

KEYWORD: Guideline F

DIGEST: Applicant failed to demonstrate that she was denied the due process afforded by the Directive. Though not represented by an attorney, she had a personal representative who assisted her in presenting her case at the hearing. A Judge is presumed to have considered all the evidence in the record. Adverse decision affirmed.

CASENO: 08-01014.a1

DATE: 09/09/2009

DATE: September 9, 2009

In Re:)	
)	
-----)	ISCR Case No. 08-01014
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

James S. DelSordo, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 27, 2009, DOHA 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 June 24, 2009, after the hearing, Administrative Judge Edward W. Loughran 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; whether the Judge misapplied the pertinent mitigating conditions; and whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.¹ Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is an employee of a defense contractor. Her financial problems began during her marriage, which has since ended in divorce. The Judge noted that her difficulties were exacerbated by her divorce, by her loss of a job, and by certain actions by her former husband, which included opening accounts in her name without her knowledge.

The Judge found that Applicant has significant delinquent debt. In the Analysis portion of the decision he states that the amount of debt which formed the basis of his adverse findings is in excess of \$35,000. These debts were for an Internal Revenue Service lien, a truck loan, public utility services, etc. Although the Judge acknowledged that Applicant's problems were affected by matters outside her control, he concluded that, upon consideration of the entire record, she had not demonstrated sufficient mitigation to warrant a clearance. Specifically, he found that Applicant had not demonstrated a good-faith effort to pay off certain of her debts, nor had she shown that her actions in regard to those debts were sufficiently responsible fully to mitigate the security concerns arising from her financial problems.

Applicant contends that she was harmed by the fact that she was not represented by a lawyer at the hearing. *See, e.g.*, ISCR Case No. 00-0086 at 2 (App. Bd. Dec. 13, 2000) ("Although the Sixth Amendment right to assistance of counsel does not apply to DOHA proceedings, an applicant has a nonconstitutional right to retain a lawyer at his or her own expense.") She states that one consequence of this was her failure to ask for an extension of time in which to present matters in her behalf. The record demonstrates that, prior to the hearing, Applicant was advised of her right to employ counsel, or to have some other person represent her; her right to present evidence and witnesses; her right to cross-examine witnesses against her; and her right to object to evidence. At the beginning of the hearing, the Judge again advised Applicant of her right to representation and her right to present evidence in her behalf. Tr. at 5.

Applicant was, in fact, accompanied at the hearing by a personal representative, who assisted her in the presentation of her case, who testified on her behalf, and who presented opening and closing statements for her. Furthermore, the record suggests that Applicant was aware of her right to request an extension of time. At the close of the hearing the Judge announced that he would hold the record open for two weeks in order to give Applicant an opportunity to present further matters. However, in response to Applicant's request, the Judge agreed to hold the record open for an additional week. Tr. at 128. A review of the entire record discloses no basis to conclude that Applicant was denied a reasonable opportunity to present evidence or that she was otherwise denied the rights due her under the Directive. *See* ISCR Case No. 08-03110 at 2 (App. Bd. Jan. 27, 2009).

¹The Judge's favorable findings under SOR subparagraphs 1(a-b), (e-j), (l-n), and (p-s) are not at issue in this appeal.

Applicant argues that the Judge either did not consider mitigating evidence, such as the effects of her marital problems and job loss on her financial condition, or that he did not give that evidence the proper weight. A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009); ISCR Case No. 07-00553 at 2 (App. Bd. May 23, 2008). Applicant's argument on appeal is not sufficient to rebut that presumption. In the case at issue here, the Judge explicitly discussed the evidence cited by Applicant in her brief, but he concluded that the evidence was not sufficient fully to mitigate the security concerns. This conclusion is sustainable. While Applicant may disagree with the weight which the Judge assigned to that evidence, she has not demonstrated that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant's appeal submission includes evidence not presented at the hearing, such as IRS documents and a statement from one of her creditors that a debt had been discharged. The Board cannot consider this new evidence. *See* Directive ¶ E3.1.29. ("No new evidence shall be received or considered by the Appeal Board.") *See also* ISCR Case No. 08-06518 at 2 (App. Bd. Mar. 3, 2009). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

As stated above, the Judge considered evidence submitted by Applicant. However, he also considered evidence less favorable, including apparent inconsistent statements she made concerning two of her more significant debts, one of which is the tax lien. The Judge's decision that "it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance" is sustainable on this record. Decision at 11. *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'")

Order

The Judge's adverse security clearance decision is AFFIRMED.

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

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board