

KEYWORD: Guideline F

DIGEST: Judge sent *ex parte* request to Department Counsel seeking additional information from Applicant. The request never reached Applicant. Adverse decision remanded.

CASE NO: 09-08295.a1

DATE: 09/13/2011

DATE: September 13, 2011

In Re:)	
)	
-----)	ISCR Case No. 09-08295
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Tovah Minster, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 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) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On June 22, 2011, after considering the record, Administrative Judge Shari Dam 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 erred in her application of the mitigating conditions; and whether the Judge’s adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant works as a configuration analyst for a Defense contractor. She has a Master's degree in Management of Information Systems. She has three adult children from a previous marriage.

In the Analysis portion of the Decision, the Judge summarized her essential finding concerning Applicant's financial condition:

In July 2003, Applicant had approximately \$238,000 of delinquent debt discharged through bankruptcy. Since then, she has accumulated about \$38,000 in delinquent debts, of which approximately \$33,000 [remain] unresolved. Decision at 4.

The Judge noted Applicant's medical problems and family issues which affected her debt situation and which were circumstances outside her control. However, the Judge also concluded that Applicant did not submit evidence of debt repayment, credit counseling, or other circumstances sufficient to mitigate the security concerns raised by her financial problems. Accordingly, the Judge denied Applicant a security clearance.

Applicant contends that she was denied due process. Specifically, she states that she never received a communication from the Judge that sought additional evidence to that contained in her reply to the SOR, her answers to DOHA interrogatories, and her response to the File of Relevant Material (FORM). We have considered the arguments contained in Applicant's Appeal Brief and in Department Counsel's Reply Brief.¹ A letter from DOHA accompanying the SOR advised Applicant of her right to request either a hearing or a decision on the written record. Applicant chose the latter. DOHA subsequently provided Applicant a copy of the FORM and advised her of her right "submit any material" that she wished for the Judge to consider, "or to make any objections" she may have as to the contents of the FORM. DOHA Letter to Applicant, November 20, 2010. This letter also advised Applicant was her right to be represented by counsel.

Applicant responded to the FORM within the required period of time. Her submission was made part of the record. On March 10, 2011, the Judge sent an *ex parte* e-mail to Department Counsel, directing Department Counsel to seek further information from Applicant. The information that the Judge desired was an exhibit documenting the status of each debt and receipts for debts that had been repaid, each exhibit referencing a debt alleged in the SOR. There is no copy of any correspondence to Applicant in the Hearing Office file. According to Department Counsel's Reply Brief, Department Counsel mailed the Judge's instruction to Applicant's last known address. However, as Department Counsel averred in her Reply Brief, Applicant had since moved without providing a forwarding address, and the Judge's request never reached her. In the Decision, the Judge commented on Applicant's failure to provide the requested information. The Judge stated that, despite Applicant's knowledge that her debts were of security significance, and despite her having been given another opportunity, on March 10, 2011, to submit additional mitigating evidence, "she did not provide documentary proof to corroborate the statements in her answer or interrogatories that many debts were paid." Decision at 6. Accordingly, the Judge denied Applicant

¹Department Counsel refers in footnotes to four appendices. However, there are no appendices in the appeal file.

a security clearance.

Under the circumstances, it is reasonable for Applicant to believe that her failure to respond to the Judge's instructions had an adverse impact on the final result in her case.² She has attached to her appeal brief documents which she would have provided to the Judge had she received the March 10, 2011, request. Given the totality of unique circumstances, we conclude that the best resolution of this case is to remand it to the Judge for further processing.

Order

The Judge's adverse security clearance decision is REMANDED.

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

²Department Counsel did not object to the Judge's *ex parte* request for evidence at that juncture. Nor did she file a cross-appeal. Therefore, the issue of the propriety of the Judge's effort to supplement the record is not before us.