

KEYWORD: Guideline F

DIGEST: A Judge must develop a full and complete record. Conduct not alleged in the SOR may be relevant to evaluating a an applicant's evidence in extenuation and mitigation and for assessing credibility. Adverse decision affirmed.

CASENO: 09-06770.a1

DATE: 11/08/2010

DATE: November 8, 2010

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In Re: )  
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 ----- ) ISCR Case No. 09-06770  
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 Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

**FOR APPLICANT**

Spiros D. Komis, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 19, 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 August 10, 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 Applicant was denied due process; whether the Judge was biased against Applicant; and whether the Judge’s adverse security clearance decision 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 Defense contractor, his salary being \$90,000 a year. He has worked for his employer since November 2009. He holds a bachelor’s degree in computer science.

In 2007, Applicant and a college friend attempted to engage in the real estate business. They bought a house in one state and built a house in another state. Their plan to sell them foundered during the real estate downturn. Applicant and his friend still co-own these houses.

Applicant was unemployed from May 2008 until February 2009, during which time he became delinquent on the two mortgages and on other debts. Applicant received loan modifications for these mortgages. As of the close of the record, Applicant had made one payment pursuant to this modification plan. Both houses are currently rented, which provides Applicant with additional income.

In addition to the mortgage debt,<sup>1</sup> the SOR alleged delinquent debts for cable services, student loans, telephone services, etc. The SOR also alleged a debt owed to a company that made mortgage payments for Applicant while he was unable to make payments himself. In addition, he owes other non-SOR debts—a credit card account in the amount of \$40,000 and another student loan of \$100,000.<sup>2</sup>

Applicant has not received credit counseling. A manager at his place of employment credits him with good character and with having a “positive work ethic.” Decision at 4.

### Due Process Issue

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<sup>1</sup>The SOR alleged only one of the two mortgages. The one alleged was in the amount of \$412, 614.77, with \$39,612 being past due. The other mortgage was for \$715,000. Although Applicant had been delinquent on this mortgage in the past, it was not past due at the time of the SOR. Government Exhibits 2 and 3, Credit Reports.

<sup>2</sup>In addition to the mortgage debts, Applicant and his friend were also co-signers for a truck loan and a student loan. Tr. at 39, 42. These latter two loans were alleged in the SOR.

Applicant contends that he was denied due process. Specifically, he claims that the Judge erred by considering “inadmissible extrinsic evidence that included matters far beyond the scope of the SOR.” Brief at 5. Applicant cites to evidence of the mortgage debt not alleged in the SOR, as well as questions by Department Counsel regarding the number of credit cards Applicant owns; what kind of car he drives and any payments he makes on the car; and whether his bank account has a significant amount of money in it. Applicant challenges more general questions by Department Counsel, such as the following: “You’ve got a lot of debt to a lot of people. Is that a fair statement?” He contends that the Judge erred by personally inquiring about both of the rental houses and about the extent to which Applicant is dependent on rental income. Applicant contends that he was denied fair notice of these matters and, therefore, was precluded from adequately preparing his case. Applicant notes that he represented himself at the hearing.

A Judge must develop a full and complete record. Directive ¶ E3.1.19. A complete record is one that permits the Judge to make a reasoned decision on an applicant’s security concerns, in light of the whole-person factors set forth in Directive, Enclosure 2 ¶ 2. Such a decision must take into account not only the conduct specifically alleged in the SOR, but it must also evaluate an applicant’s case for mitigation of the security concerns which the allegations may raise. To that end, conduct not alleged may be relevant to evaluating an applicant’s evidence for extenuation or mitigation and for assessing his credibility. *See, e.g.*, ISCR Case No. 02-07218 at 3-4 (App. Bd. Mar. 15, 2004).<sup>3</sup> Furthermore, an SOR is an administrative pleading that is not required to satisfy the strict requirements of a criminal indictment, and it does not have to allege every fact that may be relevant at the hearing. It does not have to identify specific evidence that Department Counsel will rely on at the hearing. *See, e.g.*, ISCR Case No. 04-08806 at 3 (App. Bd. May 8, 2007).

In this case, we have considered Applicant’s argument concerning the accounts, conduct, and circumstances which the Judge considered even though they were not cited in the SOR. To take one as an example, we find no error in the Judge’s consideration of the mortgage debt not alleged in the SOR. In the first place, evidence of this debt was contained in Government Exhibits which were provided to Applicant well in advance of the hearing, thereby vitiating Applicant’s contention that he was surprised that this evidence was admitted and considered. Tr. at 12. Furthermore, evidence of this other mortgage, which, like the one alleged, is co-owned by Applicant and his friend, is relevant to an understanding of the extent to which Applicant’s financial problems are “under control,” which is a mitigating factor. Directive, Enclosure 2 ¶ 20(c). Indeed, that Applicant is co-owner of several debts with his friend, whose own income is not steady,<sup>4</sup> is relevant as to the extent

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<sup>3</sup>Failure of a Judge to develop a complete record by unreasonably limiting the evidence to that necessary to establish a factual basis for the SOR allegations would work a real disadvantage to applicants. Such a record might well leave significant doubt about an applicant’s security worthiness, which would have to be resolved against the applicant. *See* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information *will be resolved* in favor of national security.” (emphasis added)

<sup>4</sup>*See* Tr. at 39, in which Applicant discusses his friend’s financial circumstances: “[Friend’s] line of business is—he’s a contractor. And so, some months . . . he gets a big check, some months he doesn’t. So every once in a while . . . he’ll miss a payment.” *See also* Tr. at 42: “[H]e’s in the contracting business. Some months are good, some months are bad.”

that Applicant's financial difficulties are likely to recur, another mitigating factor. *See* Directive, Enclosure 2 ¶ 20(a).

Similarly, the other pieces of challenged evidence are relevant to Applicant's case for mitigation, which is the context in which the Judge's decision addressed them. Accordingly, we find no error in the Judge's rulings on admissibility. In any event, Applicant never objected to the challenged evidence, thereby waiving the issue. "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." ISCR Case No. 09-01074 at 2 (App. Bd. Oct. 16, 2009). Applicant was not denied the due process rights afforded by the Directive.

Applicant's treatment of the due process issue cites to questions asked of Applicant by the Judge himself, thereby raising an issue of bias. However, after examining the entire transcript in light of the record evidence as a whole, we find no basis to conclude that the Judge divested himself of the impartiality which the Directive requires. Applicant has not rebutted the presumption that the Judge was unbiased. *See, e.g.*, ISCR Case No. 08-01306 at 4 (App. Bd. Oct. 28, 2009).

The record supports a conclusion 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: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

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

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