

KEYWORD: Guideline F

DIGEST: No precise time requirement is set for the parties to exchange discovery. Directive ¶ E3.1.13 provides that the parties shall serve one another with copies of their proposed documentary evidence “[a]s far in advance as practical.” Department Counsel indicated at the hearing that she mailed the Government’s exhibits to Applicant’s then-known address on May 2, 2018, but Applicant did not receive them because she had moved. Applicant was eventually provided all of the Government exhibits about four days before the hearing. At the hearing, Applicant did not object to the admission into evidence of the Government’s exhibits on the grounds of non-compliance with ¶ E3.1.13, unfair surprise, or similar basis. Adverse decision affirmed.

CASENO: 17-03972.a1

DATE: 07/10/2019

DATE: July 10, 2019

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 28, 2017, 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 hearing. On February 26, 2019, after the hearing, Administrative Judge Gregg A. Cervi denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

As amended, the SOR alleged that Applicant had numerous delinquent debts totaling over \$31,000, relinquished a deed in lieu of foreclosure, received a Chapter 7 bankruptcy discharge in 2006, and failed to file her Federal and state income tax returns for 2013 to 2017. She admitted the tax filing deficiencies during her testimony and admitted all but one of the other allegations in her SOR response. In his analysis, the Judge stated:

Applicant is well educated, makes a substantial income, and has experience running a business. Her unexplained failure to pay debts and a judgment when incurred, and to file income taxes when due, is troubling and inconsistent with a long-standing security clearance holder. Applicant's testimony appeared to be honest and straightforward, but her failure to report her tax return delinquencies on her [security clearance application] is unfavorable and does not give me confidence that she has a handle on her finances. [Decision at 6.]

In her appeal, Applicant raises a due process issue. She asserts that “had [she] received notice of the hearing in a timely manner, she may have been able to present resolution of financial debt to the judge at the time of the hearing, however, her ability to resolve all matters post hearing may have impacted the overall decision.” Appeal Brief at 2. She also asserts that the hearing notice was not sent “in time for her to prepare proof of being able to resolve the financial matters identified during the hearing in the governments list of exhibits.” *Id.*

At the outset, we note that Applicant was questioned about most of her financial problems during background interviews conducted in June 2017. Additionally, as noted above, the SOR was issued in late December 2017. On February 21, 2018, and March 13, 2018, Applicant responded to the SOR. With one exception, she has been placed on notice of the Government's specific security concerns regarding her financial problems months before her security clearance hearing, which was held on August 29, 2018. The one exception involves the amendment of the SOR at the hearing that added the allegation concerning the tax filing deficiencies.

At the hearing, Applicant initially indicated that she did not receive the Notice of Hearing until about four days before the proceeding. At that point, Department Counsel advised the Judge that Applicant was referring the Government's exhibits, not the Notice of Hearing. Department Counsel further noted that the Government's exhibits were originally mailed to Applicant on May 2, 2018, but Applicant did not receive them because she had moved. Tr. at 6 and 21-23. The following exchange also occurred:

[Judge]: All right. So the notice went out on August 1 by email and at that time you should have received the letter from the Chief Judge.

[Applicant]: I received notice of the hearing, I believe, but I was not able to -- I didn't know what I needed to prepare for.

[Judge]: I understand that, but you received a letter[,] no the email[,] that was sent around August 1 from the Chief Judge.

[Applicant]: Yes. [Tr. at 6.]

Both Applicant's Appeal Brief and Department Counsel's Reply Brief contain information that is not in the record. Generally, we cannot consider new evidence on appeal. Directive ¶ E3.1.29. We have in the past, however, considered such evidence concerning threshold issues of jurisdiction or due process. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul 8, 2015). We note that Department Counsel's Reply Brief contains email messages in which Applicant confirmed on August 14th (15 days before the hearing) that she received the "correspondence" and would attend the hearing scheduled "in [the designated city] on the 29th." Attachment 3 of the Reply Brief. From the foregoing, we conclude that Applicant received proper notice of the hearing as provided by Directive ¶ E3.1.8.

To the extent that Applicant is contending that she did not receive the Government's exhibits in a timely manner, we do not find that argument persuasive. No precise time requirement is set for the parties to exchange discovery. Directive ¶ E3.1.13 provides that the parties shall serve one another with copies of their proposed documentary evidence "[a]s far in advance as practical." As noted above, Department Counsel indicated at the hearing that she mailed the Government's exhibits (with the exception of GE 9) to Applicant's then-known address on May 2, 2018, but Applicant did not receive them because she had moved. Applicant was eventually provided all of the Government exhibits about four days before the hearing. At the hearing, Applicant did not object to the admission into evidence of the Government's exhibits on the grounds of non-compliance with ¶ E3.1.13, unfair surprise, or similar basis. *See, e.g.* ISCR Case No. 03-00543 at 4-5 (App. Bd. May 21, 2004)(discussing the importance of raising procedural objections at the hearing). Furthermore, the Judge left the record open for about 16 days after the hearing to provide Applicant the opportunity to present additional matters. In her post-hearing submission, Applicant stated that she received a "wake up call" during the hearing and provided information about the actions she had taken to resolve her debts. Applicant's Exhibit A. In that submission, she did not request an extension of time to submit further matters. From our review of the record, Applicant has failed to establish that she was denied the due process afforded her in the Directive.

Applicant also contends the Judge committed other errors. For example Applicant notes that the majority of her debts are for medical expenses, and the Judge did not consider health factors "as part of the rationale for delinquency." Appeal Brief at 2. She further asserts that she has never had a security infraction. Her arguments, however, are neither enough to rebut the presumption that the Judge considered all of the evidence in the record nor sufficient to show that the Judge weighed the

evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-01284 at 3 (App. Bd. Apr. 6, 2015).

Applicant has not established that the Judge committed any harmful error. The Judge examined the relevant evidence 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, Encl. 2, App. A ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board