

KEYWORD: Guideline F

DIGEST: Applicant contends he was unaware of his right to submit character statements in response to the FORM. The record shows that Applicant was advised in writing of opportunity to submit material he wished the Judge to consider. Adverse decision affirmed.

CASENO: 09-08083.a1

DATE: 07/15/2011

DATE: July 15, 2011

In Re:)	
)	
-----)	ISCR Case No. 09-08083
)	
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 September 14, 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 decision on the written record. On April 13, 2011, after considering the record, Administrative Judge Rita C. O'Brien 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 were supported by substantial record evidence; whether Applicant was denied due process; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is employed by a Defense contractor. Sixty years old, he married in the late 1970s and has two adult children. He attended a community college but did not receive a degree. In 1990 Applicant retired after a twenty-year Air Force career. He held a security clearance while on active duty. Additionally, during his career he was awarded the meritorious service medal, the commendation medal, and the humanitarian service medal, among other decorations.

After retiring from the Air Force, Applicant was unable to find adequate employment. He moved to another state, where his wife was taking care of her ill mother. He had a part-time job from 1991 to 1998 and a full-time one from 1996 to 1998. In that year, he began working for a Defense contractor and assumed his current position with the company in January 2011. His wife currently works for the Federal government, but she has experienced unemployment in the past. Applicant's son is autistic and lives with him. Additionally, Applicant has provided support for his mother and his mother-in-law, until their deaths. He has also assisted his daughter with her college expenses.

Applicant's SOR alleges numerous delinquent debts, largely for Federal and state taxes. After leaving the Air Force, he claimed too many exemptions on his returns, resulting in tax liabilities for tax years 1990 through 1996. He also owed additional taxes in 2006, due to his having made taxable withdrawals from his 401(k) plan. His tax debts have been paid primarily through seizure of his refunds. In August 2010, the IRS informed him that he was subject to backup withholding of 28 per cent of all dividends and interest.

The SOR lists two state tax liens, which he paid through seizure of his refunds. His Federal tax liens, in the amount of \$51,612, are being addressed through a payment plan. He has two other delinquent debts—one a judgment relating to two bank loans and another a collection account. The former has been paid and the latter is the subject of a payment plan.

In analyzing Applicant's case for mitigation, the Judge noted his period of low-pay and temporary employment, which was beyond Applicant's control.¹ However, she also noted that this circumstance occurred many years ago and that Applicant has been fully employed since 1998. Accordingly, she concluded that he had had sufficient time in which to pay back his debt to the IRS. She also noted that the circumstances surrounding the payment of his state tax debts and the other non-tax debts were not sufficient to demonstrate a good-faith effort to resolve his financial problems.² She concluded that his recent efforts at debt resolution were likely a response to the security clearance process.

Discussion

Applicant contends that the Judge erred in some of her findings of fact. He states that he has held a security clearance for 38 years, not for 20 as he believes the Judge to have found. He also contends that his payoff of the state tax debt was not through a seizure of his refunds but through his own effort.³

Regarding the first challenged finding, the Judge stated that Applicant had held a clearance during his Air Force career, which is supported by the record. However, we can find nothing in the record to demonstrate that Applicant held a clearance between 1990, when he retired from the Air Force, and 1998, when he began working for a Defense contractor. The Judge's finding is based upon substantial record evidence. Regarding the second challenged finding, Applicant stated to his security clearance investigator that his state tax debts were paid off through tax refunds. Item 6 at 13. Although he did not say explicitly that the refunds were attached by the state, the Judge's finding constitutes a reasonable interpretation of the record evidence. However, even if the finding were erroneous, it did not likely exert a material effect on the outcome of the case. Therefore, any error would be harmless. *See, e.g.*, ISCR Case No. 09-01793 at 2-3 (App. Bd. Sep. 28, 2010).

Applicant contends that he was not aware of his right to submit character statements in response to the File of Relevant Material (FORM). However, by letter dated November 29, 2010, DOHA advised Applicant, *inter alia*, of his opportunity to review the FORM "and submit *any material you wish the Administrative Judge to consider*["] (emphasis added) Although this letter does not explicitly mention character statements, it is sufficient to place a reasonable person on notice of the general extent of his right to present evidence. There is no reason to believe that Applicant was denied his due process right.

¹See Directive, Enclosure 2 ¶ 20(b): "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances["]

²See Directive, Enclosure 2 ¶ 20(d): "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts["]

³We review the Judge's findings of fact to determine if they are supported by substantial evidence—"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." Directive ¶ E3.1.32.1.

In support of his appeal, Applicant submits evidence not contained in the record, including character statements and documents addressing his debt repayment efforts. We cannot consider this new evidence. *See* Directive ¶ E3.1.29. (“No new evidence shall be received or considered by the Appeal Board”). *See also* ISCR Case No. 07-17076 at 2 (App. Bd. May 11, 2011).

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). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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