KEYWORD: Guideline F; Guideline E

DIGEST: The Board finds no abuse of discretion on the part of the Judge. The first scheduled hearing was cancelled at Applicant's request. Applicant responded to the rescheduling with a message saying "Thanks again. This is good enough." Given the state of the record, Applicant raises the issue of lack of preparedness for the first time on appeal. The Judge's adverse conclusions are supported by substantial record evidence. Adverse decision affirmed.

CASENO: 05-16779.a1

DATE: 09/24/2007

DATE: September 24, 2007

In Re:	)	
	)	
----------	)	ISCR Case No. 05-16779
	)	
	)	
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 June 12, 2006, DOHA issued a statement of reasons 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, 2007, after the hearing, Administrative Judge Kathryn Moen Braeman denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether Applicant was improperly denied additional time to prepare his case and was granted an insufficient amount of time to submit additional evidence after the hearing; whether certain of the Judge's findings of fact are supported by substantial record evidence; and whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

Applicant asserts that he was granted an insufficient amount of time to prepare his case for hearing and to submit post-hearing evidence. Concerning preparation for the hearing, Applicant states that he had very little time to prepare for the hearing owing to a personal travel schedule. He also states that he asked the Judge for more time but the Judge and Department Counsel were not willing to provide him with any additional time for the preparation of his case. Regarding the time allotted to submit additional evidence post-hearing, Applicant states that Department Counsel was adamant that he not be granted any more time beyond the time extension granted by the Judge and that had he been granted additional time and submitted additional evidence, he would have been granted his security clearance on the basis of that evidence alone. The Board finds no abuse of discretion or error on the part of the Judge regarding these procedural issues.

The original Notice of Hearing in this case was dated November 14, 2006. That document gave notice to the parties that the hearing was scheduled for December 4, 2006. Applicant received the Notice on November 21, 2006, which meant that if the hearing proceeded as scheduled, he would not receive the 15 days advance notice of a hearing required by the Directive. Initially, on November 29, 2006, Applicant indicated to the Judge his willingness to waive the 15 day requirement and stated that he would "prepare as well as I can with the limited time that I have limited myself to." On November 30, 2006, however, the Judge learned through Department Counsel that Applicant was no longer willing to waive the 15 day requirement and had requested that the hearing be cancelled. In light of Applicant's position, the Judge issued an Order on November 30, 2006 cancelling the December 4, 2006 hearing and rescheduling it for January 5, 2007. On December 1, 2006, the Judge sent the Order by electronic message to Applicant who replied to the message by stating, "Thanks again. This is good enough."

At the January 5, 2007 hearing, during the preliminary matters, Applicant was asked if he had any procedural matters to raise. He stated that he did not.[1] At no time during the hearing did Applicant suggest that he felt unprepared or that proceeding with the hearing at that time was a problem for him. There are no documents in the record reflecting Applicant's objection to proceeding to hearing at the appointed date and time, nor are there any indications that Applicant requested more time (other than his initial objection to the December 4, 2006 hearing date) and the Judge was unwilling to grant his request. Given the state of the record, Applicant raises the issue of lack of preparedness for the first time on appeal. As the issue was not raised below, the Applicant cannot establish error on the part of the Judge.

[1]Tr. at 9-10.

Similarly, the hearing transcript indicates that the Judge and the parties were in agreement at the start of the hearing that the Judge would leave the record open at the conclusion of the hearing and Applicant would have until January 26, 2007 to submit additional evidence, subject to objection by Department Counsel. Nothing in the hearing transcript or the written record indicates that Applicant was dissatisfied with the enlargement of time the Judge granted him, or that she denied him an extension of time over his objection.[2] Given the state of the record, Applicant is not in a position on appeal to complain about the Judge's actions. Applicant, again, fails to establish error.

The Judge made the following pertinent findings of fact: Applicant did not file federal income tax returns for the years 1990 through 1996 and for 1998 through at least 2004. He did not ask for extensions. Applicant testified that he owed $50,000 to the IRS for taxes due from 1998 to 2005, although after the hearing he provided a statement by an accountant to the effect that he owed the IRS $39,785. Applicant offered no explanation for his troubles with the IRS, other than that he had failed to pay his taxes during a period of military deployment and "[o]nce I got into that hole, I didn't think I was going to get out." Decision at 3.

In the Conclusions section of the decision, the Judge stated that Applicant has been slow in addressing his tax debt, that he did not confirm that he had filed his back taxes, and that his "long-standing delinquent tax debts . . . have persisted without any plan for a resolution." Furthermore, she stated that "Applicant has . . . provided insufficient evidence that he has a systematic plan to resolve the federal tax debts alleged in" the SOR. Decision at 7. Therefore, she concluded that Applicant had not met his burden of persuasion for the granting of a security clearance.

We have examined the Judge's material findings of security concern and conclude that they are supported by substantial record evidence. *See* Directive ¶ E3.1.32.1. Furthermore, we conclude that the Judge has articulated "a satisfactory explanation for" her decision, "including a 'rational connection between the facts found and the choices made.'" *See 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)). Accordingly, we hold that her adverse security clearance decision is neither arbitrary, capricious, nor contrary to law.

[2]Tr. at 5-10.

Order

The Judge's adverse security clearance decision is AFFIRMED.

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

Signed: William S. Fields
William S. Fileds
Administrative Judge
Member, Appeal Board

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