

KEYWORD: Guideline F

DIGEST: Applicant contends that he did not receive his right to counsel in accordance with the U.S. Constitution he asserted that once a concern was raised that he needed counsel, the Judge should have required him to be represented or advised him of his right. The Directive provides no right for an applicant to have counsel appointed or paid for by the Government. Applicant's reliance upon Bivens is misplaced. Adverse decision affirmed.

CASENO: 12-08972.a1

DATE: 04/25/2016

DATE: April 25, 2016

In Re:)	
)	
-----)	ISCR Case No. 12-08972
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James E. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Herman L. Jimerson, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 30, 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 decision on the written record. On February 10, 2016, after considering the record, Defense Office of

Hearings and Appeals (DOHA) Administrative Judge Robert J. Tuidor 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 he was denied his right to representation 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's SOR lists two state tax liens. It also alleges that Applicant failed to file state and Federal tax returns for tax years 2006, 2009, and 2010. During his clearance interview, Applicant stated that he was overwhelmed with paperwork. He was not concerned about filing his returns because his tax withholdings were sufficient. He told the interviewer that he filed his 2009 and 2011 state and Federal returns.

In his Answer to the SOR, Applicant contended that his problems resulted from disorganization. He provided no information about the concerns raised by the SOR allegations. Applicant's response to the File of Relevant Material (FORM) included a statement from an accountant that Applicant's 2006 Federal return had been filed, albeit late. However, it contained no documentation about the remaining concerns. Applicant did note that his state had levied over \$18,000 against his bank account. Applicant stated that his accountant would address his tax issues. He provided no evidence of financial counseling. His Response to the FORM stated that "these financial issues seem to paralyze me." Decision at 3. Applicant stated that he would prefer to be performing his job or caring for his elderly father.

The Judge's Analysis

The Judge entered adverse findings regarding Applicant's tax deficiencies. He stated that the information in the record showed that Applicant had taken little or no steps to resolve these problems. He stated that it is perplexing that a person with Applicant's level of education and job responsibilities, as well as access to an accountant, should have permitted his finances to deteriorate. He stated that Applicant was placed on notice three times that his tax problems were of concern to the Government—during his interview, upon receipt of the SOR, and upon receipt of the FORM. The Judge concluded that Applicant failed to submit enough evidence to mitigate the concerns raised by the SOR.

Discussion

Applicant contends that he did not receive his right to counsel in accordance with the U.S. Constitution. In making this argument, he cites to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). He states that, once a concern was raised that he needed counsel, the Judge should have required him to be represented or advised him of his right.

There is no right to a security clearance. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Accordingly, applicants "do not have constitutional due process rights in connection with security clearance determinations." *Gargiulo v. Department of Homeland Security*, 727 F.3d 1181,

1186 (Fed. Cir. 2013). There is no constitutional right to counsel in a DOHA proceeding, and DOHA applicants are not afforded the same protections as criminal defendants. *See, e.g.*, ISCR Case No. 11-06925 at 4 (App. Bd. Dec. 13, 2013). Although the Directive provides that an applicant has the right to employ counsel at his own expense, it provides no right for an applicant to have counsel appointed or paid for by the Government. *See, e.g.*, ISCR Case No. 07-15235 at 2 (App. Bd. Oct. 3, 2008).

There being no constitutional right to counsel in a DOHA case, Applicant's reliance upon *Bivens* is misplaced. Insofar as the decision to obtain representational assistance is discretionary with an applicant, a Judge has no authority to require an applicant to employ counsel. Moreover, the record shows that Applicant was advised of his right to representation as set forth in the Directive. He received a copy of the Directive along with the SOR and another copy with the FORM. In addition, the letter from DOHA that accompanied the FORM specifically advised Applicant of his right to be represented or assisted by counsel. Letter dated September 22, 2015. Applicant received notice sufficient to apprise a reasonable person of his right to counsel. The record provides no reason to conclude that Applicant's decision to represent himself was other than knowing and intelligent. *See* ISCR Case No. 14-02347 at 4 (App. Bd. Aug. 28, 2015).

Applicant's Response to the FORM has a passage in which he wonders if he should have employed counsel, but the context appears to be in relation to his history of income tax problems. At no point during the processing of his case does he appear to have asked for additional time in which to have a lawyer for security clearance purposes. *Pro se* applicants cannot be expected to act like lawyers, but they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 12-02371 at 3 (App. Bd. Jun. 30, 2014). Applicant was not denied the due process rights afforded him by the Directive.

The remainder of Applicant's brief amounts to a dispute as to the weight assigned by the Judge to Applicant's evidence in mitigation. Such a disagreement is not sufficient to demonstrate that the Judge weighed the evidence or reached conclusions that were arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-05488 at 3 (App. Bd. Mar. 25, 2016).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision, regarding both the mitigating conditions and the whole-person factors. 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.'" *Egan, supra*, at 528. *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