KEYWORD: Guideline F

DIGEST: The Board does not have fact finding authority, Even if Applicant's claims are accurate, no reasonable person would have understood Department Counsel's words as an attempt to persuade Applicant to change his election of a forum. Adverse decision affirmed

CASENO: 14-00812.a1

DATE: 07/08/2015

DATE: July 8, 2015

In Re:	)	
---	)	ISCR Case No. 14-00812
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 April 9, 2014, 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 hearing. On October 16, 2014, Applicant elected instead a decision on the written record. On March 23, 2015, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Claude R. Heiny 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 and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is a 55-year-old employee of a Defense contractor. He has worked there since 2007. He served in the U.S. military from 1978 to 1999.

Applicant's SOR lists several delinquent debts, totaling $54,700, four of which had been reduced to judgment. These judgments were unpaid as of the close of the record. Applicant submitted a monthly budget that indicated that he was making no payments on his delinquent debts. Applicant has resolved two of the SOR debts, one by payment in full and another by settlement. In his clearance interview in 2012, Applicant said that there was no specific reason for his financial problems. In his subsequent response to the File of Relevant Material (FORM), he stated that his problems resulted from expenses for modifications to his mother-in-law's house, his brother's death without burial insurance, his wife having lost a job due to knee surgery (through she is currently re-employed), payment of college tuition for two of his children, vehicle repairs, and expenses pertaining to a drain pipe.

He stated that he had used a lump sum payment from a prior employer to pay creditors, though he provided no documentation as to which creditors any such payments were made and in what amounts. He also contended that he had been working to pay his debts and that his financial problems are under control, though, again, he did not corroborate these assertions.

The Judge's Analysis

The Judge resolved three allegations in Applicant's favor. In concluding otherwise for the remainder, he stated that Applicant had not demonstrated responsible action in regard to his debts. He found that there is no evidence of financial counseling, nor is there evidence of what actions Applicant has taken to resolve his debts, such as contacting creditors, arranging payment plans, etc. The Judge cited to his finding about a lack of corroboration for Applicant's claims of debt resolution. In the whole-person analysis, the Judge noted that Applicant underwent a clearance interview in 2012, which placed him on notice of his financial problems. Nevertheless, Applicant

failed to pay the majority of his SOR debts, thereby raising concerns about his fitness to hold a clearance.

Discussion

Applicant contends that he was denied due process, specifically that Department Counsel persuaded him to cancel his request for a hearing and, instead, elect a decision on the written record. In doing so, he makes assertions from outside the record. Generally, we cannot consider new evidence on appeal. Directive ¶ E3.1.29. We have in the past, however, considered such evidence concerning threshold issues of jurisdiction or due process. *See, e.g.*, ISCR Case No. 14-03108 at 4, note 2 (App. Bd. May 20, 2015).

Applicant states that he received a phone call from Department Counsel, who advised that most applicants "choose to just have a paper hearing because they get nervous standing before a Judge." Appeal Brief at 1. He argues that her comments made it appear that it made no difference whether he had a hearing or not. He asserts that he did not realize that Department Counsel was representing the Government until after he had waived his hearing. The essence of his contention is that Department Counsel tricked or pressured him into waiving his right to a hearing.

In the Reply Brief, Department Counsel acknowledges speaking with Applicant but "categorically denies she attempted to influence Applicant's decision or to have provided any opinions as to a particular course of action available to Applicant. The conversation was limited to factual, procedural matters[,] and Applicant was advised that choices such as retaining counsel or proceeding in a particular forum are exclusively Applicant's." Reply Brief at 6.

We do not have fact-finding authority. *See, e.g.*, ISCR Case No. 14-01941 at 4, note 1 (App. Bd. Mar. 30, 2015). Therefore, we cannot resolve any factual discrepancy between Applicant's and Department Counsel's versions. However, we do not need to remand the case to the Judge for additional fact finding, because, assuming without deciding that Applicant's description of Department Counsel's comments is accurate, no reasonable person would have understood the comments as an effort to convince him to change his election of forum. As the Reply Brief asserts at p. 7, even if the statement in question had been made, "it was not misleading and it remained with Applicant to decide if he would be 'nervous standing before a Judge,' or for any other reason wanted to waive a hearing."[1]

[1]Department Counsel also argues that Applicant's recollection of the events may be faulty. Applicant claims that he did not know that the individual with whom he had been speaking was a Department Counsel until he received a letter dated October 28, 2014. However, Applicant had received an e-mail from this same official on October 16, 2014, in which she clearly identified herself as a Department Counsel. Reply Brief at p. 8. This email by Department Counsel was in response to one from Applicant, in which Applicant had stated the following: "Per our phone conversation, I respectfully request my hearing to be changed to a paper hearing." As Department Counsel argues, this message on its face does not create an inference in a reasonable mind that Applicant was acting upon the advice of Department Counsel, only that they had previously discussed the matter by phone, which Department Counsel acknowledges.

Moreover, DOHA mailed the SOR to Applicant with a cover letter that placed him on reasonable notice of his right to elect a hearing. DOHA also provided Applicant with a copy of the Directive, which contained detailed guidance regarding an applicant's rights, including choice of forum. There is nothing in Applicant's presentation or in the record to suggest that he did not understand the rights explained to him. Therefore, given that Applicant received adequate notice of his right to a hearing, and given that Department Counsel's purported statements were not misleading or of a nature to deceive or to overbear the judgment of a reasonable person, we conclude that Applicant has failed to make a *prima facie* case that his waiver of a hearing was other than knowing and intelligent. *See, e.g.*, ISCR Case No. 06-13610 at 3 (App. Bd. Oct. 31, 2008). We conclude that Applicant was not denied the due process afforded him by the Directive.

Applicant cites to his claims in the Response to the FORM and elsewhere in the record that he has paid off certain debts. This argument is not sufficient to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 14-03754 at 2 (App. Bd. Mar. 19, 2015). Applicant states that he would never do anything of a criminal nature, that his financial problems were the result of poor financial decisions in the past. The concern under Guideline F is not simply that an applicant might be influenced to commit criminal acts in order to pay off debts. A Judge must also consider the extent to which an applicant's circumstances cast doubt upon his judgment, self control, and other characteristics essential to protecting national security information. *See, e.g.*, ISCR Case No. 14-03392 at 2-3 (App. Bd. Apr. 15, 2015). The Judge's decision shows that he evaluated Applicant's financial difficulties in the proper context.

The Judge examined the relevant data 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, 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 Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael 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