

KEYWORD: Guideline F; Guideline E

DIGEST: 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; if they fail to take such steps, that failure does not constitute denial of their rights. Adverse decision affirmed

CASENO: 08-03233.a1

DATE: 08/07/2009

DATE: August 7, 2009

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In Re: )  
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----- ) ISCR Case No. 08-03233  
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Applicant for Security Clearance )  
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**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 October 28, 2008, 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 hearing. On April 30, 2009, after the hearing, Administrative Judge Roger C. Wesley denied Applicant's request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, Applicant raises the following issues: whether she was afforded due process before and during the hearing; whether the Judge was biased against her because she is transgendered; and whether the Judge should have found her financial situation to be mitigated because the accrual of her debts was beyond her control. Applicant lists a number of reasons why she feels the hearing was unfair to her.

The Judge made the following pertinent findings of fact: Applicant is a retired non-commissioned officer with over 24 years of service. After retiring from military service, Applicant underwent a change in gender identity, from male to female. Applicant's 30-year marriage ended, and Applicant has since married another woman. Applicant worked sporadically between 1991 and 1998. Following a steady job lasting 16 months, Applicant again had a number of short-term jobs. She now works steadily for a defense contractor. Applicant's military retirement of \$753 per month is divided between her and her former spouse. Applicant's SOR lists over \$45,000 in debts, many of which Applicant admits. Applicant's debt of over \$11,000 to the Internal Revenue Service (IRS), which has been reduced to a lien, arose during periods of sporadic employment while Applicant was still married to her first wife. As part of the divorce agreement, Applicant accepted responsibility for the whole debt. Another debt is for over \$20,000. A few of the debts are duplications, as to which the Judge found in Applicant's favor. Applicant has hired an attorney to settle her IRS debt, and a debt consolidation company to settle other debts. Neither the attorney nor the debt consolidation company had achieved any results at the time of the hearing. Applicant failed to disclose the IRS lien on her security clearance application.<sup>1</sup>

Applicant appeared *pro se*. However, Applicant's spouse, who was also a character witness, appeared with Applicant as a personal representative. In her appeal brief, Applicant lists several reasons why she feels the hearing process was unfair. 1. Applicant expresses concern over the fact that the Judge explained the appeal process at the very beginning of the hearing. 2. Although she requested that the hearing be held in City A, she was inconvenienced by having to travel from City A to City B for the hearing, a distance of 90 miles. 3. The Judge was "cordial," but Department Counsel was "defensive and disrespectful." 4. Applicant was "cut off" from presenting her whole argument because of time limitations. The hearing started late in the day and had to end by the time the building closed for the day. The hearing could not continue the next day because Department Counsel had another hearing scheduled in another city. 5. Applicant was harmed because the record was only held open for two weeks for Applicant to provide additional evidence, and that was not enough time for her to acquire the evidence she sought to provide.

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<sup>1</sup> The Judge found in Applicant's favor as to the SOR allegation of falsification under Guideline E concerning the IRS lien.

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; if they fail to take such steps, that failure does not constitute denial of their rights. *See, e.g.*, ISCR Case No. 03-21329 at 2 (App. Bd. Sep. 25, 2006). In this case, a hearing was begun in City A on January 28, 2009, but the case was continued because Applicant did not receive copies of the government’s evidence until that day. The hearing was rescheduled in City B on February 25 based on a telephone call to which Applicant was a party.<sup>2</sup> The hearing began at 12:57 pm, just before the scheduled time of 1:00 pm. The Judge told the parties that the courtroom had to be vacated by 5:00 pm. After Applicant provided documentary evidence, testified on her own behalf, and elicited testimony from her spouse, the Judge asked Applicant whether she had any additional evidence to present. Applicant responded in the negative. Transcript at 170. The hearing was adjourned at 4:23 pm. Applicant did not request more time to present evidence that afternoon or at a later time. The Judge discussed with Applicant the length of time for which the record would be held open for Applicant to submit additional evidence.<sup>3</sup> Applicant did not object to a period of 14 days. Since Applicant did not object at the hearing to actions such as the adjournment and the 14-day period, she cannot now argue that her right to due process was violated by those actions. After a review of the record, the Board finds no indication that Applicant was denied due process.

Moreover, there is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 07-07635 at 3 (App. Bd. Aug. 22, 2008). A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Applicant characterizes Department Counsel as “defensive and disrespectful,” and states that Department Counsel referred to Applicant as “he” rather than “she.” Applicant’s characterization of Department Counsel’s manner is not demonstrative of error by the Judge. In the transcript, Department Counsel refers to Applicant as “she,” “her” and “Ms.”<sup>4</sup> Applicant has not met her burden of persuasion, because she has not identified anything in the record that suggests a basis for a reasonable person to conclude that Department Counsel acted improperly, or engaged in a course of conduct that had the effect of denying Applicant due process.

To the extent that Applicant raises an allegation of bias on the part of the Judge, there is a rebuttable presumption that quasi-judicial officials are unbiased and impartial, and a party seeking to rebut that presumption has a heavy burden on appeal. When the Board considers a claim of bias, the standard is not whether the appealing party personally believed that the Judge was biased.

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<sup>2</sup>The Pre-Hearing Guidance for DOHA Industrial Security Clearance (ISCR) Hearings and Trustworthiness (ADP) Hearings, as posted on DOHA’s website and provided to applicants states that hearings are generally held within 150 miles of an applicant’s residence or place of employment. City A and City B are about 90 miles apart.

<sup>3</sup>In the Transcript at 76-79, the Judge suggested a period of 14 days for Applicant to submit character references and information about her military career. Applicant agreed. The Judge then pointed out that if Applicant could not meet the deadline she should contact Department Counsel and “we’ll resolve it.” During testimony regarding Applicant’s financial situation, the Judge referred to the 14-day period several times. Applicant never objected to the length of time allowed. Transcript at 119, 131, 133-134, 177-178.

<sup>4</sup>Transcript at , *e.g.*, 41, 171, 172, 173.

Rather, the standard is whether the record contains any indication that the Judge acted in a manner that would lead a disinterested person to question the fairness or impartiality of the Judge.<sup>5</sup> *See, e.g.*, ISCR Case No. 06-25545 at 2 (App. Bd. Nov. 2, 2007). In this case, Applicant offers no explanation for her claim of bias other than the adverse decision. In fact, Applicant states that the Judge was “cordial.” Applicant has not demonstrated bias.

Applicant also maintains in her appeal brief that the accrual of her debts was beyond her control. This is an argument in favor of mitigation of her financial situation. However, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). In his decision, the Judge discussed the possible application of the relevant mitigating conditions in Applicant’s case and explained why the evidence of mitigation was not sufficient to overcome the government’s security concerns.

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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. *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’”).

### Order

The Judge’s decision denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra’anan  
Michael Y. Ra’anan  
Administrative Judge  
Chairman, Appeal Board

Signed: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

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<sup>5</sup>DOHA Judges regularly explain the appeal process, along with other administrative matters, at the beginning of hearings.

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