DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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KEYWORD: Guideline F

DIGEST: Absent a showing of harmful error that affects a party's right to present evidence in the proceedings below, a party does not have any right to have a second chance at presenting its case before a Judge. Adverse decision is affirmed.

CASENO: 20-02947.a1

DATE: 01/10/2022

Date: January 10, 2022

In the matter of:	)	
	)	
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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 November 24, 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). Applicant initially requested a decision on the written record but later requested a hearing. On September 20, 2021, after the hearing, Administrative Judge Noreen A. Lynch 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 SOR alleged that Applicant had 11 delinquent debts totaling about $26,600. In responding to the SOR, Applicant denied two debts and admitted the others. The Judge found in favor of Applicant on one debt and against him on the others, including the two debts he denied. In her decision, the Judge stated:

> Only recently did [Applicant] begin to address the debts when he realized that his security clearance and employment were in jeopardy. He did not present sufficient evidence to meet his burden of proof. . . . Applicant failed to submit evidence that any payments or continuous payments have been made that demonstrate an established history of good faith payments on the delinquent debts. [Decision at 7 and 8.]

In his appeal brief, Applicant does not challenge any of the Judge's finding of fact. Instead, he requests the Judge's decision be remanded so that he can present additional evidence showing debts have been resolved. He states these debts were resolved before his hearing, but he had not received documentation from creditors showing their resolution. Being unable to provide such documentation, he argues "put [him] in the position of 'proving a negative' at the hearing." Appeal Brief at 9. We find no merit in his request to reopen the record so the Judge can consider new evidence.

A period of over seven months transpired between the issuance of the SOR and the hearing, which was held on July 13, 2021. At the hearing, Applicant was provided the opportunity to present evidence, including documents showing resolution of the alleged debts. The Judge kept the record of the proceeding open for a month after the hearing to provide Applicant the opportunity to submit additional documents. Tr. at 126-128; Decision at 1-2. Upon Applicant's request, the Judge granted a continuance to September 10, 2021, to submit documents. Decision at 2. He submitted additional documents that were accepted into the record. In her decision, the Judge noted the record closed on September 10, 2021. *Id.* The record does not reflect that Applicant requested another extension of time beyond that date for him to submit additional documents.

Absent a showing of harmful error that affects a party's right to present evidence in the proceedings below, a party does not have any right to have a second chance at presenting its case before a Judge. *See, e.g.*, ISCR Case No. 00-0250 at 3 (App. Bd. Feb. 13, 2001). To the extent a party fails to present evidence for consideration by the Judge, the party waives the opportunity to have such evidence considered. *Id.* A party is not entitled to have the case reopened to allow the introduction of evidence that comes into existence after the close of the record. As the Supreme Court has noted:

> Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order the litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in a order that would not be subject to reopening. [*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 435 U.S. 519, 554-555 (1978), quoting *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)].

The burden was on Applicant to present mitigating evidence to the Judge before the record closed. The reasons why documents were not available for submission prior to the record's closure does not establish any error on the part of the Judge. It is well settled that, absent a showing that an applicant was denied a reasonable opportunity to prepare for the hearing or was denied a reasonable opportunity to present evidence on his or her behalf, an applicant is not entitled to have the record reopened just so he or she can have another chance to present evidence. *See, e.g.*, ISCR Case No. 14-03347 at 3 (App. Bd. May 27, 2016). *See also* ISCR Case 00-0250 at 4 ("If the Board were to grant Applicant's request for a new hearing or allow her to submit new evidence in this case, then the Board would be giving her special treatment and denying other, similarly-situated applicants of their right to receive the fair, impartial, and even-handed application of Executive Order 10865 and the Directive."). In this case, Applicant has not shown the Judge or the Government denied him the opportunity to present evidence. His request to reopen the record so that the Judge can consider new evidence does not establish any harmful error that would justify such a remand.

Applicant also argues the Judge erred in concluding he failed to mitigate the alleged security concerns and in her application of the whole-person concept. These arguments amount to a disagreement with the Judge's weighing of the evidence, which is not enough to show that the Judge's analysis was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 18-02239 at 3 (App. Bd. Jul. 20, 2020).

Applicant failed to establish the Judge committed any harmful errors. 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 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 national security."

Order

The decision is **AFFIRMED**.

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

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

Signed: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board