

KEYWORD: Guideline F

DIGEST: Applicant was not denied adequate notice of the procedural rules employed at his hearing or of his rights at the hearing, nor was he otherwise denied the due process afforded by the Directive. Adverse decision affirmed.

CASE NO: 15-04472.a1

DATE: 02/09/2017

DATE: February 9, 2017

In Re:  -----  Applicant for Security Clearance	) ) ) ) ) ) )	ISCR Case No. 15-04472
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 12, 2015, 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 November 17, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Matthew E. Malone 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 works for a Defense contractor in a job he has held since 2014. He served in the military from 2005 until 2014, after which he experienced unemployment until he found his current position. Applicant held a clearance while on active duty, which was renewed in 2010. He was forward deployed during much of his military service. In 2008, when preparing for an upcoming deployment, he attempted to suspend cell phone service. This effort was not successful, and Applicant became liable for unpaid bills. A similar circumstance occurred again in 2012. Applicant is engaged to be married and has a child from a previous relationship. He pays between \$300 and \$500 a month in support.

During his last year in the military, Applicant injured his back while performing physical training. He is seeking an increase in his disability rating, which could increase his monthly payments and result in over \$24,000 in retroactive benefits. He will use this money for debt payments. His SOR lists several delinquent debts, for such things as a delinquent mortgage, which has gone into foreclosure and constitutes 90% of the amount of debt alleged. Applicant had used his VA eligibility to buy a house, planning on the contributions of a roommate to enable him to make his payments. However, the roommate left in 2011, and Applicant's last payment was in February of that year. The foreclosure sale was pending as of the close of the record. Applicant presented no evidence as to what he had done to resolve the mortgage. His delinquent debts also include the cell phone accounts described above, television services, and various other charged-off and/or collection accounts.

During his clearance interview Applicant told the investigator that he intended to seek financial counseling in order to resolve his past-due obligations. As of the hearing he had met once with a counselor but had not established a plan for paying his debts, none of which were resolved as of the close of the record. Applicant is meeting his monthly expenses and is living within his means. He files his tax returns as required, his most recent refund being used for child support. He states that he has little money left over each month after expenses.

### **The Judge's Analysis**

The Judge noted that none of Applicant's debts were resolved. He provided no documentation to support his claim that he did not owe the two cell phone accounts described above. Moreover, the largest debt, the mortgage, is due to Applicant's own poor judgment. He stated that Applicant did not present information about how he intends to manage his money in the future, and he did not show how he plans to resolve his delinquent debts. The Judge concluded that Applicant had not mitigated the concerns raised by his delinquent debts.

### **Discussion**

Applicant has raised an issue of due process. He notes that he represented himself at the

hearing. Although he received pre-hearing guidance, he states that he found the guidance difficult to comprehend. He states that he could not afford an attorney, with the result that he did not understand what kind of evidence he should present. He states that he thought the Government would submit an updated credit report, which would show that several of his debts had been resolved or had dropped off the report. Applicant contends that the Judge did not properly explain the burden of proof or the procedures that would be followed.

As Applicant acknowledges, he received written guidance prior to the hearing. This guidance was prepared by the Chief Administrative Judge and advised Applicant of his right to hire counsel or enlist the services of some other representative. It also explained in some detail the procedures that would be followed at the hearing—opening and closing statements, evidentiary rules, the order of presentation of evidence, examination of witnesses, objections, etc. In addition to the Chief Judge’s guidance, Department Counsel provided Applicant with a separate memorandum that explained his rights, including the right to representation, to present evidence, to object to evidence, etc. This memo also listed the documents that Department Counsel intended to present at the hearing, and that he in fact did present. The cover letter accompanying the SOR provided similar guidance, along with a copy of the Directive, which establishes the rights an applicant enjoys at a DOHA proceeding and describes the respective evidentiary burdens of the parties. *See* Directive ¶¶ E3.1.14, E3.1.15. At the beginning of the hearing, the Judge advised Applicant that he would not hold Applicant to the standards expected of an attorney. Tr. at 8. He inquired if Applicant received written pre-hearing guidance and if he had any questions. Applicant replied that he did not have any questions “currently.” Tr. at 8. When, at the beginning of his presentation, he expressed uncertainty as to the best way to proceed, the Judge assisted him, suggesting that he go down each allegation in the SOR and discuss it. Tr. at 22-23.

Applicant cites to no evidence that he could have presented that would likely have affected the outcome of the case.<sup>1</sup> He points to nothing in the record that would have led him to think that Department Counsel was going to present a later credit report or anything other than what he had advised Applicant he was going to offer.<sup>2</sup> If Applicant had believed that additional evidence would have helped him, he had an opportunity to submit it as part of his case-in-chief. *See* Directive ¶ E3.1.15, *supra*, to the effect that it is an applicant’s task to present evidence in mitigation. Applicant was not denied adequate notice of the procedural rules employed at his hearing or of his rights at the hearing, nor was he otherwise denied the due process afforded by the Directive. *See, e.g.*, ISCR Case No. 14-03929 at 2 (App. Bd. Nov. 20, 2015).

Applicant cites to evidence of his expected increase in VA payments, the loss of a roommate resulting in his mortgage delinquency, etc. The Judge made findings about this evidence, and his analysis took these findings into account. Applicant has not rebutted the presumption that the Judge

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<sup>1</sup>Applicant said nothing at the hearing that should have alerted the Judge that he had other evidence that he wanted to submit. “[Judge]: All right, no other documents in support of your case? [Applicant]: No other documents. No, Your Honor. [Judge]: Is there anything that you had intended to bring here today that you either forgot, or just now realized that you should have brought? [Applicant]: Not that I can think of, right now, Your Honor.” Tr. at 21.

<sup>2</sup>In any event, that a debt no longer appears on a credit report does not establish meaningful evidence as to the circumstances of debt’s disposition. *See, e.g.*, ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015).

considered all of the evidence in the record. Neither has he shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-03929, *supra.* at 2-3. Despite Applicant’s argument to the contrary, we conclude that the Judge’s whole-person analysis satisfied the requirements of Directive ¶ 6.3, in that he considered the totality of the evidence in formulating his conclusions. *See, e.g.*, ISCR Case No. 14-05762 at 3 (App. Bd. Dec. 15, 2016). Applicant cites to a Hearing Office case that he believes supports his effort to obtain a favorable result. We give this case due consideration as persuasive authority. However, Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *Id.*

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, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information 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