

KEYWORD: Guideline F

DIGEST: Applicant was adequately advised by DOHA regarding his right to submit evidence in his own behalf. The Judge’s order did not constitute an attempt improperly to limit what evidence Applicant could submit. A typographical error in citing to a SOR paragraph was harmless. Adverse decision affirmed.

CASE NO: 11-11221.a1

DATE: 08/19/2013

DATE: August 19, 2013

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In Re:)	
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-----)	ISCR Case No. 11-11221
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 14, 2012, DoD 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 6, 2013, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge David M. White 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's findings of fact contained errors; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

The Judge found that Applicant has worked for a Defense contractor since 2003 and has held a top secret clearance since 2004. Applicant has significant delinquent debt, arising from a credit card, first and second mortgages on his home, medical expenses, and unpaid taxes due the IRS. The Judge noted that Applicant had not paid the credit card debt, which was beyond the statute of limitations at the close of the record. He found that Applicant had modified the first mortgage on his home but had provided no corroboration of his claim to be attempting to renegotiate the second mortgage. Applicant submitted a document purporting to show that he had settled the medical debt by paying 50% of its value, charging it to a credit card. The Judge found this evidence to be "unclear and contradictory." Decision at 4. The Judge also found that Applicant's claim to have paid the \$7,000 tax debt down to \$181 was not corroborated. The Judge noted evidence that Applicant owed tax to his state as well.¹

Applicant's financial problems "stemmed from his wife's undefined period of unemployment, their growing family, and a lack of sufficient funds to pay their obligations." *Id.* Applicant did not submit a personal financial statement or evidence of savings. Applicant did not provide evidence of financial counseling, except that he had hired a law firm that had begun settling over \$74,000 in unsecured debt in 2011. Applicant provided no evidence about the quality of his professional performance, his track record with handling sensitive information, or his compliance with security procedures.

The Judge's Analysis

The Judge concluded that Applicant's circumstances raised security concerns under Guideline F. He also concluded that Applicant had failed to mitigate those concerns. He stated that the ongoing nature of Applicant's debt problems preclude a finding that they are not likely to recur. He also stated that Applicant had failed to show that his reliability, trustworthiness, and judgment had improved. He also stated that the record was not clear as to the extent to which Applicant's wife's unemployment arose from circumstances beyond his control. Moreover, evidence that Applicant had hired the law firm was not sufficient to demonstrate responsible action in regard to his debts. The Judge cited to his finding that Applicant had not presented evidence of financial counseling or that his financial problems had stabilized. He also noted a lack of corroboration for Applicant's claims to have paid off his tax debt and that the record evidenced no basis to dispute the legitimacy of any of the debts alleged in the SOR. In the whole-person analysis, the Judge concluded that Applicant's financial circumstances entailed a potential for pressure, coercion, and duress.

Discussion

¹The state tax debt was not alleged in the SOR.

Applicant contends that he was not aware of the extent of his right to submit evidence. He states that he did not know that he could submit character references and that he “was unaware of providing additional evidence to rebut, extenuate, or mitigate” the concerns raised by the SOR. Appeal Brief at 3. He states that he did not know that he was to submit evidence documenting his claims about debt repayment, his wife’s job loss, etc.

Because Applicant requested a decision on the written record, Department Counsel prepared a File of Relevant Material (FORM), providing a copy to Applicant before submitting it to the Judge. Department Counsel advised Applicant that he had 30 days from receipt of the FORM to submit documents “setting forth objections, *rebuttal*, *extenuation*, *mitigation*, or *explanation*, as appropriate.” (emphasis added) Applicant’s copy of the FORM was accompanied by a letter from a DOHA paralegal. This letter also advised Applicant of his right to submit objections “or any additional information you wish to be considered.” DOHA Letter, dated February 19, 2013. The paralegal enclosed a copy of the Directive, which explains an applicant’s rights in detail, and she advised Applicant how he could access the Directive on line. Applicant did not respond to the FORM within the 30 days allotted.

When the case was presented to him for a decision, the Judge noted that Applicant had not responded to the FORM. He also noted that, in his reply to the SOR, Applicant had referenced an “original submission of documentation at initial review.” Findings and Order, dated May 13, 2013. The Judge stated that it was not clear if Applicant understood that only the material attached to the FORM would be submitted to him and that Applicant was responsible for submitting any additional evidence that he wanted the Judge to consider. The Judge gave Applicant a week to submit the documentation that he had presented “at initial review.”² Subsequently, Applicant submitted several documents, constituting 12 pages, which were incorporated into the record. Applicant Exhibit (AE) A (1-3).

Under the circumstances, the record shows that Applicant was adequately advised of his right to submit evidence on his own behalf. While the various communications from DOHA personnel did not specifically mention character references, these communications were sufficient to have placed a reasonable person on notice as to the general extent of an applicant’s right to present evidence. *See, e.g.*, ISCR Case No. 09-08083 at 3 (App. Bd. Jul. 15, 2011). Presenting evidence in mitigation is an applicant’s responsibility. In doing so, he or she has a right to be represented by counsel or by some other person, and Applicant was advised of this right as well. In ruling on evidence, a Judge is bound by the admissibility rules specified by the Directive. *See, e.g.*, Directive ¶ E3.1.20. Otherwise, DOHA is not authorized to limit an applicant’s discretion as to what information, if any, he or she should in good faith submit, and none of the communications from DOHA to Applicant, including the Judge’s Order, could reasonably be interpreted as doing so. Applicant was not denied the due process afforded by the Directive.

²In his Appeal Brief, Applicant states that he thought that he was only to “provide documentation requested in the SOR and Judge’s White’s Order[.]”

Applicant contends that he cannot be sure that all of the documentation that he e-mailed the Judge made it into the record. However, AE A, his e-mail submission of May 23, 2013, lists several documents, all of which appear in the record as attachments. The e-mail does not reference any document that is not attached. There is no reason to believe that Applicant submitted anything that was not included in the record. Applicant has challenged the sufficiency or completeness of Judge's findings. One of the challenges is to the Judge's reference to a SOR ¶ 1(f). Applicant notes that the SOR contains allegations (a) through (e) only. Reading the Decision as a whole, we conclude that the challenged reference is a typographical error by the Judge. Otherwise, the Judge's material findings of security concern are based on substantial record evidence or constitute reasonable characterizations or inferences that could be drawn from the evidence. The Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 11-06659 at 5 (App. Bd. Oct. 22, 2012). In support of his appeal, Applicant has included a document not contained in the record. We cannot consider new evidence on appeal. Directive ¶ E3.1.29. *See* ISCR Case No. 12-01038 at 1 (App. Bd. Mar. 22, 2013).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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 Decision is **AFFIRMED**.

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