

KEYWORD: Guideline F; Guideline E

DIGEST: Applicant's contentions that he was denied due process were without merit considering (1) the claim that he was denied representation by counsel is negated by the fact that he elected to have the case decided without a hearing; and (2) the SOR was sufficient to place Applicant on notice of the security concerns alleged under Guideline E and to enable him to prepare his case for mitigation. Also, the Judge's findings concerning which of Applicant's debts had been paid were sufficient in light of Applicant's admissions that he owed the debts. Under Guideline E, the Judge's conclusion that Applicant's omissions on his security clearance application were deliberate is supported by the record. Adverse decision affirmed.

CASENO: 11-06659.a1

DATE: 10/22/2012

DATE: October 22, 2012

In Re:	)	
	)	
-----	)	ISCR Case No. 11-06659
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Mark E. Pelosky, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 9, 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 July 31, 2012, after considering the record, Administrative Judge John Grattan Metz, Jr., 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 Applicant was denied due process; whether the Judge failed to comply with the Directive in making his findings of fact; whether the Judge’s findings contained errors; whether the Judge failed to consider all of the record evidence; whether the Judge failed properly to weigh the evidence; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant works for a Defense contractor. He has held a security clearance without incident since the early 1980s. Married, he and his wife have no children. However, he is the legal guardian of his nephew. He has approximately \$2,500 in positive monthly cash flow, which does not include repayment of delinquent debts. Applicant has numerous delinquent debts, all of which he has admitted in his response to the SOR.<sup>1</sup>

Applicant’s nephew entered an expensive university in 2007. Tuition was approximately \$60,000 a year. The nephew paid his tuition through scholarships, federal grants, and loans. The nephew lived off campus, and Applicant paid his living expenses of \$1,800 a month. Applicant used credit cards to make up any shortfall in his expenses.

In December 2010, Applicant’s nephew prepared to enter his last semester in college, needing only two courses to graduate. The university informed him that, because he was not taking a full course load, he would not qualify for the balance of his financial aid package. Accordingly, the university reduced the nephew’s financial aid by \$4,000. Because Applicant did not have sufficient credit available through his credit cards, he stopped making payment on his delinquent debts and paid the \$4,000 on his nephew’s behalf. Applicant continued paying the nephew’s living expenses after the nephew’s May 2011 graduation.

In completing his security clearance application (SCA) in February 2011, Applicant failed to disclose any financial problems. He claimed that his delinquent accounts did not fall within the scope of the questions. However, his account documentation demonstrates that, at the time he completed his application, he had seven accounts with significant past due amounts.

Applicant has engaged in some recent communications with his creditors and has made some token payments on his debts. Although he has a cash flow of \$2,500, he claims to have committed to \$4,000 monthly debt repayment plans. He has submitted no work or character references and has not demonstrated where the additional money he needs to pay off his debts will come from.

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<sup>1</sup>The SOR alleged sixteen delinquent debts. The total amount alleged and admitted by Applicant is over \$64,000. These debts range in amount from \$48 to \$18,929. The debts appear to be mostly for credit card accounts. Item 6, Answers to Interrogatories dated August 27, 2011, at Attachment G, contains a statement by Applicant that he is also a co-signer of his nephew’s student loans.

In the Analysis, the Judge concluded that Applicant's financial problems were the result of his own decisions. He stated that, although Applicant and his nephew understood the "mechanics of student aid" (Decision at 4), Applicant did not hold his nephew responsible for obtaining the additional \$4,000 he needed to complete his degree. He also stated that Applicant had not provided a reasonable explanation for his failure to resume paying his own debts after he had made the \$4,000 tuition payment on behalf of his nephew, permitting several of them to be charged off and others to become over 120 days delinquent. The Judge stated that Applicant's financial problems are recent and multiple;<sup>2</sup> that they did not arise from circumstances outside Applicant's control and that he has not acted responsibly in regard to his debts;<sup>3</sup> and that he has received no credit counseling nor has he shown that his problems are under control.<sup>4</sup> The Judge stated that Applicant's plan to pay off his debts contains an uncovered shortfall of \$1,500 and will take up to 42 months to complete, preventing a conclusion that Applicant has initiated a good-faith effort to repay his creditors.<sup>5</sup>

Under Guideline E, the Judge concluded that Applicant's answers to the SCA raised security concerns. He stated that Applicant was familiar with the need for full disclosure of his financial condition in completing his SCA. Nevertheless, he failed to disclose his significant load of delinquent debts, which the Judge characterized as deliberate and knowing. Although Applicant claimed that his answers were not technically incorrect, the Judge stated that these answers "were neither full nor frank." *Id.* at 5. The Judge also concluded that Applicant had failed to demonstrate mitigation of the Guideline E concerns. He noted that the Government depends on applicants to truthfully disclose their circumstances, which is an indicator of their willingness to report security concerns while holding a clearance.

Applicant contends that he was denied due process. He argues that there was no hearing in his case, nor was he represented by counsel. However, in his reply to the SOR, Applicant stated that he desired a decision without a hearing. Moreover, by letter dated February 23, 2012, Applicant was advised of his right to be represented by counsel in preparing his response to the File of Relevant Material (FORM). The aspects of the case of which Applicant now complains—choice of forum and representation—were the result of his own decisions and were consistent with the Directive, a copy of which was provided to Applicant along with the above-referenced letter. *See, e.g.*, Directive ¶ E3.1.7 for procedures to be followed when an applicant requests a decision on the written record and ¶ E3.1.8 for those applicable to a hearing. This argument by Applicant is without merit.

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<sup>2</sup>Directive, Enclosure 2 ¶ 20(a): "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

<sup>3</sup>Directive, 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[.]"

<sup>4</sup>Directive, Enclosure 2 ¶ 20(c): "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control[.]"

