

KEYWORD: Guideline F; Guideline E

DIGEST: When he completed his security clearance application (SCA), Applicant did not disclose that he had charged-off debts. During his subsequent interview, the investigator asked Applicant about his financial situation, and Applicant answered each question negatively. When reminded that he was under oath and when confronted with his credit record, Applicant admitted his delinquent debts. He stated that he had intentionally falsified his SCA and lied about his financial difficulties because he was embarrassed. Adverse decision affirmed.

CASENO: 15-08255.a1

DATE: 08/22/2017

DATE: August 22, 2017

In Re:)	
)	
-----)	ISCR Case No. 15-08255
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Daniel J. MacKinnon, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 8, 2016, DoD issued a statement of reasons (SOR) 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 May 18, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski 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 had some delinquent debts. These included a charged-off balance owed to a credit union. Applicant offered to settle the debt, but the creditor demanded full payment. Applicant did not set aside funds to resolve this debt. Applicant also had a charged-off debt to a bank in the amount of \$485, which he has paid.

In December 2009, Applicant was affiliated with a fraternal lodge. He asked the treasurer if he could borrow \$2,400 to cover a paint job at his personal residence. Applicant was seeking a home equity loan (HELOC) on his house, but the painter wanted his money immediately. The treasurer agreed, notifying the lodge of the loan. Applicant was master of the lodge, a position that entailed a fiduciary duty to the other members. The next day, Applicant was contacted by a lodge official. Applicant promised that he would repay the loan within a week. During December 2009, Applicant's HELOC was approved in the amount of nearly \$82,000.

On December 7, Applicant met with lodge officials, who advised that he did not follow proper procedures in seeking a loan. For example, he presented his request to the treasurer rather than to the lodge members themselves. These officials reminded Applicant that he had previously received a \$1,500 loan from the lodge in 2007, which was not done according to lodge rules. The lodge had no proof that Applicant had paid the \$1,500, and Applicant could not substantiate payment. Neither did he substantiate payment of the 2009 loan. He resigned from the lodge on December 7, 2009.

When he completed his security clearance application (SCA), Applicant did not disclose that he had charged-off debts. During his subsequent interview, the investigator asked Applicant about his financial situation, and Applicant answered each question negatively. When reminded that he was under oath and when confronted with his credit record, Applicant admitted his delinquent debts. He stated that he had intentionally falsified his SCA and lied about his financial difficulties because he was embarrassed.

Applicant's financial problems arose from funeral expenses resulting from his mother's death. In addition, Applicant's sister did not pay property taxes on a house they inherited. His difficulties were also associated with the expenses of his wedding. Applicant has had counseling from a licensed certified social worker to help resolve emotional repercussions from deaths in the family and from his financial problems. Applicant has an annual income of about \$47,000, and his wife's is about \$34,000. They have about \$1,000 left over at the end of each month. Applicant enjoys a good reputation for the quality of his work performance and for his trustworthiness.

The Judge's Analysis

The Judge concluded that Applicant's charged-off debts and his two misappropriations of lodge funds raised concerns under Guideline F. Though noting certain things that were outside his control that affected his debts, the Judge concluded that Applicant had not shown responsible action. She stated that, given Applicant's history of late payments on various obligations and a lack of proof that he had repaid his lodge, he had failed to mitigate the concerns arising from his debts.

The Judge also concluded that Applicant had failed to mitigate the concerns arising from his false statements on his SCA and during his interview. She stated that these falsifications were not minor and that they impugn his judgment and trustworthiness. She stated that he had not demonstrated sufficient reform, in that he attempted to minimize the significance of his false statement by contending that they resulted in some way from stressors that he had been experiencing. She also stated that, in obtaining money from his lodge outside the proper channels, Applicant had put his own needs over those to whom he owed a fiduciary obligation.

Discussion

Applicant contends that he has demonstrated mitigation of the Guideline E concerns. He cites to his many years of holding a clearance without incident or concern, the counseling that he has received, his efforts to resolve his debts, etc. He argues that he has taken steps to eliminate any vulnerability to coercion that his false statements may have entailed. However, the Directive provides that failure to provide truthful answers during national security investigations is of special concern. It also states that refusal to provide full, frank, and truthful answers to lawful questions will normally result in an unfavorable determination. Directive, Encl. 2, App. A ¶ 15. Given Applicant's admission that he deliberately withheld his financial delinquencies due to embarrassment, we find no reason to conclude that the Judge's unfavorable findings were arbitrary, capricious, or contrary to law.

Applicant raises an issue of due process. Specifically, he argues that the Judge erred in concluding that the earlier misappropriation from the lodge, which occurred in 2007, raised security concerns. He notes that the SOR only alleged the incident in 2009 and that neither the Judge nor Department Counsel sought to amend it. He argues that by treating the 2007 incident as she did, the Judge went beyond the scope of the SOR and that Applicant's testimony regarding that incident should not have been considered.

An SOR is an administrative pleading that does not have to allege every relevant fact. To the contrary, an SOR is sufficient if it places an applicant on notice of the concerns to be addressed at the hearing so that he or she can prepare a case for mitigation. *See, e.g.*, ISCR Case No. 14-06440 at 3-4 (App. Bd. Jan. 8, 2016). Variances between SOR allegations and a Judge's findings may occur from time to time. They are material only when the extent of the variance is so great that the SOR fails to serve as reasonable notice, subjecting the Applicant to unfair surprise. *See, e.g.*, ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In this case, the Judge's findings about two misappropriations from Applicant's lodge constitute a variance from her formal finding on the SOR allegation, which refers only to one. However, we conclude that this variance was not material for the following reasons. First, in 2009, the lodge members discussed the 2007 incident with Applicant in the meeting that led to his

resignation. The earlier incident, therefore, was part of the operative facts or *res gestae* underlying the 2009 incident alleged in the SOR and is therefore within the general scope of that allegation. Second, the 2007 incident cannot plausibly have caused Applicant unfair surprise, insofar as he addressed it in detail during his clearance interview and during the hearing. Third, Applicant did not state or otherwise indicate to the Judge that consideration of this earlier incident was unfair to him. Moreover, although the Judge stated that she would give Applicant time after the hearing to submit additional evidence, he never requested for her to do so. Tr. at 25. Although *pro se* applicants are not held to the standards of lawyers, they are expected to take reasonable and timely steps to protect their rights. *See, e.g.*, ISCR Case No. 12-02371 at 3 (App. Bd. Jun. 30, 2014). Because the variance between pleading and proof on this issue is not material, we conclude that the Judge did not err in citing both incidents in her analysis of the disqualifying conditions. However, even if she did err, it was harmless, given that her adverse decision is independently supportable based upon the Guideline E allegations discussed above. *See, e.g.*, ISCR Case No. 15-00535 at 3 (App. Bd. Mar. 13, 2017) for definition of harmless error.

Applicant argues that he has shown mitigation of the Guideline F concerns. However, this argument is essentially a disagreement with the Judge's weighing of the evidence, which is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-08842 at 3 (App. Bd. Feb. 14, 2017). Applicant takes issue with the Judge's characterization of his loans as misappropriations. Given the totality of the evidence, the Judge's use of that term is supportable.

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: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board