

KEYWORD: Guideline F

DIGEST: The record as a whole provides no basis to conclude Applicant was denied due process afforded by the Directive. Adverse decision affirmed.

CASENO: 08-05699.a1

DATE: 03/19/2010

DATE: March 19, 2010

In Re:)	
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Applicant for Security Clearance)	ISCR Case No. 08-05699

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Eric B. Bryen, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 26, 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 decision on the written record. On January 12, 2010, after considering the record, Administrative Judge Marc E. Curry 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 certain of the Judge's factual findings are based upon substantial record evidence; whether Applicant was denied due process; and whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant was born and raised in a Middle-Eastern country. He immigrated to the U.S. in the 1970s and became a U.S. citizen in the early 1980s. He has worked as a translator in support of U.S. military operations.

In the late 1980s Applicant was a successful real estate developer. He was a partner in a company that owned several shopping centers. In the early 1990s the real estate market crashed, and Applicant became unable to pay his creditors. His debts were discharged in Chapter 7 bankruptcy in the mid-1990s.

After his discharge in bankruptcy, Applicant became a stockbroker. This endeavor faltered during the stock market crash that followed the attacks of September 11, 2001. Some of his clients sued him. Additionally, he experienced family difficulties which added to his money problems. The IRS filed a lien against Applicant's property for unpaid taxes. In 2006 he filed again for Chapter 7 bankruptcy protection, listing liabilities of \$482,000 (including \$140,000 in back federal and state taxes). His debts were discharged in bankruptcy later that year. Part of the bankruptcy process included Applicant's completion of budget and credit counseling.

In late 2006, the state obtained a lien against Applicant's property for unpaid taxes. In early 2007, the IRS obtained a lien due to unpaid federal taxes. He has entered into agreements to repay these debts on a monthly basis.

In deciding the case adversely to Applicant, the Judge considered Applicant's contributions to U.S. security, and he acknowledged that Applicant's financial problems were affected by circumstances outside his control. However, he also noted the recurrent nature of Applicant's financial problems, the relatively large amount of debt Applicant had amassed prior to the 2006 bankruptcy, and the amount of delinquent debts remaining. He stated that not all of Applicant's financial problems corresponded with downturns in the economy. He also concluded that Applicant had not corroborated his claims to have been making payments consistent with the repayment plans.

Applicant contends that he was denied due process, in that he did not present cancelled checks to demonstrate payment. He asserts that he was advised that all he needed to present was evidence of a payment plan rather than of actual payment. He attaches to his appeal copies of cancelled checks. This is new evidence, which the Board cannot consider. *See* Directive ¶ E3.1.29. ("No new evidence shall be received or considered by the Appeal Board"). *See also* ISCR Case No. 08-06875 at 2 (App. Bd. Oct. 29, 2009); ISCR Case No. 08-06518 at 2 (App. Bd. Mar. 3, 2009).

Applicant does not state who advised him concerning the extent of the evidence that he needed to submit in response to the FORM. In any event, he appears to have had the opportunity to seek assistance of counsel in preparing his response,¹ and the record as a whole provides no reason to believe that Applicant was denied the due process afforded by the Directive. *See* ISCR Case No. 09-01074 at 2 (App. Bd. Oct. 16, 2009); ISCR Case No. 08-03110 at 2 (App. Bd. Jan. 27, 2009). Furthermore, the payment plan was new at the close of the record. There is no basis to conclude that Applicant could have documented a substantial number of payments.

Applicant contends that the Judge erred in his finding as to the amount Applicant owes to the IRS. We conclude that the Judge’s material findings of security concern are based upon substantial record evidence. *See* Directive ¶ E3.1.32.1. (Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.”) The record demonstrates that, as the Judge found, there is substantial evidence in support of the SOR allegations.

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)). The Judge’s adverse 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).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge

¹Applicant’s brief states that he acted *pro se* in preparing the response. However, the cover letter accompanying Applicant’s response to the FORM names an attorney as the one who is to receive the decision in Applicant’s case and to whom questions should be addressed. Therefore, at the very least, Applicant was aware of his right to consult counsel.

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board