

KEYWORD: Guideline F

DIGEST: In spite of the plain language to the contrary, Applicant asserts that he believed in June and July 2016 that Department Counsel was “working on my behalf.” If Applicant misunderstood the nature of his rights, the blame cannot fairly be placed on DOHA or other DOD officials. Applicant was not denied adequate notice of his due process rights. Adverse decision affirmed.

CASENO: 15-03168.a1

DATE: 07/21/2017

DATE: July 21, 2017

In Re:)	
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Applicant for Security Clearance)	
)	ISCR Case No. 15-03168

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Shawn C. Graham, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 2, 2016, 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 decision on the written record. On April 13, 2017, after considering the record, Defense Office of Hearings

and Appeals (DOHA) Administrative Judge Braden M. Murphy 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 served in the military until 2004 and upon discharge began working for a Defense contractor. He has held a clearance for over 20 years. Between 2008 and 2010, Applicant engaged in a custody dispute with the mother of his eldest son. The resulting legal fees depleted his savings. At the same time, Applicant had a dispute with his homeowners association (HOA), and he stopped making payments to the HOA in order to pay his legal expenses.

Applicant's SOR lists a judgment in favor of the HOA in the amount of over \$14,400. The HOA secured a garnishment action to satisfy this debt. Although Applicant showed that his wages had indeed been garnished from early 2015 until mid-2016, he did not provide any documentation to establish that the judgment had been satisfied or released. Another SOR debt is a charged-off credit card account, which Applicant claims has been satisfied. However, he provided no documentation to corroborate this claim.

In addition to the above, Applicant failed timely to file his Federal and state income tax returns. He discovered this during conversations with IRS officials during the course of submitting his 2013 returns. Applicant did not provide evidence that he had filed his 2010 returns.

The Judge's Analysis

Though noting circumstances outside Applicant's control that affected his financial situation, the Judge concluded that Applicant had not demonstrated responsible action in regard to his problems. He cited to evidence that Applicant had stopped paying HOA fees in order to pay his legal expenses during a custody dispute, which the Judge concluded was not a responsible act. He also noted that the HOA was forced to obtain a judgment and garnishment action to satisfy the debt that Applicant owed to it. He stated that garnishment does not equate to a good-faith effort by an applicant to resolve past-due debts. The Judge concluded that Applicant had not demonstrated resolution of the HOA debt, the credit card debt, and the delinquent tax filing.

Discussion

Applicant has raised an issue of due process. In doing so, he makes assertions from outside the record. We are not permitted to consider new evidence on appeal. Directive ¶ E3.1.29. However, we will do so in resolving threshold issues such as jurisdiction or due process. *See, e.g.*, ISCR Case No.14-00812 at 2 (App. Bd. Jul. 8, 2015).

Applicant claims that he did not understand the procedures that would apply in his case. He stated that he believed that DoD officials would inform him whether his SOR response was

sufficient to mitigate the concerns in his case and, if not, he would be authorized to request a hearing. He cites to a letter from DOHA to the effect that his SOR response was in compliance with the Directive. He argues that this letter failed to advise him that his SOR response was inadequate and that his case had been referred to DOHA for adjudication. He states that he believed that he was entitled to a hearing even after having submitted a documentary response to the File of Relevant Material (FORM).

We have considered Applicant's argument in light of the record. Applicant's response to the SOR included a DOHA-prepared attachment in which he requested "a decision based on the administrative (written) record, without a hearing before an Administrative Judge. This will include a memo prepared by DoD Department Counsel." The attachment also notified Applicant of his right to provide documents or other evidence in response to the FORM. Item 1.

On May 30, 2016, Department Counsel provided Applicant with a copy of the FORM. Her memo stated clearly that the FORM was being sent because Applicant had requested such a procedure rather than a hearing. Department Counsel also advised Applicant of his right to submit a documentary response to the FORM.

The FORM was accompanied by a cover letter from DOHA, dated May 31, 2016. This is the letter that Applicant referenced in his argument. The cover letter advised that his response to the SOR had been received and that it complied with the Directive. It also stated the following:

You requested that a determination be made in your case without a hearing. [Department Counsel] has been assigned to present the Government's case and has prepared a file of what is considered the relevant material which will be submitted to an Administrative Judge to make the determination in your case. Before that file is sent to the Administrative Judge, you have an opportunity to review the attached copy of that complete file and submit any material you wish the Administrative Judge to consider or to make any objections you may have as to the information in the file . . . If you do not file any objections to the attached material or submit any additional information within 30 days of receipt of his letter, your case will be assigned to an Administrative Judge for a determination based solely on the attached [FORM].

As Applicant notes in his Appeal Brief, he submitted documents in response to the FORM that the Judge included in the record. In spite of the plain language to the contrary, Applicant asserts that he believed in June and July 2016 that Department Counsel was "working on my behalf."

The guidance cited above is consistent with the Directive and is couched in the standard language used when applicants request a decision on the written record. The SOR attachment that Applicant signed provided him with a choice between hearing or a FORM, and the notice that Applicant received from various DOHA officials after he chose a FORM clearly and exclusively described a written procedure and made no reference to a hearing purportedly in the future. Moreover, there is nothing in the record to show that, after Applicant chose a FORM, he changed his mind and requested to convert the case to a hearing. If Applicant misunderstood the nature of his rights, the blame cannot fairly be placed on DOHA or other DoD officials. Applicant was not

denied adequate notice of his due process rights. *See, e.g.*, ISCR Case No. 15-04472 at 3 (App. Bd. Feb. 9, 2017).

Beyond this, we find no reason to disturb the Judge’s weighing of the evidence. The Judge examined the relevant evidence 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, Encl. 2 App. A ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

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