KEYWORD: Guideline F

DIGEST: The Board does not have authority to accept new evidence on appeal. The record evidence is not consistent with Applicant's contention that she made a bankruptcy decision in reliance on poor advice from Department Counsel that ultimately resulted in the Judge's adverse decision. Even if Department Counsel made improper statements the record does not support Applicant's contentions. Applicant made her decision prior to the hearing and the alleged conversation but, according to her brief, she only filed the bankruptcy after the Judge's decision. Adverse decision affirmed.

CASENO: 06-22217.a1

DATE: 07/11/2008

DATE: July 11, 2008

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| Applicant for Security Clearance | ) | |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**
Richard A. Stevens, Esq., Department Counsel

**FOR APPLICANT**
***Pro Se***

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 3, 2007, DOHA 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 requested a hearing. On April 22, 2008, after the hearing, Administrative Judge Charles D. Ablard denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant relied to her detriment on advice from Department Counsel; and whether the Judge erred in his evaluation of the Guideline F mitigating conditions and in his whole person analysis. Finding no harmful error, we affirm.

The Judge found that Applicant had numerous delinquent debts, for such things as credit cards, automobile loans, consumer purchases, etc. Though the Judge found in Applicant's favor on two of the debts alleged in the SOR, the total for the remaining debts exceeds $20,000. Applicant provided evidence that she intended to file for Chapter 7 bankruptcy protection. The Judge concluded that Applicant's conduct in regard to her debts did not establish any of the pertinent mitigating conditions, nor could he clear her under a whole-person analysis. "The lack of effective action to resolve these delinquent debts over the past three years when she had extra income from her employment, yet did not resolve any of the delinquent debts, prompts me to conclude that she has not mitigated the security concerns arising from the financial considerations and that it is premature at this time to grant a security clearance." Decision at 8. Concerning Applicant's plan to file for bankruptcy, the Judge stated, "[H]er solution of choice is to file for Chapter 7 bankruptcy which will, if successful, completely eliminate the debts, providing no relief to her creditors. While this may have been done on the advice of her bankruptcy counsel as she testified, it does not meet the requisite standard of responsible behavior . . ." *Id.*

In her appeal submission, Applicant stated that at the time of her hearing she met with Department Counsel and asked him whether Chapter 7 bankruptcy or Chapter 13 would be more beneficial to her efforts to maintain a clearance. She stated that Department Counsel advised her that Chapter 7 was a better choice in that it removes all debt and, thereby, all attendant stress. She stated that "with that recommendation, on May 2nd 2008, I filed Chapter 7 bankruptcy based upon what [Department Counsel] said a DOHA judge would view as a better choice. Viewing the judge's report, filing the Chapter 7 was looked upon as I did not want to contribute anything back to the creditors. This was not the case. I felt helpless and did not know what to do at that point and acted solely off the guidance that [Department Counsel] gave." Applicant's Brief at 1.

Department Counsel filed a reply brief in which he addressed this issue. He stated that the hearing took place on January 30, 2008, but that the Judge had held the record open to permit Applicant to submit matters describing her pre-bankruptcy credit counseling. He further stated that at the hearing Applicant presented evidence to the Judge to the effect that she intended to file Chapter 7 bankruptcy.

Department Counsel stated that his conversation with Applicant occurred after the hearing, though before the close of the record. "Applicant asked Department Counsel how the Administrative Judge would view her bankruptcy, either Chapter 7 or Chapter 13. Department Counsel denies offering any opinion as to how the assigned Administrative Judge would consider her planned bankruptcy filing. Department Counsel discussed the Directive's general concern under Guideline F, namely that being financially overextended could cause stress in a person's life, creating the potential that they might resort to illegal activity involving classified information . . . Department Counsel informed Applicant that in his experience DOHA judges do not view bankruptcy, either under Chapter 7 or 13, in a negative way and only consider it as a legal remedy that tends to mitigate the government's concern by reducing the stress described earlier. Department Counsel advised Applicant that she should continue to consult with her attorney and do what was best for her particular financial situation." Department Counsel's Brief at 4-5.

