For a charged-off credit card debt, Applicant stated in his SOR Answer that he had a payment plan, but submitted no proof of payments under the plan. For a cellphone account and a bank debt, applicant admitted the debts, but stated that he could not afford to pay them. Regarding an auto loan debt, Applicant asserted in his SOR Answer that the debt had been paid, relying upon documents submitted to the background investigator. The Judge found for Applicant on the auto loan debt, but against him on the other five debts alleged, concluding that Applicant provided insufficient information or documentation to establish any of the relevant mitigating conditions.

Discussion

On this second appeal, Applicant again makes no assertion of error on the Judge's part, but instead provides an update on five of the alleged accounts, including his attempts to contact creditors. These are new matters not contained in the record, which we cannot consider. *See* Directive ¶ E3.1.29 ("No new evidence shall be received or considered by the Appeal Board").

Although our review of the earlier decision revealed due process concerns, our review of the record following remand confirms that Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive. Upon remand, the Judge confirmed that Applicant had copies of all evidence that the government intended to offer and had an opportunity to object to it. The Judge advised Applicant that he could provide documents relating to specific debts, his general financial situation, or any other matter that he wished to submit. Upon hearing nothing from Applicant by the 30-day deadline, the Judge reached out to Applicant to verify whether he had submitted documents or intended to do so. Upon receiving an ambiguous and confusing response, the Judge afforded Applicant an opportunity to clarify, but Applicant failed to do so.

The record indicates that the Administrative Judge conducted the case upon remand in an impartial, professional manner and in compliance with our order. Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, their failure to act does not constitute denial of their rights. *See, e.g.*, ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003).

A review of the entire record discloses no basis to conclude that Applicant was denied the rights due him under the Directive or that he was not adequately advised of those rights. *See, e.g.*, ISCR Case No. 15-04472 at 3 (App. Bd. Feb. 9, 2017). It is an applicant's job to present evidence sufficient to mitigate the concerns raised in his case, and the applicant bears the ultimate burden of persuasion that he should be granted a clearance. Directive ¶ E3.1.15. *See* ISCR Case No. 16-

02243 at 2 (App. Bd. Nov. 30, 2018). In this case, Applicant neglected to avail himself of the opportunity provided to reopen the record and submit matters to the Judge, electing instead to belatedly submit new evidence on appeal to the Board. We cannot receive new evidence and do not review cases *de novo*. Our authority to review is limited to cases in which the appealing party has raised a claim of harmful error. *See, e.g.*, ISCR Case No. 18-01962 at 2 (App. Bd. Aug. 29, 2019). Applicant has made no such allegation.

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 is **AFFIRMED**.

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

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

Signed: Moira D. Modzelewski
Moira D. Modzelewski
Administrative Judge
Member, Appeal Board