KEYWORD: Guideline F

DIGEST: The Directive does not require a Judge to reopen a record for the purpose of taking in evidence not available prior to the record's closure. Favorable decision affirmed.

CASE NO: 09-02281.a1

DATE: 04/18/2011

DATE: April 18, 2011

In Re:	)	
	)	
----------	)	ISCR Case No. 09-02281
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Department Counsel

FOR APPLICANT
Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 13, 2010, 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 January 12, 2011, after the hearing, Administrative Judge LeRoy F. Foreman granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in declining to reopen the record and whether the Judge's favorable decision under Guideline F was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Federal contractor. She was cleared for sensitive compartmented information (SCI) from 1988 until 1999 and has held a secret clearance since 2008.

A Ph.D. in political science, Applicant was a university professor during the mid-1980s. She worked for a consulting firm in the late 1980s. From 1989 until 1999 she was vice-president for a company working as a federal contractor, making around $115,000 a year. From 1999 until 2002 she worked for another company, making about $200,000 a year. The company downsized and Applicant was unemployed from 2002 until 2004.

Her job loss caused financial problems. She lived off savings and borrowed money from her parents. She did consulting work during 2004, earning about $3,000 a month. In 2004 she filed for Chapter 13 bankruptcy, but the petition was dismissed because she failed to make the payments. Additionally, she sold her house in 2005, paying off the mortgages and using the equity for living expenses. She worked as a waitress in that year as well. In 2006 she returned to work for her previous employer. In 2007 she was earning $6,000 per year. Her pay increased in 2009 to $90,000 and, later that year, to $178,000, at which point she began contacting creditors for her largest debts. Her pay was cut in half due to a business downturn and, in August 2010, she began working for her present employer, earning about $188,000 per year.

Applicant is divorced and has a 24 year old son. She has received no child support from the father. She has lived with a domestic partner since 2003. He suffered a stroke, and his only income is from disability payments of about $1,900 a month.

Applicant has numerous delinquent debts, for credit cards, an automobile lease, and a judgment against her in favor of a law firm. The credit card debts are alleged in the SOR in the following amounts: ¶ 1(b): $30,325; ¶ 1(c): $26,724; ¶ 1(d): $31,050; ¶ (f): $59,396; and ¶ 1(h): $14,000. ¶¶ (b) and (c) allege the same underlying debt. Applicant used the card alleged in (b) to pay her son's college tuition. She also used the cards to pay living expenses while she was unemployed and to consolidate other debts.

Applicant has settled the credit card debts and the auto lease debt alleged in the SOR. Additionally, she has paid or settled numerous other debts not alleged in the SOR. She has not settled the debt underlying the judgment.

Department Counsel argues that the Judge erred in declining to reopen the record and consider new evidence raising security concerns under Guideline E (Personal Conduct). The basis for the request is as follows: at the hearing Applicant was questioned about a background investigation for SCI conducted by another Government agency. The investigation had been discontinued prior to a decision.

At the hearing, Applicant was questioned about the judgment against her. She had stated that she had been unaware of the judgment (as opposed to the underlying debt itself) until the security clearance investigation at issue in this case. When asked if the other Government agency had put her on notice of the judgment during its investigation, she replied, "No; not that I recall." Tr. at 128.

After the hearing was over, Department Counsel consulted with representatives of the other Government agency. Department Counsel was provided with documents describing the contents of Applicant's clearance interview conducted by the other agency in late 2007/early 2008. Department Counsel alleges that these documents provide a reason to believe that the other agency did indeed put Applicant on notice of the judgment.

Department Counsel submitted to the Judge a motion to reopen the record, take in the newly-obtained evidence supplied by the other agency, and amend the SOR to allege a Guideline E security concern pertaining to a false statement at the hearing.

The Judge denied the motion. He noted that Directive ¶ E3.1.17 permits a Judge to amend a SOR at the hearing in order to render it in conformity with the evidence. However, the Judge stated that the request in this case was made after the hearing. He concluded that he had no authority to reopen the record under the circumstances of this case and that the Government's remedy was to issue a new SOR alleging the Guideline E concern.

We find no error in the Judge's ruling on this issue. We find no support in the Directive for the proposition that a Judge is required to reopen a record and amend a SOR based upon newly discovered evidence not available prior to the record's closure.

Concerning the remaining issue, the Judge's findings that Applicant's financial problems were affected by a loss of employment; that she had settled or paid off all but one of the SOR debts; that she had settled or paid off several non-SOR debts; and that she was making efforts to address the remaining debt are sufficient to support a favorable whole-person analysis. The Judge's ultimate decision is sustainable. We need not agree with a Judge's decision in order to find it sustainable. *See, e.g.*, ISCR Case No. 09-05893 at 2 (App. Bd. Sep. 14, 2010).

Order

The Judge's favorable security clearance decision is AFFIRMED.

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

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

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

This case puts us at the junction of different aspects of our jurisdiction. The Board is not prepared to conclude that the Judge erred in his analysis under Guideline F. We do not have authority to conduct *de novo* review. Department Counsel's motion to amend the SOR occurred after the close of the record and the hearing. The Judge denied Department Counsel's motion two months before issuing the decision in the case. Department Counsel's appeal brief does not expressly challenge the Judge's credibility determination outside the context of the SOR amendment issue. The language of the pertinent provision of the Directive appears to be permissive. Although the Directive's language refers to the hearing as the context for such amendment, there are some Appeal Board precedents which suggest that the SOR may be amended after the hearing .[1] Also, the Directive has general language granting the Judge the authority to make procedural rulings and mandating that the Judge conduct all proceedings in a fair, timely and orderly manner.

In light of the foregoing, the Board is not in a position to reverse or remand, even if we may differ with the Judge's conclusions. Of course, as the Judge noted, Department Counsel is free to issue a new SOR addressing the issues raised in the motion to amend.

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

[1]*See, e.g.*, ISCR Case No. 09-02752 at 4-6 (App. Bd. Apr. 6, 2010); ISCR Case No. 08-02404 at 5 (App. Bd. Jun. 5, 2009), and ISCR Case No. 04-08547 at 5-6 (App. Bd. Aug. 30, 2007).