

KEYWORD: Guideline F; Guideline E

DIGEST: Applicant’s contention that her failure to respond to the File of Relevant Material was due to poor advice from Department Counsel and her employer failed through lack of specificity. Board cannot consider new evidence she submitted in support of her appeal. Adverse decision affirmed.

CASE NO: 09-04601.a1

DATE: 05/11/2011

DATE: May 11, 2011

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In Re:)	
)	
-----)	ISCR Case No. 09-04601
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 3, 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). Applicant requested the case be decided on the written record. On February 28, 2011, after considering the record, Administrative Judge Philip S. Howe denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse clearance decision is arbitrary, capricious or contrary to law.

In this case, Applicant elected to have a decision based on the written record, and then did not respond to the government's file of relevant material (FORM). On appeal, she seeks reversal of the Judge's adverse decision arguing that the Judge's findings were not based on substantial evidence, that he erred in the application of the mitigating conditions, and that his whole-person analysis was erroneous. In support of her argument, she submits an extensive amount of new evidence, including a detailed statement addressing the allegations in the SOR and multiple documentary exhibits. The Board cannot consider this new evidence on appeal. *See* Directive ¶ E3.1.29.

At the beginning of her brief, Applicant makes the general assertion that she did not respond to the government's FORM because she detrimentally relied on poor advice from Department Counsel and her employer, and thought she had provided all she could. She does not specify what advice she received, when it was provided, or who provided it. Moreover, Applicant does not advance that claim later in her brief as one of her "issues on appeal." Appeal Brief at 1. Accordingly, Applicant's claim in that regard fails for lack of specificity. *See, e.g.*, ISCR Case No.03-11096 at 6 (App. Bd. Feb. 3, 2005)(Appealing party has the burden of raising claims of error with sufficient specificity). Although *pro se* applicants cannot be expected to act like a lawyer, they are expected to take timely, reasonable steps to protect their rights under the Directive. Failure to take those steps does not constitute a denial of their rights. *See, e.g.*, ISCR Case No. 05-03307 at 2 (May 7, 2007).

Applicant's presentation does not demonstrate that the Judge's decision is arbitrary, capricious or contrary to law. Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 07-13837 at 2 (App. Bd. Sep. 28, 2010).

In his decision, the Judge weighed the available evidence, evaluated the length and seriousness of the disqualifying conduct, and considered the possible application of relevant conditions and factors. He reasonably explained why there was insufficient mitigating evidence to overcome the government's security concerns. Decision at 4-10. The Board does not review a case *de novo*. 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 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). Therefore, the Judge's unfavorable security clearance decision

is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

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

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board