We have examined Applicant's appeal submission and Department Counsel's reply. The Board does not have authority to consider new evidence on appeal. Directive ¶ E3.1.29. Neither does the Board have the authority to supplement the record or otherwise engage in *de novo* fact finding. *See* Directive ¶ E3.1.32. The Board has, in the past, remanded cases for the Judge to reopen the record, as we did in ISCR Case No. 06-19169 (App. Bd. Nov. 2, 2007), in order to clear up a jurisdictional issue.

In this case, however, there is no reason to remand the case to address the issue raised by Applicant. The record as it now stands is not consistent with Applicant's contention on appeal that she detrimentally relied on poor advice from Department Counsel in presenting her case. The Board makes this determination without regard to the matters asserted by Department Counsel in his reply brief.

The record before us indicates that Applicant had made the decision to file Chapter 7 prior to the January 30, 2008, hearing, but was prevented from filing because she had not satisfied administrative prerequisites such as credit counseling. Applicant's Exhibit A, dated January 23, 2008, is a letter to the Judge from Applicant's attorney, stating that "[Applicant] has retained the services of . . . the undersigned to represent her in filing a Petition for Chapter 7 Bankruptcy in the Middle District of [State]." Applicant's Exhibit B is a contract, dated January 25, 2008, signed by the attorney and Applicant, covering "retention of services of [Attorney's Law Firm] to act as your attorneys in the matter of your Chapter 7 Bankruptcy Petition." Applicant's Exhibits D and E are documents submitted after the hearing which demonstrate completion of credit counseling. There is nothing in these documents or in the record as a whole to suggest that, were she not facing a loss of her clearance, Applicant would be undertaking a different course of action in regard to her debts. For example, she provided testimony at the hearing to the effect that she was seeking bankruptcy protection due to her bad financial situation : "I really cannot afford to pay all this debt and maintain my current bills right now. Q: Was this a course of action that was recommended to you by someone or did you do it on your own initiative? A: I did it on my own." Tr. at 46. This testimony is consistent with the finding of the Judge, quoted above, about Applicant's decision to file for bankruptcy being on the advice of privately-retained counsel.

Furthermore, the Judge held the record open simply to provide Applicant an opportunity to show that she had attended pre-bankruptcy credit counseling, rather than for her to show that she had made a final decision as to Chapter 7 over Chapter 13, etc. It appears that the matters Applicant presented after the hearing were in response to a request by the Judge, rather than to comments by Department Counsel.[1] Indeed, in her own appeal brief, Applicant states that she actually filed for bankruptcy on May 2, 2008, which was *after* the Judge issued his adverse decision on April 22, 2008. The date of her bankruptcy filing, therefore, is not consistent with her contention on appeal that she took this course of action in order to influence the Judge's decision regarding her clearance. The record viewed as a whole does not corroborate Applicant's statement on appeal that she relied to her detriment upon advice from Department Counsel in filing for Chapter 7 bankruptcy and in her presentation of evidence in her security clearance case.

Moreover, even if Department Counsel made improper statements to Applicant concerning how DOHA Judges might evaluate certain types of evidence, there is no reason to believe that such statements actually affected the outcome of the case. The record as a whole does not support a conclusion that, had Applicant presented her case in another way, the outcome would have been different. Therefore, to the extent that Department Counsel erred, it is harmless. *See, e. g.*, ISCR Case No. 06-19544 at 4 (App. Bd. May 28, 2008); ISCR Case No. 0706332 at 3 (App. Bd. May 9, 2008).

As to the remaining issue, the Judge's has drawn "a rational connection between the facts found" and his ultimate adverse security clearance decision, both as regards the Guideline F mitigating conditions and the whole-person analysis. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). *See also 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 decision that "it is not clearly consistent with the national security to grant Applicant eligibility for a security clearance" is sustainable on this record. Decision at 8. *See Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

## Order

The Judge's adverse security clearance decision is AFFIRMED.

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

[1]The Judge stated at the end of the hearing "I would like to leave this open for approximately 30 days . . . [A]t that point I want you to get back to [Department Counsel] and advise him what has happened with regard to these counseling sessions. Also at that point I would like to have a letter from your bankruptcy counsel as to what steps you have taken or will be taking in the next weeks thereafter, assuming that she hasn't already filed in matter in bankruptcy." Tr. at 69.

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

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