KEYWORD: Guideline F; Guideline E

DIGEST: Applicant's claim that he did not submit the most beneficial information because of his pro se status is not persuasive. After the hearing the Judge held the record open for two weeks. The Judge specifically mentioned the possibility of Applicant submitting documentation about his mortgage. Applicant later reported that he had been unable to obtain any documents on that subject. Applicant has not demonstrated that he was denied the due process afforded by the Directive. Adverse decision affirmed

CASENO: 09-01719.a1

DATE: 10/08/2010

DATE: October 8, 2010

In Re:	)	
	)	
----------	)	ISCR Case No. 09-01719
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Alan V. Edmunds, Esq., Krystal M. Limon, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 8, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On July 29, 2010, after the hearing, Administrative Judge Robert E. Coacher 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 the Judge denied Applicant due process; whether the Judge did not properly apply the pertinent mitigating factors; and whether the Judge did not properly apply the whole-person factors.[1] Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is employed by a Defense contractor. He has a Bachelor's degree in computer science. In 2007 Applicant bought a house, financing the purchase with a $328,000 loan secured by a mortgage. The loan was for 40 years and has a 6.75% fixed interest rate. His original monthly payments were $2,500.

In 2008 Applicant had trouble making his mortgage payments, which had increased by $250 a month due to an escrow adjustment. He was also over-extended on a credit card. During the Spring of 2008 he began skipping mortgage payments about every other month. A few months later, he entered into an agreement with a private company to assist him in seeking a loan modification. This company was still engaging in negotiations with the lender at the close of the record. Applicant has not made a mortgage payment since April 2009, stating that the lender had told him to stop payments during negotiations. He provided no evidence in corroboration. At the close of the record, Applicant was $40,000 in arrears in his mortgage payments.

Applicant has been employed in the same position since he bought the house. He has not experienced a diminution of pay, nor has he amassed other debts. He has paid off a judgment against him for credit card debt, which was also alleged in the SOR. He paid off two other debts that were not alleged. If his proposed loan modification is not approved, he will have to give up his house. He has received no financial counseling, other than his arrangement with the company referenced above. He had sought a debt consolidation through his credit union, but his request was denied.

Applicant enjoys an excellent reputation at work for his professionalism, trustworthiness, and loyalty.

[1]The Judge's favorable findings under Guideline E are not at issue in this appeal.

In the Analysis portion of the decision, the Judge concluded that, under the circumstances of this case, Applicant's financial problems did not originate from circumstances outside his control. The Judge acknowledged Applicant's efforts to obtain a loan modification. However, he stated that Applicant's merely having enrolled in a loan modification program is not sufficient to demonstrate a good-faith effort to pay debts. He noted that this program had been ongoing since the summer of 2008, with no demonstrated results as of the close of the record. Indeed, the Judge also noted that, given Applicant's income and expenses, it is not clear that he would even be able to make payments under a modified loan. Furthermore, the Judge raised reasonable questions concerning the alleged advice Applicant received from his lender to the effect that he should make no payments during negotiations over loan modification, questions which Applicant's evidence did not answer.

Due Process Issue

Applicant contends that the Judge denied him due process. He argues that, in light of his *pro se* status at the hearing, he was not aware of the kind of evidence that would have benefitted his case for mitigation. He argues that the Judge should have given him more time after the hearing to present corroborating evidence concerning his loan modification.

However, the record demonstrates that the Judge did hold the record open for two weeks following the May 27, 2010, hearing to enable Applicant to submit additional evidence concerning, among other things, the loan modification. The Judge specifically stated that Applicant could, if he chose, present something in writing from the lender regarding Applicant's claim that he was told not to make mortgage payments during negotiations. Tr. at 128-129. Applicant subsequently presented additional documents. However, he averred that he had been unable to obtain any documents from the mortgage holder addressing the status of his mortgage payments. Applicant Exhibit G, Memo with Attachments, dated June 11, 2010. Applicant did not state or suggest that evidence to this effect could be obtained in the near future, and he did not request a further extension of time. Furthermore, in light of the Judge's favorable credibility determination and the reasons set forth for his adverse conclusions, it is not clear how much difference corroborative evidence might have made in this case.

At the beginning of the hearing, the Judge advised Applicant of his right to obtain counsel. The Judge concluded that, based on Applicant's level of education, his facility with the English language, and his prior experience in applying for a security clearance, Applicant was qualified to represent himself. Tr. at 6-7. Furthermore, Applicant was advised in writing prior to the hearing of his right to counsel, to present evidence, etc. Memorandum from DOHA, entitled *Prehearing Guidance for DOHA Industrial Security Clearance (ISCR) Hearings and Trustworthiness (ADP) Hearings*. The Judge concluded that Applicant was capable of representing himself, and this conclusion was not error.

Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 09-

01074 at 2 (App. Bd. Oct. 16, 2009). Neither Applicant's brief nor the record point to additional mitigating evidence which Applicant could have presented if he had been aware of the need to do so. There is no reason to conclude that the Judge denied Applicant a fair opportunity to present evidence in mitigation. Applicant appears to have represented himself adequately. He has not demonstrated that he was denied the due process afforded by the Directive.

Remaining Issues

After reviewing the record, we conclude that the Judge did not err in his treatment of the mitigating conditions or of the whole-person factors. He 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
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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