

KEYWORD: Guideline F

DIGEST: It is an applicant's task to present evidence to rebut explain or mitigate adverse facts proven by Department Counsel. In this case, the Judge admitted all the evidence presented by Applicant and made some findings based on Applicant's testimony. Adverse decision affirmed.

CASENO: 12-02329.a1

DATE: 08/17/2015

DATE: August 17, 2015

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In Re:)	
)	
-----)	ISCR Case No. 12-02329
)	
)	
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 30, 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 requested a hearing. On May 19, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello 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 the Judge’s findings were based on substantial record evidence; 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 decision.

The Judge’s Findings of Fact

Applicant graduated from high school, after which he obtained technical degrees. Married four times, he has adult children from prior marriages. He last married in 2011 but is currently separated. Applicant has worked for his current employer since 1985, during which time he has held a security clearance.

Applicant’s SOR lists numerous delinquent debts, for communication services, utilities, credit cards, etc. Applicant disputes a number of these debts, although he did not provide evidence corroborating the basis for the disputes. He testified that he sent handwritten letters to the credit bureaus claiming not to owe certain debts, but he never heard back from the bureaus and did not keep copies of these letters. Applicant claimed to have been a victim of identity theft. He also stated that his separation agreement from a previous wife, whom he divorced in 2008, set forth responsibilities between the parties regarding the payment of debts. However, he does not have a copy of the settlement agreement. He stated that he gave his divorce attorney \$7,000 to pay his share of the marital debts, but he does not know if this was done and the attorney has since died. Applicant acknowledged a debt for more than \$15,000, stating that it was his responsibility after his 2008 divorce. He claimed to have worked out a payment agreement but was unable to make payments because of other responsibilities, such as child support and a debt to the IRS that was the subject of a garnishment action. Another creditor has acquired this debt, and Applicant states that he is in negotiations to resolve it.

In 2011, Applicant was interviewed pursuant to his clearance application. When confronted with his delinquent debts, he was concerned. He stated that he would obtain a copy of his credit report and maybe seek legal counsel. He has stated a desire to resolve his debts, although he claims that most of them are not legitimately his. He stated that he had taken care of a number of debts that were identified by the DoD during the processing of his clearance. He stated that the SOR allegations are all that remain of his financial problems.

Applicant submitted documents after the hearing. These include an application for a hardship loan from his retirement plan and a statement that he would use the funds to pay his debts rather than resolve them by disputing them.

The Judge's Analysis

The Judge resolved two SOR allegations, for medical expenses, in Applicant's favor. However, she reached the opposite conclusion regarding the remainder. She stated that Applicant had been aware of his delinquent debts at least since his 2011 interview, yet they remain unresolved. She noted his claims to have been a victim of identity theft but also noted that Applicant had provided nothing in corroboration of these claims. Neither did he corroborate his testimony that he sent dispute letters to the credit bureaus. She stated that there is no evidence that Applicant has initiated a good-faith effort to pay his debts. Even the \$15,000 one, which he agrees is legitimate, has not been paid or made the subject of a payment agreement with the current creditor. The Judge acknowledged that Applicant had applied for a loan from his retirement plan. However, she concluded that it was too soon to conclude that his debts are no longer matters of security concern.

Discussion

Factual Sufficiency

Applicant claims that the Judge's decision was "based on assumptions and opinions" rather than facts established by the Government, "such as income to debt ratio." Appeal Brief at 1. He argues that the Judge failed to admit all of the evidence since the beginning of his case. Had she done so, it would have shown that he has addressed a large number of his debts.

It is an applicant's task to present "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the Department Counsel[.]" Directive ¶ E3.1.15. We have examined the entire record, paying particular attention to the transcript. Nowhere can we find an instance, either during or after the hearing, in which the Judge refused to admit evidence provided by Applicant. Indeed, all of the documents he offered were admitted into evidence without objection. If he believed that there was other evidence that should have been considered, he could have offered it while the record was open. In any event, the Judge made a finding based on Applicant's testimony that he had taken care of many of the debts that had been drawn to his attention during the processing of his application for a clearance. We find no reason to conclude that the Judge failed to extend appropriate weight to this finding. The Judge's material findings of security concern are based upon substantial record evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014). We resolve this assignment of error adversely to Applicant.

Due Process

Applicant argues that neither the Judge nor Department Counsel gave him appropriate advice on what steps he needed to take to resolve his debts to the satisfaction of the Government. As a

consequence, he claims that he had no reason to know what he should have done to mitigate the concerns in his case.

A Judge is an impartial fact-finder. *See, e.g.*, ISCR Case No. 14-00434 at 3 (App. Bd. Jan. 20, 2015). As such, a Judge has no authority to advise an applicant on the quantum of evidence sufficient to mitigate the concerns raised in an SOR. *See, e.g.*, ISCR Case No. 14-04664 at 3 (App. Bd. Jul. 24, 2015). Neither is a Department Counsel authorized to advise an applicant on how to present his or her case or otherwise to act as an advocate for an opposing party. *See, e.g.*, ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014). For them to do otherwise would be inconsistent with their respective duties to make findings and conclusions or to represent the interests of the U.S.

As stated above, it is an applicant's responsibility to provide evidence in mitigation of the concerns raised in the SOR. To that end, an applicant has a right to employ counsel or some other person to provide assistance and representation at the hearing. *See* Directive, Enclosure 1 ¶ SECTION 3 (5); ¶ E3.1.8. The record shows that Applicant was advised of his rights, including the right to present evidence and to be represented, if he so chose. These rights were explained in the Directive, a copy of which was furnished to Applicant along with the SOR. They were also explained in pre-hearing guidance from the Chief Administrative Judge. At the beginning of the hearing the Judge summarized Applicant's rights, and he stated that he understood them. Applicant advised that he intended to represent himself. Tr. at 5-8.

In regard to Applicant's argument that he lacked "information on what needs to be done" (Appeal Brief at 1), the Directive contains a list of disqualifying and mitigating conditions for each Guideline, which are sufficient to apprise a reasonable person of the ways in which security concerns can be rebutted or mitigated. Moreover, during the hearing the Judge told Applicant that she would hold the record open to enable him to provide "anything to show that you've actually taken any action at all" in regard to his debts, thereby suggesting that corroborating evidence would be relevant and material in evaluating Applicant's claims of debt payment or of identity theft, and Applicant replied, "I understand." Tr. at 73. We conclude that Applicant was apprised of his rights and duties to a degree sufficient to have enabled him to present his case for mitigation or to make an informed judgment about securing representation in the event he required assistance. Applicant was not denied the due process afforded by the Directive. *See* ISCR Case No. 11-14723 at 2-3 (App. Bd. Oct. 3, 2014).¹

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

¹To the extent that Applicant's various arguments imply that the Judge might have been biased against him, we note that Judges are presumed to be unbiased and that claims to the contrary must satisfy a "heavy burden" of persuasion. *See, e.g.*, ISCR Case No. 11-13949 at 3 (App. Bd. Sep. 5, 2013). We find no reason to conclude that the Judge acted in such a manner that would persuade a reasonable person that she lacked the requisite impartiality.

concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

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