

KEYWORD: Guideline F; Guideline E

DIGEST: The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s security eligibility. Applicant failed to demonstrate that he was denied the due process afforded by the Directive. A Judge may find that conduct is of security concern under one Guideline but not under another. Adverse decision affirmed.

CASE O: 10-00925.a1

DATE: 06/26/2012

DATE: June 26, 2012

In Re:)	
)	
-----)	ISCR Case No. 10-00925
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 19, 2011, DOHA 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 decision on the written record. On April 9, 2012, after considering the record, Administrative Judge Martin H. Mogul 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 there is a nexus between his financial condition and the Guideline F security concern; whether Applicant was denied due process; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline E are not at issue in this appeal. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Defense contractor. He is currently married, and he has three prior marriages. Applicant has numerous delinquent debts. Applicant was provided an opportunity to submit a response to the File of Relevant Material (FORM), but the one document that he provided did not prove that any of the SOR debts had been paid, resolved, or subject to a repayment plan.

In the Analysis, the Judge resolved the one Guideline E allegation in Applicant's favor. This allegation referenced one of the Guideline F debts, which was in the amount of \$20,676 for tuition and relocation expenses owed to a previous employer. SOR ¶¶ 1(v), 2(a); Item 6, Answers to Interrogatories, at 7. The Judge concluded that the Government had not presented sufficient evidence to establish an independent security concern under Guideline E. However, he resolved all of the Guideline F allegations against Applicant. Although noting evidence that Applicant had experienced marital problems and unemployment, the Judge stated that there was no evidence in the record to demonstrate that Applicant had acted responsibly in regard to his debts¹ or that he had demonstrated any of the other mitigating conditions.

Applicant contends that there is no nexus between the debts reflected in his credit reports and the likelihood that he would commit criminal acts. He contends that the Judge erred in concluding that his circumstances raised security concerns under Guideline F.

The Financial Considerations security concern is as follows:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive, Enclosure 2 ¶ 18.

This language is broader than a concern that an applicant might commit criminal acts in order to pay off his debts. Rather, Guideline F requires a judge to consider the totality of an applicant's circumstances—the reasons underlying his financial problems and his efforts to address them—in order to arrive at a conclusion as to whether the applicant possesses the judgment and self-control required of those who have access to national security information.

¹Directive, Enclosure 2 ¶ 20(b): "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation) and the individual acted responsibly under the circumstances."

Moreover, the Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 08-06506 at 2 (App. Bd. Jul. 30, 2010). In a DOHA proceeding, the Government has the burden of producing substantial evidence of those allegations in the SOR which are controverted. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶¶ E3.1.14; E3.1.32.1. *See also* ISCR Case No. 11-02087 at 3 (App. Bd. Mar. 20, 2012).

In the case under consideration here, Applicant admitted 10 of the 25 allegations contained in the SOR. These ten allegations, therefore, were not controverted. Regarding those that were, the Government presented evidence that included Applicant's credit reports. "It is well settled that adverse information from a credit report can normally meet the substantial evidence standard and the [Government's] obligations under" the Directive. ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010). In addition, the Government presented Applicant's security clearance application and his answers to DOHA interrogatories. The evidence that the Government presented, considered alongside Applicant's admissions to the SOR, were sufficient to constitute substantial evidence of security concerns under Guideline F.

Applicant contends that his adjudication was unfair, in that it placed the ultimate burden of persuasion upon him rather than the Government. He argues, in effect, that he was denied due process. Once the Government has produced substantial evidence of security concerns, the burden shifts to the applicant to present "witnesses and other evidence to rebut, explain, extenuate, or mitigate" those concerns. Directive ¶ E3.1.15.

Applicant elected to have his case decided upon the written record. The record demonstrates that he received a complete copy of the FORM and that he was advised of his right to submit material for the Judge's consideration. As the Judge noted, Applicant's submission did not contain any evidence at all concerning his efforts to address the debts alleged against him. Although Applicant's appeal brief includes some evidence from outside the record concerning debt resolution, we cannot consider new evidence on appeal. *See, e.g.*, ISCR Case No. 10-03701 at 2 (App. Bd. Mar. 14, 2012). The record demonstrates that Applicant was advised of his rights under the Directive. There is no basis in the record to conclude that Applicant was denied any of those rights. Although he argues that the Directive's provisions regarding the burden of persuasion are unfair, the Appeal Board's authority and jurisdiction are limited. Nothing in the Directive gives us the jurisdiction or authority to pass judgment on the guidance provided to us or to entertain challenges to the wisdom or authority of provisions of the Directive. *See, e.g.*, ISCR Case No. 09-00447 at 2 (App. Bd. Jul. 16, 2010).

Applicant's arguments rely in part on the concept of "innocent until proven guilty." However, that is a rule applicable to criminal proceedings and does not pertain to the adjudication of security clearance applications. DOHA cases are civil in nature. *See, e.g.*, ISCR Case No. 10-04922 at 4 (App. Bd. Dec. 19, 2011).

Applicant contends that the Judge's favorable conclusions under Guideline E also mandated favorable conclusions under Guideline F. We have held that an applicant's conduct may have security significance under more than one guideline. *See, e.g.*, ISCR Case No. 06-21537 at 5 (App. Bd. Feb. 21, 2008). However, each case must be decided on its own merits. In an appropriate case a Judge may find that conduct is of security concern under one Guideline but not under a second. Applicant's arguments do not demonstrate 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, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

Order

The Judge's adverse security clearance decision is AFFIRMED.

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

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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