

KEYWORD: Guideline F

DIGEST: Applicant challenges the Judge’s decision not to consider the summary of interview and argues the summary contains information beneficial to him. In a previous case, we considered a similar issue and, based on the facts in that case, concluded the best resolution was to remand the case to the Judge to consider the summary of interview and issue a new decision. In this case, however, the Judge’s decision to exclude the summary of interview was inconsequential. In particular, the summary of interview does not establish that Applicant satisfactorily resolved any of the alleged debts. Exclusion of that document from consideration likely had no affect on the outcome of the case. Adverse decision affirmed.

CASENO: 16-01715.a1

DATE: 12/8/2017

DATE: December 8, 2017

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In Re:)	
)	
-----)	ISCR Case No. 16-01715
)	
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 July 21, 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 October 6, 2017, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Michael H. Leonard denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The SOR alleged that Applicant had ten delinquent debts totaling about \$22,270. The Judge found against Applicant on all of the SOR allegations. The Judge concluded Applicant had a problematic financial history, had resolved none of the debts, and had failed to provide sufficient corroborating documentation.

Much of Applicant's appeal presentation consists of matters from outside the record. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

In the File of Relevant Material (FORM), Department Counsel included an unauthenticated summary of Applicant's background interview, which was part of the DoD Report of Investigation (ROI), and advised Applicant in a footnote that, absent an objection from him, the Judge may consider the summary of interview. Applicant did not submit a response to the FORM. In the decision, the Judge stated he did not consider the summary of interview essentially because Applicant had not affirmatively waived the authentication requirement for ROIs under Directive ¶ E3.1.20 and the FORM did not demonstrate Applicant understood the implications of not objecting to the summary.

Applicant challenges the Judge's decision not to consider the summary of interview and argues the summary contains information beneficial to him. In ISCR Case No. 15-05252 (App. Bd. Apr. 13, 2016), we considered a similar issue and, based on the facts in that case, concluded the best resolution was to remand the case to the Judge to consider the summary of interview and issue a new decision. In this case, however, the Judge's decision to exclude the summary of interview was inconsequential. In particular, the summary of interview does not establish that Applicant satisfactorily resolved any of the alleged debts. Exclusion of that document from consideration likely had no effect on the outcome of the case. *See, e.g.*, ISCR Case No. 15-01494 at 3 (App. Bd. Jul. 8, 2016).

Applicant has not established that the Judge committed harmful error. 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: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board

CONCURRING OPINION OF ADMINISTRATIVE JUDGE MICHAEL RA'ANAN

The majority opinion resolves the case without having to reach the issues raised in Department Counsel's Reply Brief. I agree with the resolution of the case. However, I am concerned about a serious inconsistency between Department Counsel's language in the FORM and their arguments in their Reply Brief.

In the FORM, Department Counsel notes that they have included a summary of Personal Subject Interview. They then assert, in part, "If no objections are raised in your response to the FORM, or if you do not respond to the FORM, the Administrative Judge may determine that you have waived any objections to the admissibility of the summary and may consider the summary as evidence in your case." (Department Counsel's FORM at n.1 p.1) I believe that statement is reasonably accurate as to the state of the DOHA case law to date. The word "may" is used twice in the above quoted language. The word "may" is permissive in nature, not mandatory.

By contrast, however, in their Reply Brief, Department Counsel asserts that the Judge was required to consider the summary because it had not been the subject of an explicit objection. For example they wrote "While the statement in the present case was not specifically adopted, applicant raised no objection to it becoming part of the record, and thus, not only should it have been admitted based upon the waived objection, but the waiver is tantamount to an adoption."

In a system of due process, where many of the Applicants are *pro se*, and the party-opponent

is the government and is always represented by attorneys, it is imperative that the language used by those government attorneys is reliable. To tell a *pro se* Applicant prior to his or her decision to object that something may happen if they fail to object, and then afterward assert that failure to object necessarily produces a certain result, runs contrary to the due process afforded by the Directive.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board