<sup>5</sup>Directive, Enclosure 2 ¶ 20(d): "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts[.]"

Applicant also complains that the SOR was not sufficient to place him on notice of the debts that he was alleged to have falsified or omitted. The SOR contained two allegations under Guideline E. The first allegation cited to a question on the SCA as to whether any of Applicant's debts had, within the previous seven years, been turned over to a collection agency. The second allegation cited to a question as to whether, within the previous seven years, any of Applicant's debts had been charged off or cancelled due to failure to pay. The SOR cited to specific, identified debts, in light of which Applicant's "no" answers were alleged to have been deliberately false. The SOR in this case was sufficient to place Applicant on notice of the security concerns alleged under Guideline E and to enable him to prepare his case for mitigation. *See, e.g.*, ISCR Case No. 08-06859 at 4 (App. Bd. Oct. 29, 2010). Considering the record as a whole, we find no reason to conclude that Applicant was denied the due process afforded him by the Directive.

Applicant contends that the Judge did not comply with the Directive in making his findings of fact. Specifically, he argues that the Judge did not identify which of Applicant's debts had been paid, settled, etc. He argues that the Judge's findings are not sufficient to enable the Board to perform meaningful appellate review. A "Judge shall make a written clearance decision [that] sets forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR[.]" Directive ¶ E3.1.25. This provision requires a Judge to enter such factual findings as will enable him to draw reasonable conclusions on each of the SOR allegations and to formulate his ultimate decision regarding the granting of a clearance. *See, e.g.*, ISCR Case No. 10-04821 at 3 (App. Bd. May 21, 2012). In this case, Applicant admitted each of the sixteen Guideline F allegations, and the Judge cited to these admissions at the beginning of his findings of fact, thereby incorporating them by reference. Applicant's admissions, considered alongside findings about the circumstances underlying Applicant's debts and his efforts to address them, support the Judge's adverse formal findings. We resolve this assignment of error adversely to Applicant.

Applicant contends that the Judge's findings of fact contained errors. He argues that the Judge erred in finding that he had falsified his SCA. Applicant contends that the answers he gave to the cited questions were true, in that, at the time he completed the SCA, he was not aware that any of his debts had been sent to collection agencies or had been charged off. In the Analysis portion of the Decision, the Judge acknowledged Applicant's evidence that his answers were technically true. However, as stated above, the Judge went on to observe that, at the time he completed the SCA, Applicant was aware that he had significant financial delinquencies yet did not mention them. The Judge stated that a person with Applicant's long history of holding a security clearance would have known of the Government's requirement for full disclosure of relevant and material information and that, under the circumstances, Applicant's failure to disclose his debts appeared to have been deliberate. Under the facts of this case, we conclude that the Judge's analysis of this issue was not arbitrary, capricious, or contrary to law.

Applicant notes the Judge's finding that he had submitted no character references. He cites to his answers to the SCA, in which he provided the names of persons who knew him well. Item 5, SCA, at 13-14. He argues that the Judge failed to contact these persons for evidence of Applicant's good character, etc. However, the Directive places the burden of persuasion as to mitigation on an applicant. When an applicant admits the allegations against him, and/or the Government presents evidence of security concern, the burden shifts to the applicant to present evidence in mitigation or extenuation. *See* Directive ¶ E3.1.15. In this case, Applicant chose to

meet his burden of persuasion through a written record rather than a hearing. The letter from DOHA, dated February 23, 2012, advised Applicant of his right to “submit any material you wish the Administrative Judge to consider” in response to the FORM. Although Applicant submitted a relatively voluminous response, he did not choose to provide letters of character reference, evidence of duty performance, etc. *Pro se* applicants are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 10-07016 at 2 (App. Bd. Jan. 27, 2012). The Directive does not authorize a Judge to act as an investigator in a case, for either party. Applicant’s assignment of error is not persuasive.

After reviewing the record, we conclude that the Judge’s material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. We note Applicant’s argument that the Judge erred in finding that his proposed payment plan would result in a \$1,500 monthly shortfall<sup>6</sup> and that Applicant had held a Top Secret clearance for a longer period than was actually the case. Considering the record as a whole, we find no reason to conclude that, had these findings not been made, the Judge would have granted Applicant a clearance. Applicant has not identified any harmful error likely to change the outcome of the case. The Judge’s material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 08-07602 at 2 (App. Bd. Aug. 4, 2009).

Applicant contends that the Judge did not consider evidence favorable to him, such as his having held a clearance for many years without incident. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012). The Judge made a finding about this evidence, and he addressed it in a reasonable way in the Analysis. Applicant has not demonstrated that the Judge failed to consider all of the evidence. Neither has he demonstrated that the Judge mis-weighed the evidence. *See, e.g.*, ISCR Case No. 11-03623 at 3 (App. Bd. Jul. 25, 2012).

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.”

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<sup>6</sup>The Judge cited to Applicant’s response to the FORM as the basis of his finding that Applicant’s repayment plan entailed a shortfall. Appendix G of that response is a table showing debt payments for March 2012 as totaling nearly \$4,000. Appendix H is a table setting forth Applicant’s debt payments from December 2010 through March 2012. The total debt payments listed are just over \$4,000 a month. Elsewhere, in the summary of Applicant’s clearance interview, contained in Item 7, Answers to Interrogatories, Applicant makes promises for debt repayment totaling around \$3,000 a month. Applicant’s response to the FORM asserts that he can satisfy his debts by means of payments within his current budget. Given the record as a whole, we cannot conclude that the Judge has weighed the evidence concerning Applicant’s proposed repayment plan in an unreasonable manner. The challenged finding is supportable. However, as stated below, even if this finding were erroneous, we conclude that the error is harmless.

**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: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board